

111TH CONGRESS }
2d Session

SENATE

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PROCEEDINGS OF THE
UNITED STATES SENATE
IN THE
IMPEACHMENT TRIAL OF
G. THOMAS PORTEOUS, JR.,
A JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA



DECEMBER 8, 2010.—Ordered to be printed

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AGAINST JUDGE G. THOMAS PORTEOUS, JR.**

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ACKNOWLEDGMENTS

The Committee gratefully acknowledges the high standard of professionalism and long hours of dedicated service of its staff. The Committee also expresses its appreciation to Lynden C. Armstrong, Chief Clerk of the Committee on Rules and Administration, and to the following staff of Committee members:

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FOREWORD

This volume completes the printing of the Senate's proceedings in the impeachment of G. Thomas Porteous, Jr., formerly a United States District Judge for the Eastern District of Louisiana. It brings together for the future use of the Senate, scholars, and the public those materials that have not been made readily available in other Senate publications. The purpose of this foreword is both to describe the contents of this volume and to identify the other Senate documents published in this impeachment proceeding in order to provide a full understanding of the documentary record.

The House Managers exhibited to the Senate the Articles of Impeachment against Judge Porteous on March 17, 2010. The text of the Articles of Impeachment and the initial proceedings in the Senate upon exhibition of the articles are reprinted in this volume at pages 3–5. Judge Porteous's answer to the articles and the original House replication are reprinted at pages 9–16. An errata to the replication and the amended replication are reprinted at pages 17–23. The Articles of Impeachment, the answer, and the amended replication also appear in Senate Document 111–13 (2010), together with the Senate's procedural rules for impeachment proceedings and relevant constitutional provisions. On March 17, 2010, the Senate agreed to Senate Resolution 458, which provided for the appointment of an impeachment trial committee to conduct evidentiary proceedings. The Impeachment Trial Committee's proceedings from the consideration of Senate Resolution 458 through the completion of the Committee's evidentiary hearings are reprinted in the multi-volume report of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr.: Hearings Before the Senate Impeachment Trial Committee, Senate Hearing 111–691 (2010).

Volume 1, Parts A and B of that hearing report contain the Committee's pretrial proceedings. Volumes 2A and 2B of Senate Hearing 111–691 contain the testimonial record of the Committee's evidentiary hearings, which occupied five days from September 13–21, 2010. Volume 3, Parts A–E reproduce some post-trial filings and the exhibits admitted into evidence at the Committee's hearings.

Senate Resolution 458 authorized the Committee to accompany its certified report of its evidentiary proceedings with a neutral summary of the evidence presented. Senate Report 111–347 (2010), which the Committee filed with the Senate on November 16, 2010, is the Committee's certification of its record and summary of evidence. Following the completion of the Committee's proceedings, the parties filed briefs before the full Senate. These briefs are reprinted in this final volume at pages 527–549. The Senate heard oral argument by the parties on December 7, deliberated in closed session later that day, and voted on one motion of Judge Porteous's, the Articles of Impeachment, and on disqualification of Judge Porteous on December 8, 2010. The oral argument on the Senate floor is reprinted in this volume at pages 555–589, the Senate's votes are reproduced at pages 591–594, and the judgment of conviction and disqualification appears at page 596. The statements of thirteen Senators who filed public statements on their votes are printed at pages 602–618.

This impeachment proceeding also generated applications to the district court for immunized testimony for witnesses. The papers filed there and the orders of the court are reprinted at pages 621–735.

We hope that this final volume on the impeachment of Judge Porteous, together with the record that has been previously published, will contribute to an understanding of the significant issues which the parties and the Senate confronted in these proceedings.

CLAIRE McCASKILL,
Chairman,

ORRIN G. HATCH
Vice-Chairman,

*Impeachment Trial Committee on the
Articles Against Judge G. Thomas Porteous, Jr.*

APRIL 2011

**PRELIMINARY PROCEEDINGS OF THE UNITED
STATES SENATE SITTING AS A COURT OF
IMPEACHMENT**

ORDER FOR EXHIBITING ARTICLES
OF IMPEACHMENT AGAINST G.
THOMAS PORTEOUS, JR.

Mr. BROWN of Ohio. Mr. President, I ask unanimous consent the Secretary inform the House of Representatives the Senate is ready to receive the managers appointed by the House of Representatives for the purpose of exhibiting articles of impeachment against G. Thomas Porteous, Jr., Judge of the U.S. District Court for the Eastern District of Louisiana, agreeable to the notice communicated to the Senate, and at the hour of 2 p.m., Wednesday, March 17, 2010, the Senate will receive the honorable managers on the part of the House of Representatives in order that they may present and exhibit the said articles of impeachment against the said G. Thomas Porteous, Jr., Judge of the U.S. District Court for the Eastern District of Louisiana.

The PRESIDING OFFICER. Without objection, it is so ordered.

EXHIBITION OF ARTICLES OF IMPEACHMENT AGAINST G. THOMAS PORTEOUS, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Mr. REID. Mr. President, I ask unanimous consent that the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting Articles of Impeachment against G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, agreeably to the notice communicated to the Senate, and at the hour of 2 p.m., today, Wednesday, March 17, 2010, the Senate will receive the honorable managers on the part of the House of Representatives in order that they may present and exhibit the said Articles of Impeachment against the said G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, I ask unanimous consent that the following counsel and staff of the House of Representatives be permitted the privileges of the floor during the proceedings with respect to the trial of the impeachment of Judge Porteous. They are as follows: Danielle Brown, Allison Halataei, Alan Baron, Harry Damelin, Mark Dubester, Kirsten Konar, Jessica Klein, Branden Ritchie, Michael Len, Phil Tahtakran, Ryan Clough, and Elisabeth Stein.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senate will be in order.

I will now call upon the Secretary for the majority.

The Secretary to the majority, Lula J. Davis, announced the presence of the House managers, as follows:

Mr. President, I announce the presence of the managers on the part of the House of Representatives to conduct proceedings on behalf of the House concerning the impeachment of G. Thomas

March 17, 2010

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Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana.

The PRESIDING OFFICER. The managers on the part of the House will be received and assigned their seats.

The managers (Mr. SCHIFF, Ms. ZOE LORFREN of California, Mr. JOHNSON of Georgia, Mr. GOODLATTE, and Mr. SENSABRENNER) were thereupon escorted by the Sergeant at Arms of the Senate, Terrance W. Gainer, to the well of the Senate.

The PRESIDING OFFICER. The Sergeant at Arms will make a proclamation.

The Sergeant at Arms, Terrance W. Gainer, made the proclamation, as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States Articles of Impeachment against G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana.

The PRESIDING OFFICER. The managers on the part of the House will proceed.

Mr. Manager SCHIFF, Mr. President, the managers on the part of the House of Representatives are here present and ready to present the Articles of Impeachment, which have been preferred by the House of Representatives against G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana.

The House adopted the following resolution which, with the permission of the President of the Senate, I will read:

H. RES. 1185

Resolved, That Mr. Schiff, Ms. Zoe Lofgren of California, Mr. Johnson of Georgia, Mr. Goodlatte, and Mr. Sensenbrenner are appointed managers on the part of the House to conduct the trial of the impeachment of G. Thomas Porteous, Jr., a Judge for the United States District Court for the Eastern District of Louisiana, that a message be sent to the Senate to inform the Senate of these appointments, and that the managers on the part of the House may exhibit the articles of impeachment to the Senate and take all other actions necessary in connection with preparation for, and conduct of, the trial, which may include the following:

(1) Employing legal, clerical, and other necessary assistants and incurring such other expenses as may be necessary, to be paid from amounts available to the Committee on the Judiciary under House Resolution 15, One Hundred Eleventh Congress, agreed to January 13, 2009, or any other applicable expense resolution on vouchers approved by the Chairman of the Committee on the Judiciary.

(2) Sending for persons and papers, and filing with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they consider necessary.

NANCY PELOSI,

Speaker of the House of Representatives.

With the permission of the President of the Senate, I will now read the Articles of Impeachment.

H. RES. 1031

Resolved, That G. Thomas Porteous, Jr., a judge of the United States District Court for the Eastern District of Louisiana, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against G. Thomas Porteous, Jr., a judge in the United States District Court for the Eastern District of Louisiana, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

G. Thomas Porteous, Jr., while a Federal Judge of the United States District Court for the Eastern District of Louisiana, engaged in a pattern of conduct that is incompatible with the trust and confidence placed in him as a Federal Judge, as follows:

Judge Porteous, while presiding as a United States district judge in *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises*, denied a motion to recuse himself from the case, despite the fact that he had a corrupt financial relationship with the law firm of Amato & Creely, P.C. which had entered the case to represent Liljeberg. In denying the motion to recuse, and in contravention of clear canons of judicial ethics, Judge Porteous failed to disclose that beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, he engaged in a corrupt scheme with attorneys, Jacob Amato, Jr., and Robert Creely, whereby Judge Porteous appointed Amato's law partner as a "curator" in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm. During the period of this scheme, the fees received by Amato & Creely amounted to approximately \$40,000, and the amounts paid by Amato & Creely to Judge Porteous amounted to approximately \$20,000.

Judge Porteous also made intentionally misleading statements at the recusal hearing intended to minimize the extent of his personal relationship with the two attorneys. In so doing, and in failing to disclose to Lifemark and its counsel the true circumstances of his relationship with the Amato & Creely law firm, Judge Porteous deprived the Fifth Circuit Court of Appeals of critical information for its review of a petition for a writ of mandamus, which sought to overrule Judge Porteous's denial of the recusal motion. His conduct deprived the parties and the public of the right to the honest services of his office.

Judge Porteous also engaged in corrupt conduct after the *Lifemark v. Liljeberg* bench trial, and while he had the case under advisement, in that he solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash. Thereafter, and without disclosing his corrupt relationship with the attorneys of Amato & Creely PLC or his receipt from them of cash and other things of value, Judge Porteous ruled in favor of their client, Liljeberg.

By virtue of this corrupt relationship and his conduct as a Federal judge, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE II

G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court Judge. That conduct included the following: Beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, and continuing while he was a Federal judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail bondman Louis M. Marcotte, III, and his sister Lori Marcotte. As part of this corrupt relationship, Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefited the Marcottes. These official actions by Judge Porteous included, while on the State bench, setting, reducing, and splitting bonds as requested by the Marcottes, and improperly setting aside or expunging felony convictions for two Marcotte employees (in one case after Judge Porteous had been confirmed by the Senate but before being sworn in as a Federal judge). In addition, both while on the State bench and on the Federal bench, Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench.

Accordingly, Judge G. Thomas Porteous, Jr., has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office.

ARTICLE III

Beginning in or about March 2001 and continuing through about July 2004, while a Federal Judge in the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., engaged in a pattern of conduct inconsistent with the trust and confidence placed in him as a Federal judge by knowingly and intentionally making material false statements and representations under penalty of perjury related to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case. Judge Porteous did so by—

(1) using a false name and a post office box address to conceal his identity as the debtor in the case;

(2) concealing assets;

(3) concealing preferential payments to certain creditors;

(4) concealing gambling losses and other gambling debts; and

(5) incurring new debts while the case was pending, in violation of the bankruptcy court's order.

In doing so, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE IV

In 1994, in connection with his nomination to be a judge of the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., knowingly made material false statements about his past to both the United States Senate and to the Federal Bureau of Investigation in order to obtain the office of United States District Court Judge. These false statements included the following:

(1) On his Supplemental SF-86, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known. Judge Porteous answered "no" to this question and signed the form under the warning that a false statement was punishable by law.

(2) During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.

(3) On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees", Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did "not know of any unfavorable information that may affect [his] nomination". Judge Porteous signed that questionnaire by swearing that "the information provided in this statement is, to the best of my knowledge, true and accurate".

However, in truth and in fact, as Judge Porteous then well knew, each of these answers was materially false because Judge Porteous had engaged in a corrupt relationship with the law firm Amato & Creely, whereby Judge Porteous appointed Creely as a "curator" in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm and also had engaged in a corrupt relationship with Louis and Lori Marcotte, whereby Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted the Marcottes. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench. Judge Porteous's failure to disclose these corrupt relationships deprived the United States Senate and the public of information that would have had a material impact on his confirmation.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

NANCY PELOSI,

Speaker of the House of Representatives.

Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other arti-

cle of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said G. Thomas Porteous, Jr., may be put to answer the misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Mr. President, the managers on the part of the House of Representatives, by the adoption of the Articles of Impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of the said G. Thomas Porteous, Jr., to answer said impeachment and do now demand his conviction and appropriate judgment thereon.

THE PRESIDING OFFICER. The majority leader.

Mr. REID. Mr. President, at this time the oath should be administered in conformance with article I, section 3, clause 6 of the Constitution of the United States and the Senate's impeachment rules. I move that the Senator from Kentucky, Mr. McConnell, be designated by the Senate to administer the oath to the Presiding Officer of the Senate, the Senator from Hawaii, Mr. Inouye.

THE PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCONNELL. Do you solemnly swear that in all things appertaining to the trial of the impeachment of G. Thomas Porteous Jr., Judge of the United States District Court for the Eastern District of Louisiana, now pending, you will do impartial justice according to the Constitution and laws, so help you God?

Mr. INOUE. I do.

Mr. REID. Mr. President, the oath shall now be administered by the Presiding Officer to all Senators. This is an appropriate time for any Senator who has cause to be excused from service in this impeachment to make that fact known.

If there is no Senator who desires to be excused, I move that the Presiding Officer administer the oath to Members of the Senate.

THE PRESIDING OFFICER. Without objection, it is so ordered.

Sensors shall now be sworn. Will Senators rise and raise your hand.

Do you solemnly swear that in all things appertaining to the trial of the impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, now pending, you will do impartial justice according to the Constitution and laws, so help you God?

SENATORS: I do.

The following named Senators are recorded as having subscribed to the oath this day:

Daniel K. Akaka, Lamar Alexander, John Barrasso, Max Baucus, Evan Bayh, Mark Begich, Michael Bennet, Jeff Bingaman, Christopher S. Bond, Bar-

bara Boxer, Scott Brown of Massachusetts, Sherrod Brown of Ohio, Sam Brownback, Jim Bunning, Richard Burr, Roland W. Burris, Maria Cantwell, Benjamin L. Cardin, Thomas R. Carper, Robert P. Casey, Jr., Saxby Chambliss, Tom Coburn, Thad Cochran, Susan M. Collins, Kent Conrad, Bob Corker, John Cornyn, Mike Crapo, Jim DeMint, Byron L. Dorgan, Richard Durbin, John Ensign, Michael B. Enzi, Russell D. Feingold, Dianne Feinstein, Al Franken, Kirsten E. Gillibrand, Lindsey Graham, Chuck Grassley, Judd Gregg, Kay R. Hagan, Tom Harkin, Orrin G. Hatch, Kay Bailey Hutchison, James M. Inhofe, Daniel K. Inouye, Johnny Isakson, Mike Johanns, Tim Johnson, Edward E. Kaufman, John F. Kerry, Amy Klobuchar, Herb Kohl, Jon Kyl, Mary L. Landrieu, Frank R. Lautenberg, George S. LeMieux, Carl Levin, Joseph I. Lieberman, Blanche L. Lincoln, Richard G. Lugar, John McCain, Claire McCaskill, Mitch McConnell, Robert Menendez, Jeff Merkley, Barbara A. Mikulski, Lisa Murkowski, Patty Murray, Ben Nelson of Nebraska, Bill Nelson of Florida, Mark L. Pryor, Jack Reed, Harry Reid, James E. Risch, Pat Roberts, John D. Rockefeller IV, Bernard Sanders, Charles E. Schumer, Jeff Sessions, Jeanne Shaheen, Richard C. Shelby, Olympia J. Snowe, Arlen Specter, Debbie Stabenow, Jon Tester, John Thune, Mark Udall of Colorado, Tom Udall of New Mexico, David Vitter, George V. Voinovich, Mark R. Warner, Jim Webb, Sheldon Whitehouse, Roger F. Wicker.

Mr. REID. Mr. President, any Senator who was not in the Senate Chamber at the time the oath was administered to the other Senators will make that fact known to the Chair so that the oath may be administered as soon as possible to that Senator. The Secretary will note the names of the Senators who have been sworn and will present to them for signing a book, which will be the Senate's permanent record of the administration of the oath. I will remind all Senators who were administered this oath that they must now sign the oath book, which is at the desk, before leaving the Chamber.

ISSUANCE OF A SUMMONS AND FOR RELATED PROCEDURES CONCERNING THE ARTICLES OF IMPEACHMENT AGAINST G. THOMAS PORTEOUS, JR.

Mr. REID. Mr. President, on behalf of myself and the distinguished Republican leader, Mr. McConnell, I send to the desk a resolution that provides for the issuance of a summons to Judge G. Thomas Porteous, Jr., for Judge Porteous's answer to the Articles of Impeachment against him, and for a replication by the House, and ask for its immediate consideration.

THE PRESIDING OFFICER. The clerk will report the resolution by title.

The legislative clerk read as follows:

A resolution (S. Res. 457) to provide for issuance of a summons and for related procedures concerning the articles of impeachment against G. Thomas Porteous, Jr.

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The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 457) was agreed to, as follows:

S. RES. 457

Resolved, That a summons shall be issued which commands G. Thomas Porteous, Jr. to file with the Secretary of the Senate an answer to the articles of impeachment no later than April 7, 2010, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

SEC. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

SEC. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

SEC. 4. The Managers on the part of the House may file with the Secretary of the Senate a replication no later than April 21, 2010.

SEC. 5. The Secretary shall notify counsel for G. Thomas Porteous, Jr. of the filing of a replication, and shall provide counsel with a copy.

SEC. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed, the Presiding Officer shall cause a plea of not guilty to be entered.

SEC. 7. The articles of impeachment, the answer, and the replication, if any, together with the provisions of the Constitution on impeachment, and the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, shall be printed under the direction of the Secretary as a Senate document.

SEC. 8. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 9. The Secretary shall notify the House of Representatives of this resolution.

Mr. REID. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. McCONNELL. Mr. President, I move to lay the motion on the table.

The motion to lay on the table was agreed to.

APPOINTMENT OF A COMMITTEE TO RECEIVE AND TO REPORT EVIDENCE WITH RESPECT TO ARTICLES OF IMPEACHMENT AGAINST JUDGE G. THOMAS PORTEOUS, JR.

Mr. REID. Mr. President, on behalf of myself and the distinguished Republican leader, Mr. McCONNELL, I send a resolution to the desk on the appointment of an impeachment trial committee and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The legislative clerk read as follows: A resolution (S. Res. 458) to provide for the appointment of a committee to receive and

to report evidence with respect to articles of impeachment against Judge G. Thomas Porteous, Jr.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 458) was agreed to, as follows:

S. RES. 458

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members, including a chairman and vice chairman, respectively, to the Presiding Officer for appointment to the committee.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6(a). The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

(b). In carrying out its powers, duties, and functions under this resolution, the committee is authorized, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimbursable, basis the services of personnel of any such department or agency.

SEC. 7. The committee appointed pursuant to section one of this resolution shall terminate no later than 60 days after the pronouncement of judgment by the Senate on the articles of impeachment.

SEC. 8. The Secretary shall notify the House of Representatives and counsel for Judge G. Thomas Porteous, Jr. of this resolution.

Mr. REID. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. McCONNELL. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

APPOINTMENT OF IMPEACHMENT TRIAL COMMITTEE

Mr. REID. Mr. President, in accordance with the resolution on the appointment of an impeachment trial committee, I recommend to the Chair the appointment of Senators McCaskill, as chair, Klobuchar, Whitehouse, Udall of New Mexico, Shaheen, and Kaufman.

The PRESIDING OFFICER. The Republican leader is recognized.

Mr. McCONNELL. Mr. President, in accordance with the resolution on the appointment of an impeachment trial committee, I recommend to the Chair the appointment of Senator Hatch, who will serve as vice chairman, and Senators Barrasso, Demint, Johanns, Risch, and Wicker.

The PRESIDING OFFICER. Pursuant to the resolution on the appointment of an impeachment trial committee and impeachment rule XI, the Chair appoints upon the recommendation of the two leaders the following Senators to be members of the committee to receive and report evidence in the impeachment of Judge G. Thomas Porteous, Jr.: Senators McCaskill (chairman), Klobuchar, Whitehouse, Udall of New Mexico, Shaheen, Kaufman, Hatch (vice chairman), Barrasso, Demint, Johanns, Risch, and Wicker. The Senate will take further proper order and notify the House of Representatives and counsel for Judge Porteous.

Mr. REID. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DORGAN. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

At 2:10 p.m., a message from the House of Representatives, delivered by Mr. Schiff, a manager on the part of the House to conduct the trial of the impeachment of G. Thomas Porteous, Jr., a Judge for the United States District Court for the Eastern District of Louisiana, announcing that the House has agreed to the following resolutions:

H. Res. 1031. Resolution impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors.

H. Res. 1165. Resolution appointing managers on the part of the House to conduct the trial of the impeachment of G. Thomas Porteous, Jr., a Judge for the United States District Court for the Eastern District of Louisiana.



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WASHINGTON, MONDAY, APRIL 12, 2010

No. 50

House of Representatives

The House was not in session today. Its next meeting will be held on Tuesday, April 13, 2010, at 2 p.m.

Senate

MONDAY, APRIL 12, 2010

The SECRETARY of the SENATE.
Do you, Drew Willison, solemnly swear that the return made by you upon the process issued on the 19th of March, 2010, by the Senate of the United States against G. Thomas Porteous, Jr., is truly made and that you have performed such service as therein described, so help you God?

The DEPUTY SERGEANT at ARMS.
I do.

Mr. President, I send to the desk the return of service I executed upon service of the summons upon Judge G. Thomas Porteous, Jr., Friday, March 19, 2010, at 8:55 a.m.

The ACTING PRESIDENT pro tempore. The return of service will be spread upon the Journal and printed in the RECORD.

The return of service is as follows:

The foregoing writ of summons, addressed to G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana and the foregoing precept, addressed to me, were duly served upon the said G. Thomas Porteous, Jr. by my delivering true and attested copies of the same to G. Thomas Porteous, Jr., at his home, 4801 Neyrey Drive, Metairie, LA, on the 19th day of March 2010, at 8:55 a.m.

TERRANCE W. GAINER,
Sergeant at Arms.

Witness: ANDREW B. WILLISON,
Deputy Sergeant at Arms.

Dated 23 March 2010.

Mr. REID. Mr. President, I ask that the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, to the articles of impeachment.

COURT OF IMPEACHMENT

Mr. REID. Mr. President, I ask unanimous consent the Senate convene as a Court of Impeachment to process the answer of Judge G. Thomas Porteous, Jr.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Pursuant to rule IX of the Rules and Procedures in the Senate when sitting on impeachment trials, the Secretary of the Senate will now swear the Sergeant at Arms.

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. REID. I further ask that the answer be referred to the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., established by the Senate on March 17, 2010; and that the answer of the respondent, G. Thomas Porteous, Jr., to the Articles of Impeachment exhibited against him by the House of Representatives be printed for the use of the Senate sitting in the trial of said impeachment.

The ACTING PRESIDENT pro tempore. It is so ordered.

The Answer to the Articles of Impeachment is as follows:

IN THE SENATE OF THE UNITED STATES
SITTING FOR THE TRIAL OF AN
IMPEACHMENT

In re:

Impeachment of G. Thomas Porteous, Jr.,
United States District Judge for the Eastern
District of Louisiana

ANSWER OF JUDGE G. THOMAS PORTEOUS, JR.
TO THE ARTICLES OF IMPEACHMENT

The Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, as commanded by the summons of the Senate of the United States, answers the accusations made by the House of Representatives of the United States in the four Articles of Impeachment it has exhibited to the Senate as follows:

PREAMBLE

THE HOUSE OF REPRESENTATIVES' IMPEACHMENT OF JUDGE PORTEOUS IS UNPRECEDENTED AND UNJUSTIFIED

For the first time in modern history, the House of Representatives has impeached a sitting Article III Judge who has never been charged with a crime. Indeed, it has been more than 74 years since the House of Representatives has brought Articles of Impeachment against a judge that were not preceded by that judge's indictment in the criminal courts. The Articles of Impeachment brought against Judge Porteous are also unprecedented in two additional ways. First, this is the only time since the ratification of the Constitution that the House of Representatives has brought Articles of Impeachment against a judge after the Executive Branch, having conducted a thorough investigation, has declined to prosecute. Second, it is the only time in the same period that the House of Representatives has based an Article of Impeachment against a judge, or any other officer, upon allegations that pre-date his or her entry into federal office.

These actions are unprecedented and they are also unjustified by the facts of this case. The four Articles of Impeachment do not allege a single offense that supports the conviction and removal of a sitting Article III Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Indeed, in some instances, the Articles allege violations of the canons of judicial ethics or criticize Judge Porteous' handling of matters before the Court. While Judge Porteous vehemently denies violating those canons or mishandling

matters, noncriminal ethical violations or incorrect decisions have never been found to be a sufficient basis for conviction and removal from office. Such issues simply do not rise to the level of "high Crimes and Misdemeanors" as contemplated by the Framers. To the extent that a trial on the Articles in this case is permitted to convert—in contravention of both the Constitution and impeachment precedent—such acts into grounds for removal of an Article III Judge, it will set a new standard. A standard that treads deeply and dangerously into the realm of an independent judiciary that was at the very core of the Framers' vision of three co-equal branches of government.

In devising the three branches, the Framers divided the ability to impeach and remove Executive and Judicial Branch officers between the House of Representatives and the Senate. By doing so, the Framers, through the Constitution, empowered the House to allege the standard for impeachment based upon the language of the impeachment clause. But history has shown the power to impeach is not the power to remove. The power to try impeachments and remove officers upon conviction was vested solely in the Senate. It is the Senate—a uniquely deliberative body, free from the passions and prejudices of the majority—that sits in judgment and determines whether a given Article of Impeachment is sufficient, both legally and factually, to justify the removal of an Article III Judge.

In striking this careful balance, the Framers made clear that the trial and removal process is not one that should embrace unprecedented or novel impeachments. In vesting the power in the Senate, the Framers' intent was that the process would not be exercised easily or quickly, but carefully and deliberately. The Framers, through the Constitution, positioned the Senate along the path between the possibility of ill-considered and novel uses of the power to impeach and the decision to remove, confident that the Senate would stand as a safeguard against removal when constitutional standards had not been met. The Articles of Impeachment returned by the House are unprecedented, unjustified, and fail to meet the constitutionally required standard. Accordingly, Judge Porteous, in answer, asks the Senate to fulfill its constitutionally mandated role by dismissing the articles or, alternatively, acquitting him of the charges.

GENERAL DENIAL OF FACTS NOT ADMITTED
Judge Porteous denies each and every material allegation of the four Articles of Impeachment not specifically admitted in this ANSWER.

ARTICLE I

ANSWER TO ARTICLE I

Without waiving his affirmative defenses, Judge Porteous admits that he presided as a United States District Judge over the Lifemark Hospitals of Louisiana, Inc. v. Lifemark Enterprises litigation and that on October 17, 1996 he denied a motion seeking to recuse him from presiding over the case. Judge Porteous denies that he engaged in any corrupt conduct in connection with his handling of the litigation or in denying the motion for recusal. Judge Porteous denies that he intentionally made any misleading statements during the recusal hearing. Judge Porteous also denies engaging in a corrupt scheme of any sort with Jacob Amato, Jr. and Robert Creely and that he, at any time, deprived the parties or the public of the right to the honest services of his office. Judge Porteous further denies that he engaged in any corrupt conduct after the bench trial in Lifemark Hospitals of Louisiana, Inc. v. Lifemark Enterprises or at any time while the case was under advisement.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE I

Article I does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Because Article I does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE I

Article I is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. In essence, Article I alleges that Judge Porteous took several judicial actions while presiding as a United States District Judge in Lifemark Hospitals of Louisiana, Inc. v. Lifemark Enterprises, including failing to grant a pretrial motion and failing to disclose certain facts. In doing so, the Article alleges that Judge Porteous "deprived the parties and the public of the right to the honest services of his office." This "deprivation of the right to honest services" language is borrowed from Title 18, United States Code, Section 1346, a statute that is fraught with vagueness concerns. Indeed, its constitutional viability is currently pending before the United States Supreme Court in a series of cases. See *Weyrauch v. United States*, No. 08-1196; *Black v. United States*, No. 08-676; and *Skilling v. United States*, No. 08-1394. The inclusion of this standard, as well as the non-specific allegations regarding the allegedly improper judicial actions taken by Judge Porteous, render Article I unconstitutionally vague.

It is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific "high Crime and Misdemeanor" upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article I fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE I

Article I is fatally flawed because it charges multiple instances of allegedly corrupt conduct in a single article. The Constitution provides that "no person shall be convicted without the Concurrence of two thirds of the Members present." Senate Rule XXIII provides that "an article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial."

Despite these clear pronouncements, the House of Representatives, in Article I, has alleged a series of allegedly wrongful acts. In doing so, the House of Representatives has returned an Article of Impeachment which might permit a Senator to vote for impeachment if he or she finds that Judge Porteous committed even a single allegedly wrongful act, even where two-thirds of the Senators do not agree on which wrongful act was committed. This creates the very real possibility

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that conviction could occur even though Senators were in wide disagreement as to the alleged wrong committed. The structure of Article I presents the possibility that Judge Porteous could be convicted even though he would have been acquitted if separate votes were taken on each allegedly wrongful acts included in the article. As written, Article I does not require the constitutionally required number of Senators to agree on the specific conduct forming the basis for conviction and removal. By charging multiple wrongs in one article, the House of Representatives has made it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of two-thirds of the members. Accordingly, Article I should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I

Article I was returned by the House of Representatives in violation of Judge Porteous' constitutional rights in that it is based, in part, upon his compelled testimony provided under a grant of immunity. Because the process of impeachment, conviction and removal is a quasi-criminal one and under the circumstances here, Judge Porteous has constitutional rights that are violated by the use of his prior compelled, immunized testimony. Article I must be dismissed. Further, because the immunity grant by Judge Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals and Chair of the Special Committee of the Judicial Conference of the Fifth Circuit, was not proper under the immunity statute, the compelled testimony was wrongly procured and any Article of Impeachment based upon that testimony must be dismissed.

ARTICLE II

ANSWER TO ARTICLE II

Without waiving his affirmative defenses, Judge Porteous denies that he engaged in a longstanding pattern of corrupt conduct demonstrating his unfitness to serve as a United States District Court Judge as alleged in Article II. Judge Porteous further denies that he improperly set aside or expunged felony convictions for two Marcotte employees. Judge Porteous also denies that he at any time took any action in his capacity as a United States District Judge that related in any way to the Marcottes or their business interests.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE II

Article II does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Because Article II does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE II

Article II is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. Article II alleges that Judge Porteous engaged in certain corrupt actions prior to his appointment and confirmation to the position of United States District Judge. Article II makes no specific allegations concerning actions taken by Judge Porteous while on the federal bench. Indeed, the only allegations con-

cerning Judge Porteous tenure on the federal bench is that he in some unidentified way "used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business." The vagueness problem here cannot be overstated. It is simply not possible to begin to defend against this type of allegation. It is wholly lacking in any factual basis and clearly fails to frame a set of facts that amount to "high Crimes and Misdemeanors."

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific "high Crime and Misdemeanor" upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article II fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE II

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article II is constitutionally defective because it charges multiple alleged wrongs in a single article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article II should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE II

Article II cannot support the conviction and removal of an Article III United States District Judge because the alleged conduct preceded Judge Porteous' service as a United States District Judge. The constitutional impeachment mechanism provides a procedure to remove a judge for the commission of "high Crimes and Misdemeanors" while in federal office. The impeachment precedents do not provide a single example of an Article of Impeachment that has ever been based upon conduct that allegedly occurred prior to the impeached officer's entry into federal office. In contrast, the precedents suggest that while the House of Representatives may have investigated such allegations, that such conduct has never provided the basis for an impeachment and, significantly, the House has, on occasion, refused to take action because the allegations preceded the officer's entry into federal service. Moreover, while Judge Porteous contends that any attempt to use Article III's "good behaviour" clause to lower the standard necessary to impeach a federal judge is unsupported by the Constitution's impeachment clause, the House has clearly applied that lower standard in returning the four Articles of Impeachment. To the extent that the House has relied on the "good behaviour" clause, that clause states that judges "shall hold their offices during good behaviour" and clearly relates to a judge's conduct while in federal judicial office. Because the allegations of Article II relate to a period prior to Judge Porteous taking the federal bench, Article II must be dismissed.

ARTICLE III

ANSWER TO ARTICLE III

Without waiving his affirmative defenses, Judge Porteous denies that he knowingly and intentionally made material false statements and representations in connection with his personal bankruptcy or that he

knowingly and intentionally repeatedly violated a court order in his bankruptcy case.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE III

Article III does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Because Article III does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE III

Article III is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. In essence, Article III alleges a number of actions taken by Judge Porteous in connection with his personal bankruptcy, but it unclear as to the specific acts are claimed to violate the constitutional standard. Moreover, it is also does not clearly state the specific allegations regarding what transaction Judge Porteous concealed during the bankruptcy process or what new debts he allegedly incurred.

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific "high Crime and Misdemeanor" upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article III fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE III

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article II is constitutionally defective because it charges multiple alleged wrongs in a single article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article II should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE III

For the reasons set forth in the FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I, Article III was returned by the House of Representatives in violation of Judge Porteous' constitutional rights in that it is based, in part, upon his compelled testimony provided under a grant of immunity. Because the process of impeachment, conviction and removal is a quasi-criminal one and under the circumstances here, Judge Porteous has constitutional rights that are violated by the use of his prior compelled, immunized testimony. Article I must be dismissed. Further, because the immunity grant by Judge Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals and Chair of the Special Committee of the Judicial Conference of the Fifth Circuit, was not proper under the immunity statute, the compelled testimony

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was wrongly procured and any Article of Impeachment based upon that testimony must be dismissed.

FIFTH AFFIRMATIVE DEFENSE TO ARTICLE III.

The allegations in Article III do not rise to the level of "high Crimes and Misdemeanors" because they address purely personal conduct that is not criminal. Prior impeachment precedent has never before sought to convict and remove a judge from office based upon personal non-criminal conduct. The very nature of the impeachment process is focused first and foremost upon the official actions of judges. Where allegations in the Articles of Impeachment address non-official personal acts by judges, longstanding precedent has limited "high Crimes and Misdemeanors" to those personal acts that are also indictable offenses. Article III ignores this precedent in seeking to convict and remove Judge Porteous from office for non-official, non-criminal acts. While it is possible that the House of Representatives would claim that the actions taken in relation to the personal bankruptcy were indictable offenses, this claim would conflict with the multi-year investigation of the United States Department of Justice which concluded that prosecution was not warranted in light of the concern that the issues related to the bankruptcy were not material. It would also conflict with the criminal bankruptcy statutes, which require that any alleged false statement not be made simply knowingly or willfully, but fraudulently, before criminal liability may attach to such conduct. In framing Article III, the House of Representatives is seeking to convict and remove a sitting United States District Judge based upon a lowered standard, one that does not constitute "high Crimes and Misdemeanors," and one that has never before provided a basis for impeachment, much less conviction and removal from office. Article III of the Articles of Impeachment should be dismissed.

ARTICLE IV
ANSWER TO ARTICLE IV

Without waiving his affirmative defenses, Judge Porteous denies that he knowingly made material false statements in order to obtain the office of United States District Court Judge.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Because Article IV does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. In essence, Article IV alleges that Judge Porteous gave false answers on various forms that were presented in connection with the background investigation that was used to evaluate his appointment and confirmation as a United States District Judge. However, it is not clear whether Article IV contends that simply providing a single one of the alleged false

statements is a "high Crime or Misdemeanor" or whether the "high Crime or Misdemeanor" is based upon all of the acts alleged, i.e., several alleged false statements and other conduct alleged. Moreover, the nature of the questions on the forms that are the focus of this Article themselves add to the vagueness problem.

As we set forth in the **SECOND AFFIRMATIVE DEFENSE TO ARTICLE I**, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific "high Crime and Misdemeanor" upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article IV fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE IV

For the reasons set forth in the **THIRD AFFIRMATIVE DEFENSE TO ARTICLE I**, Article IV is constitutionally defective because it charges multiple instances of alleged acts of making false statements in one article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article IV should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV cannot support the conviction and removal of an Article III United States District Judge because the alleged conduct preceded Judge Porteous' service as a United States District Judge. The constitutional impeachment mechanism provides a procedure to remove a judge for the commission of "high Crimes and Misdemeanors" while in federal office. The impeachment precedents do not provide a single example of an Article of Impeachment that has ever been based upon conduct that allegedly occurred prior to the impeached officer's entry into federal office. In contrast, the precedents suggest that while the House of Representatives may have investigated such allegations, that such conduct has never provided the basis for an impeachment and, significantly, the House has, on occasion, refused to take action because the allegations preceded the officer's entry into federal service. Moreover, while Judge Porteous contends that any attempt to use Article III's "good behaviour" clause to lower the standard necessary to impeach a federal judge is unsupported by the Constitution's impeachment clause, the House has clearly applied that lower standard in returning the four Articles of Impeachment. To the extent that the House has relied on the "good behaviour" clause, that clause states that judges "shall hold their offices during good behaviour" and clearly relates to a judge's conduct while in federal judicial office. Because the allegations of Article IV relate to a period prior to Judge Porteous taking the federal bench, Article IV must be dismissed.

Respectfully submitted,

RICHARD W. WESTLING,
CHELSEA S. RICE,
JACKSON D. BOYD,
ANTHONY J. BURBA,
*Ober, Kaler, Grimes &
Shriver, P.C.*
SAMUEL S. DALTON,
Attorney at Law
RÉMY VOISIN STARNES,
Attorney At Law
PLLC.

*Counsel for G. Thomas
Porteous, Jr., United
States District Judge
for the Eastern Dis-
trict of Louisiana.*

Submitted: April 7, 2010.

The ACTING PRESIDENT pro tempore. The Court of Impeachment is adjourned.

*April 15, 2010*

CONGRESSIONAL RECORD—SENATE

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ARTICLES OF IMPEACHMENT
AGAINST JUDGE G. THOMAS
PORTEOUS, JR.

The PRESIDING OFFICER. The Chair submits to the Senate for printing in the Senate Journal and in the CONGRESSIONAL RECORD the replication of the House of Representatives to the Answer of Judge G. Thomas Porteous, Jr., to the Articles of Impeachment against Judge Porteous, pursuant to S. Res. 457, 111th Congress, Second Session, which replication was received by the Secretary of the Senate on April 15, 2010.

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CONGRESSIONAL RECORD — SENATE

April 15, 2010

The materials follow.

CONGRESS OF THE UNITED STATES,
Washington, DC, Apr. 15, 2010.
Re Impeachment of G. Thomas Porteous, Jr.,
United States District Judge for the
Eastern District of Louisiana.

Hon. NANCY ERICKSON,
Secretary of the Senate,
U.S. Senate, Washington, DC.

DEAR MS. ERICKSON: Pursuant to Senate
Resolution 457 of March 17, 2010, enclosed is
the Replication of the House of Representa-
tives to the Answer of G. Thomas Porteous
Jr., to the Articles of Impeachment.

A copy of the Replication and of this letter
will be served upon counsel for Judge
Porteous today through electronic mail.

Sincerely,

ALAN I. BARON,

Special Impeachment Counsel.

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

IN RE: IMPEACHMENT OF G. THOMAS PORTEOUS,
JR., UNITED STATES DISTRICT JUDGE FOR
THE EASTERN DISTRICT OF LOUISIANA

REPLICATION OF THE HOUSE OF REPRESENTATIVES TO THE ANSWER OF G.
THOMAS PORTEOUS, JR., TO THE ARTI-
CLES OF IMPEACHMENT

The House of Representatives, through its
Managers and counsel, respectfully replies to
the Answer to Articles of Impeachment as
follows:

RESPONSE TO THE PREAMBLE

Judge Porteous in his Answer to the Arti-
cles of Impeachment, denies certain of the
allegations and makes what are primarily
technical arguments as to the charging lan-
guage that do not address the factual sub-
stance of the allegations. However, it is in
Judge Porteous's Preamble that he sets forth
his real defense and, without denying he
committed the conduct that is alleged in the
Articles of Impeachment, insists that never-
theless he should not be removed from Of-
fice.

At several points in his Preamble, Judge
Porteous notes that he was not criminally
prosecuted by the Department of Justice, the
implication being that the House and the
Senate should abdicate their Constitu-
tionally assigned roles of deciding whether
the conduct of a Federal judge rises to the
level of a high crime or misdemeanor and
warrants the Judge's removal, and should in-
stead defer to the Department of Justice on
this issue. Judge Porteous maintains that
impeachment and removal may only proceed
upon conduct that resulted in a criminal
prosecution, no matter how corrupt the con-
duct at issue, or what reasons explain the
Department's decision not to prosecute. Judge
Porteous provides no support for this
contention because there is none—that is not
what the Constitution provides.

Indeed, the Senate has by its prior actions
made it clear that the decision as to whether
a Judge's conduct warrants his removal from
Office is this Constitutional prerogative of
the Senate—not the Department of Justice—
and the existence of a successful (or even an
unsuccessful) criminal prosecution is irrele-
vant to the Senate's decision. The Senate
has convicted and removed a Federal judge
who was acquitted at a criminal trial (Judge
Alcee Hastings). The Senate has also con-
victed a Federal Judge for personal financial
misconduct (Judge Harry Claiborne) while at
the same time acquitting that same Judge of
the Article that was based specifically on the
fact of his criminal conviction.¹ Thus, Judge
Porteous's repeated references to what the
Department of Justice did or did not do add

nothing to the Senate's evaluation of the
charges or the facts in this case.²

Further, according to Judge Porteous, pre-
Federal bench conduct cannot be the basis of
Impeachment, even if that conduct consisted
of egregious corrupt activities that was be-
yond the reach of criminal prosecution be-
cause the statute of limitations had run, and
even if Judge Porteous fraudulently con-
cealed that conduct from the Senate and the
White House at the time of his nomination
and confirmation. There is nothing in the
Constitution to support this contention, and
it flies in the face of common sense. The Sen-
ate is entitled to conclude that Judge
Porteous's pre-Federal bench conduct re-
veals him to have been a corrupt state judge
with his hand out under the table to bail
bondsmen and lawyers. Such conduct, which,
as alleged in Articles I and II, continued into
his Federal bench tenure, demonstrates that
he is not fit to be a Federal judge.

Finally, the notion that Judge Porteous is
entitled to maintain a lifetime position of
Federal judge that he obtained by acts that
included making materially false statements
to the United States Senate is untenable.
Judge Porteous would turn the confirmation
process into a sporting contest, in which, if
he successfully were to conceal his corrupt
background prior to the Senate vote and
thereby obtain the position of a Federal
judge, he is home free and the Senate cannot
remove him.

ARTICLE I

The House of Representatives denies each
and every statement in the Answer to Arti-
cle I that denies the acts, knowledge, intent
or wrongful conduct charged against Re-
spondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of this purported af-
firmative defense and further states that Ar-
ticle I sets forth an impeachable offense as
defined in the Constitution of the United
States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of this purported af-
firmative defense, namely, that Article I is
vague. To the contrary, Article I sets forth
several precise and narrow factual assertions
associated with Judge Porteous's handling of
a civil case (the Liljeberg litigation), includ-
ing allegations that Judge Porteous "denied
a motion to recuse himself from the case, de-
spite the fact that he had a corrupt financial
relationship with the law firm of Amato &
Creely, P.C. which had entered the case to
represent Liljeberg" and that while that case
was pending, Judge Porteous "solicited and
accepted things of value from both Amato
and his law partner Creely, including a pay-
ment of thousands of dollars in cash." There
is no vagueness whatsoever in these allega-
tions. Article I's allegation that Judge
Porteous deprived the public and the Court
of Appeals of his "honest services"—a phrase
to which Judge Porteous raises a particular
objection—could not be more clear and free
of ambiguity as used in this Article, and ac-
curately describes Judge Porteous's dishon-
esty in handling a case, including his distor-
tion of the factual record so that his ruling
on the recusal motion was not capable of ap-
ellate review.³

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of the purported affir-
mative defense that Article I charges more
than one offense. The plain reading of Ar-
ticle I is that Judge Porteous committed mis-
conduct in his handling of the Liljeberg case
by means of a course of conduct involving
his financial relationships with the attor-

neys in that case and his failure to disclose
those relationships or take other appropriate
judicial action. The separate acts set forth in
Article I constitute part of a single unified
scheme involving Judge Porteous's dishon-
esty in handling Liljeberg. Further, the
charges in this Article are fully consistent
with impeachment precedent.⁴

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of this purported af-
firmative defense, which, in effect, seeks to
suppress the voluntary statements of a high-
ly educated and experienced Federal judge,
made under oath, before other Federal
judges. Judge Porteous was provided a grant
of immunity in connection with his Fifth
Circuit Hearing testimony, and the immu-
nity order provided that his testimony from
that proceeding could not be used against
him in "any criminal case." Simply put, an
impeachment trial is not a criminal case.⁵
Accordingly, there is simply no credible
basis to argue that the Senate should not
consider Judge Porteous's voluntary and im-
munized Fifth Circuit testimony.

ANSWER TO ARTICLE II

The House of Representatives denies each
and every statement in the Answer to Arti-
cle II that denies the acts, knowledge, intent
or wrongful conduct charged against Re-
spondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of this purported af-
firmative defense and further states that Ar-
ticle II sets forth an impeachable offense as
defined in the Constitution of the United
States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of this purported af-
firmative defense, namely, that the Article
is vague. To the contrary, Article II sets
forth several precise and narrow factual as-
sertions associated with Judge Porteous's re-
lationship with the Marcottes—both prior to
and subsequent to Judge Porteous taking the
Federal bench. Article II alleges with speci-
ficity the things of value given to Judge
Porteous over time and identifies the judi-
cial or other acts taken by Judge Porteous
for the benefit of the Marcottes and their
business.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of this purported af-
firmative defense, namely, that the Article
improperly charges multiple offenses. The
plain reading of Article II is that Judge
Porteous engaged in a corrupt course of con-
duct whereby, over time, he solicited and
accepted things of value from the Marcottes,
and, in return, he took judicial acts or other
acts while a judge to benefit the Marcottes
and their business.

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each
and every allegation of this purported af-
firmative defense, namely, that Article II
improperly charges pre-Federal bench con-
duct as a basis for impeachment. First, Ar-
ticle II plainly alleges that Judge Porteous's
corrupt relationship with the Marcottes con-
tinued while he was a Federal Judge. Second,
Judge Porteous's assertion that pre-Federal
bench conduct may not form a basis for im-
peachment finds no support in the Constitu-
tion and is not supported by any other sound
legal or logical basis.⁶ As a factual matter, it
is especially appropriate for the Senate to
consider Judge Porteous's pre-Federal bench
corrupt relationship with the Marcottes
where it was affirmatively concealed from
the Senate in the confirmation process,

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where it involved conduct as a judicial officer directly bearing on whether he was fit to hold a Federal judicial office, and where that conduct, having now been exposed, brings disrepute and scandal to the Federal bench.

ARTICLE III

The House of Representatives denies each and every statement in the Answer to Article III that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article III sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges in substance that the allegations in Article III are vague. To the contrary, Article III sets forth several specific allegations associated with Judge Porteous's conduct in his bankruptcy proceedings. There is no credible contention that Judge Porteous cannot understand what he is charged with in this Article.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges, in substance, that Article III charges more than one offense. The plain reading of Article III is that Judge Porteous committed misconduct in his bankruptcy proceeding by making a series of false statements and representations, and by incurring new debt in violation of a Federal Bankruptcy Court order. This Article alleges a single unified fraud scheme, with the purpose of deceiving the bankruptcy court and creditors as to his assets and his financial affairs, so that Judge Porteous could enjoy undisclosed wealth and income for personal purposes including gambling.

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the voluntary statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges. Judge Porteous was provided a grant of immunity in connection with his Fifth Circuit Hearing testimony, effectively eliminating the possibility that any of that testimony could be used against him in any criminal case. An impeachment trial is not a criminal case. There is simply no credible basis to argue that the Senate should not consider Judge Porteous's voluntary and immunized Fifth Circuit testimony.

FIFTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense—which does not take issue with the proposition that Judge Porteous committed misconduct in a Federal judicial bankruptcy proceeding, but contends only that the acts as alleged do not warrant impeachment. First, this is not an affirmative defense. It is up to the Senate to decide whether the facts surrounding the bankruptcy warrant impeachment.

Second, the Senate has in fact removed a judge for personal financial misconduct, and in 1986 convicted Federal Judge Harry Claiborne and removed him from office for evading taxes. It is significant that the Senate did not convict Judge Claiborne for the crime of evading taxes. Rather, the Senate acquitted Judge Claiborne of the one Article that charged him with having committed and having been convicted of a crime.

Third, what the Department of Justice may consider material for purposes of a criminal prosecution has nothing to do with what the Senate may deem to be material for purposes of determining whether Judge Porteous should be removed, from Office—an Office which requires that he oversee bankruptcy cases and administer and enforce the oath to tell the truth.²

ARTICLE IV

The House of Representatives denies each and every statement in the Answer to Article IV that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article IV sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges the Article is vague. The allegations set forth in Article IV are specific and precise. In fact, Judge Porteous's description of the charge fairly characterizes the offense: "In essence, Article IV alleges that Judge Porteous gave false answers on various forms that were presented in connection with the background investigation. . . . It is apparent, therefore, that Judge Porteous has a clear understanding of these allegations in Article IV, which specify the dates and circumstances when the statements were made, and the contents of the statements that are alleged to have been false. There is no credible contention that Article IV does not provide Judge Porteous specific notice as to what this Article alleges."

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense. The allegations set forth in Article IV are specific and precise. They charge in substance that Judge Porteous made a series of false statements to conceal the fact of his improper and corrupt relationships with the Marcottes and with attorneys Creely and Amato in order to procure the position of United States District Court Judge. Charging these four false statements, all involving a single issue, in a single Article is consistent with precedent.³

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, alleging that the Senate cannot impeach Judge Porteous based on pre-Federal bench conduct. First, Judge Porteous's assertion that pre-Federal bench conduct may not form a basis for impeachment is not supported by the Constitution. Notwithstanding Judge Porteous's assertions to the contrary, the Constitution does not limit Congress from considering pre-Federal bench conduct in deciding whether to impeach, and there are compelling reasons for Congress to consider such conduct—especially where such conduct consists of making materially false statements to the Senate. The logic of Judge Porteous's position is that he cannot be removed by the Senate, even though the false statements he made to the Senate concealed dishonest behavior that goes to the core of his judicial qualifications and fitness to hold the Office of United States District Court Judge. The proposition that the Senate lacks power under these cir-

cumstances to remedy the wrong committed by Judge Porteous is simply untenable.

Respectfully submitted,
THE UNITED STATES HOUSE OF REPRESENTATIVES

By

ADAM SCHIFF,

Manager.

BOB GOODLATTE,

Manager.

ALAN I. BARON,

Special Impeachment

Counsel.

Managers of the House of Representatives:
Adam B. Schiff, Bob Goodlatte, Zoe Lofgren,
Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.
April 15, 2010.

ENDNOTES

¹ Judge Harry E. Claiborne was acquitted of Article III, charging that he "was found guilty by a twelve-person jury" of criminal violations of the tax code, and that "a judgment of conviction was entered against [him]." See "Impeachment of Harry E. Claiborne," H. Res. 471, 99th Cong., 2d Sess. (1986) (Articles of Impeachment); 132 Cong. Rec. S15761 (daily ed. Oct. 9, 1986) (acquitting him on Article III).

² Moreover, the Department of Justice's investigation hardly vindicated Judge Porteous. To the contrary, the Department viewed Judge Porteous's misconduct as so significant that it referred the matter to the Fifth Circuit for disciplinary review and potential impeachment, and set forth its findings in its referral letter.

³ Judge Porteous treats Article I as if it alleges the criminal offenses of "honest services fraud," in violation of Title 18, United States Code, Section 1346, and that because the term "honest services" has been challenged as vague in the criminal context, the term is likewise vague as used in Article I. Despite Judge Porteous's suggestion to the contrary, Article I does not allege a violation of the "honest services" statute. Moreover, it could hardly be contended that proof that Judge Porteous acted dishonestly in the performance of his official duties does not go to the very heart of the Senate's determination of whether he is fit to hold office.

⁴ The respective Articles of Impeachment against Judges Halsted L. Ritter, Harold Louderback, and Robert W. Archbald each set forth lengthy descriptions of judicial misconduct arising from improper financial relationships between those judges and the private parties. These consist of detailed narration specifying numerous discrete acts. See "Impeachment of Judge Halsted L. Ritter," H. Res. 422, 74th Cong., 2d Sess. (March 2, 1936) and "Amendments to Articles of Impeachment Against Halsted L. Ritter," H. Res. 471, 74th Cong., 2d Sess. (March 30, 1936), reprinted in "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) (hereinafter "1973 Committee Print") at 188-197 (H. Res. 422), 198-202 (H. Res. 471); ("Articles of Impeachment against Judge Robert W. Archbald," H. Res. 622, 62d Cong., 2d Sess. (1912), 48 Cong. Rec. (House) July 1, 1912 (8705-06), reprinted in 1973 Committee Print at 176; and ("Articles of Impeachment against George W. English,") Cong. Rec. (House), Mar. 25, 1926 (8283-87), reprinted in 1973 Committee Print at 162.

⁵ The Constitution makes it clear that impeachment was not considered by the Framers to be a criminal proceeding. It provides: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment,

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according to Law." U.S. Const., Art. 3, cl. 7. See also, *United States v. Nixon*, 506 U.S. 224, 234 (1993) ("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. . . .").

⁶As but one example, if the pre-Federal bench conduct consisted of treason, there could be no credible contention that such conduct would not provide a basis for impeachment.

⁷It should be noted that Judge Porteous has testified and cross-examined witnesses at the Fifth Circuit Hearing on the subject of his bankruptcy, and the House therefore possesses evidence that was unavailable to the Department of Justice.

⁸As but one example, Article III of the Articles of Impeachment against Judge Walter Nixon charged that he concealed material facts from the Federal Bureau of Investigation and the Department of Justice by making six, specified, false statements on April 18, 1994 at an interview, and by making seven discrete false statements under oath to the Grand Jury. "Impeachment of Walter L. Nixon, Jr.," H. Res. 87, 101st Cong., 1st Sess. (1989) (Article III).

The PRESIDING OFFICER (Mr. FRANKEN). The Senator from Illinois.

Mr. BURRIS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BURRIS. Mr. President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

ARTICLES OF IMPEACHMENT
AGAINST JUDGE PORTEOUS

The PRESIDING OFFICER. The Chair submits to the Senate for printing in the Senate Journal and in the CONGRESSIONAL RECORD the replication-errata of the House of Representatives to the Answer of Judge G. Thomas Porteous, Jr., to the Articles of Impeachment against Judge Porteous, pursuant to S. Res. 457, 111th Congress, Second Session, which replication was received by the Secretary of the Senate on April 21, 2010.

The replication-errata of the House of Representatives is as follows:

CONGRESS OF THE UNITED STATES,

Washington, DC, April 21, 2010.

Re Impeachment of G. Thomas Porteous, Jr.,
United States District Judge for the
Eastern District of Louisiana, Replication—Errata

Hon. NANCY ERICKSON,
Secretary of the Senate, U.S. Senate,
Washington, DC.

DEAR Ms. ERICKSON: On behalf of the House Managers, I am writing to inform the Senate of the following errata in the Replication that the House filed April 15, 2010.

Page 5, first sentence in the Section entitled "Fourth Affirmative Defense," the word "voluntary" should be deleted, so that the sentence now reads: "The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges."

Page 6, last sentence in the Section entitled "Fourth Affirmative Defense," the words "voluntary and" should be deleted, so that the sentence now reads: "Accordingly, there is simply no credible basis to argue that the Senate should not consider Judge Porteous's immunized Fifth Circuit testimony."

Page 9, first sentence in the Section entitled "Fourth Affirmative Defense," the word "voluntary" should be deleted, so that the sentence now reads: "The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges."

Page 9, last sentence in the Section entitled "Fourth Affirmative Defense," the

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words "voluntary and" should be deleted, so that the sentence now reads: "There is simply no credible basis to argue that the Senate should not consider Judge Porteous's immunised Fifth Circuit testimony."

I would request that any future published versions of this Replication incorporate and reflect the above changes. Further, in that the Replication has been published in the Congressional Record, to the extent consistent with the Senate rules, we respectfully request that this letter likewise be published.

A copy of this letter will be served upon counsel for Judge Porteous today through electronic mail.

Sincerely,

ALAN I. HARON,
Special Impeachment Counsel.

April 22, 2010

CONGRESSIONAL RECORD — SENATE

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RESPONSE TO THE PREAMBLE

Judge Porteous in his Answer to the Articles of Impeachment, denies certain of the allegations and makes what are primarily technical arguments as to the charging language that do not address the factual substance of the allegations. However, it is in Judge Porteous's Preamble that he sets forth his real defense and, without denying he committed the conduct that is alleged in the Articles of Impeachment, insists that nevertheless he should not be removed from Office.

At several points in his Preamble, Judge Porteous notes that he was not criminally prosecuted by the Department of Justice, the implication being that the House and the Senate should abdicate their Constitutionally assigned roles of deciding whether the conduct of a Federal judge rises to the level of a high crime or misdemeanor and warrants the Judge's removal, and should instead defer to the Department of Justice on this issue. Judge Porteous maintains that impeachment and removal may only proceed upon conduct that resulted in a criminal prosecution, no matter how corrupt the conduct at issue, or what reasons explain the Department's decision not to prosecute. Judge Porteous provides no support for this contention because there is none—that is not what the Constitution provides.

Indeed, the Senate has by its prior actions made it clear that the decision as to whether a Judge's conduct warrants his removal from Office is the Constitutional prerogative of the Senate—not the Department of Justice—and the existence of a successful (or even an unsuccessful) criminal prosecution is irrelevant to the Senate's decision. The Senate has convicted and removed a Federal judge who was acquitted at a criminal trial (Judge Alice Hastings). The Senate has also convicted a Federal judge for personal financial misconduct (Judge Harry Claiborne) while at the same time acquitting that same Judge of the Article that was based specifically on the fact of his criminal conviction.¹ Thus, Judge Porteous's repeated references to what the Department of Justice did or did not do adds nothing to the Senate's evaluation of the charges or the facts in this case.²

Further, according to Judge Porteous, pre-Federal bench conduct cannot be the basis of Impeachment, even if that conduct consisted of egregious corrupt activities that was beyond the reach of criminal prosecution because the statute of limitations had run, and even if Judge Porteous fraudulently concealed that conduct from the Senate and the White House at the time of his nomination and confirmation. There is nothing in the Constitution to support this contention, and it flies in the face of common sense. The Senate is entitled to conclude that Judge Porteous's pre-Federal bench conduct reveals him to have been a corrupt state judge with his hand out under the table to bail bondsmen and lawyers. Such conduct, which, as alleged in Articles I and II, continued into his Federal bench tenure, demonstrates that he is not fit to be a Federal judge.

Finally, the notion that Judge Porteous is entitled to maintain a lifetime position of Federal judge that he obtained by acts that included making materially false statements to the United States Senate is untenable. Judge Porteous would turn the confirmation process into a sporting contest, in which, if he successfully were to conceal his corrupt background prior to the Senate vote and thereby obtain the position of a Federal judge, he is home free and the Senate cannot remove him.

ARTICLE I

The House of Representatives denies each and every statement in the Answer to Article I that denies the acts, knowledge, intent

ARTICLES OF IMPEACHMENT
AGAINST JUDGE PORTEOUS

The PRESIDING OFFICER. The Chair submits to the Senate for printing in the Senate Journal and in the CONGRESSIONAL RECORD the amended replication of the House of Representatives to the Answer of Judge G. Thomas Porteous, Jr., to the Articles of Impeachment against Judge Porteous, pursuant to S. Res. 457, 111th Congress, Second Session, which replication was received by the Secretary of the Senate on April 22, 2010.

The amended replication of the House of Representatives is as follows:
CONGRESS OF THE UNITED STATES,
Washington, DC, Apr. 22, 2010.

Impeachment of G. Thomas Porteous, Jr.,
United States District Judge for the Eastern District of Louisiana, Amended Replication.

Hon. NANCY ERICKSON,
Secretary of the Senate, U.S. Senate, Washington, DC.

DEAR Ms. ERICKSON: Enclosed please find the Amended Replication of the House of Representatives to the Answer of G. Thomas Porteous, Jr., to the Articles of Impeachment.

A copy of this letter and the Amended Replication will be served upon counsel for Judge Porteous today through electronic mail.

Sincerely,

ALAN I. BARON,
Special Impeachment Counsel.
IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

IN RE: IMPEACHMENT OF G. THOMAS PORTEOUS, JR., UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF LOUISIANA

AMENDED

REPLICATION OF THE HOUSE OF REPRESENTATIVES TO THE ANSWER OF G. THOMAS PORTEOUS, JR., TO THE ARTICLES OF IMPEACHMENT

The House of Representatives, through its Managers and counsel, respectfully replies to the Answer to Articles of Impeachment as follows:

or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article I sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that Article I is vague. To the contrary, Article I sets forth several precise and narrow factual assertions associated with Judge Porteous's handling of a civil case (the Liljeberg litigation), including allegations that Judge Porteous "denied a motion to recuse himself from the case, despite the fact that he had a corrupt financial relationship with the law firm of Amato & Creely, P.C. which had entered the case to represent Liljeberg" and that while that case was pending, Judge Porteous "solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash." There is no vagueness whatsoever in these allegations. Article I's allegation that Judge Porteous deprived the public and the Court of Appeals of his "honest services"—a phrase to which Judge Porteous raises a particular objection—could not be more clear and free of ambiguity as used in this Article, and accurately describes Judge Porteous's dishonesty in handling a case, including his distortion of the factual record so that his ruling on the recusal motion was not capable of appellate review.³

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of the purported affirmative defense that Article I charges more than one offense. The plain reading of Article I is that Judge Porteous committed misconduct in his handling of the Liljeberg case by means of a course of conduct involving his financial relationships with the attorneys in that case and his failure to disclose those relationships or take other appropriate judicial action. The separate acts set forth in Article I constitute part of a single unified scheme involving Judge Porteous's dishonesty in handling Liljeberg. Further, the charges in this Article are fully consistent with impeachment precedent.⁴

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges. Judge Porteous was provided a grant of immunity in connection with his Fifth Circuit Hearing testimony, and the immunity order provided that his testimony from that proceeding could not be used against him in "any criminal case." Simply put, an impeachment trial is not a criminal case.⁵ Accordingly, there is simply no credible basis to argue that the Senate should not consider Judge Porteous's immunized Fifth Circuit testimony.

ANSWER TO ARTICLE II

The House of Representatives denies each and every statement in the Answer to Article II that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article II sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that the Article is vague. To the contrary, Article II sets forth several precise and narrow factual assertions associated with Judge Porteous's relationship with the Marcottes—both prior to and subsequent to Judge Porteous taking the Federal bench. Article II alleges with specificity the things of value given to Judge Porteous over time and identifies the judicial or other acts taken by Judge Porteous for the benefit of the Marcottes and their business.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that the Article improperly charges multiple offenses. The plain reading of Article II is that Judge Porteous engaged in a corrupt course of conduct whereby, over time, he solicited and accepted things of value from the Marcottes, and, in return, he took judicial acts or other acts while a judge to benefit the Marcottes and their business.

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that Article II improperly charges pre-Federal bench conduct as a basis for impeachment. First, Article II plainly alleges that Judge Porteous's corrupt relationship with the Marcottes continued while he was a Federal Judge. Second, Judge Porteous's assertion that pre-Federal bench conduct may not form a basis for impeachment finds no support in the Constitution and is not supported by any other sound legal or logical basis.⁶ As a factual matter, it is especially appropriate for the Senate to consider Judge Porteous's pre-Federal bench corrupt relationship with the Marcottes where it was affirmatively concealed from the Senate in the confirmation process, where it involved conduct as a judicial officer directly bearing on whether he was fit to hold a Federal judicial office, and where that conduct, having now been exposed, brings disrepute and scandal to the Federal bench.

ARTICLE III

The House of Representatives denies each and every statement in the Answer to Article III that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article III sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges in substance that the allegations in Article III are vague. To the contrary, Article III sets forth several specific allegations associated with Judge Porteous's conduct in his bankruptcy proceedings. There is no credible contention that Judge Porteous cannot understand what he is charged with in this Article.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges, in substance, that Article III charges more than one offense. The plain reading of Article III is that Judge Porteous committed misconduct in his bankruptcy proceeding by making a series of false statements and representations, and by incurring new debt in violation of a Federal Bankruptcy Court order. This Article alleges a single unified fraud scheme, with the purpose of deceiving the bankruptcy court and creditors as to his assets and his financial affairs, so that Judge Porteous could enjoy undisclosed wealth and income for personal purposes—including gambling.

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges. Judge Porteous was provided a grant of immunity in connection with his Fifth Circuit Hearing testimony, effectively eliminating the possibility that any of that testimony could be used against him in any criminal case. An impeachment trial is not a criminal case. There is simply no credible basis to argue that the Senate should not consider Judge Porteous's immunized Fifth Circuit testimony.

FIFTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense—which does not take issue with the proposition that Judge Porteous committed misconduct in a Federal judicial bankruptcy proceeding, but contends only that the acts as alleged do not warrant impeachment. First, this is not an affirmative defense. It is up to the Senate to decide whether the facts surrounding the bankruptcy warrant impeachment.

Second, the Senate has in fact removed a judge for personal financial misconduct, and in 1986 convicted Federal Judge Harry Claiborne and removed him from office for evading taxes. It is significant that the Senate did not convict Judge Claiborne for the crime of evading taxes. Rather, the Senate acquitted Judge Claiborne of the one Article that charged him with having committed and having been convicted of a crime.

Third, what the Department of Justice may consider material for purposes of a criminal prosecution has nothing to do with what the Senate may deem to be material for purposes of determining whether Judge Porteous should be removed from Office—an Office which requires that he oversee bankruptcy cases and administer and enforce the oath to tell the truth.

ARTICLE IV

The House of Representatives denies each and every statement in the Answer to Article IV that denies the acts, knowledge, intent or wrongful conduct charged against Respondent.

FIRST AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense and further states that Article IV sets forth an impeachable offense as defined in the Constitution of the United States.

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges the Article is vague. The allegations set forth in Article IV are specific and precise. In fact, Judge Porteous's description of the charge fairly characterizes the offense: "In essence, Article IV alleges that Judge Porteous gave false answers on various forms that were presented in connection with the background investigation. . . ." It is apparent, therefore, that Judge Porteous has a clear understanding of these allegations in Article IV, which specify the dates and circumstances

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when the statements were made, and the contents of the statements that are alleged to have been false. There is no credible contention that the Article IV does not provide Judge Porteous specific notice as to what this Article alleges.

THIRD AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense. The allegation sets forth in Article IV are specific and precise. They charge in substance that Judge Porteous made a series of false statements to conceal the fact of his improper and corrupt relationships with the Marcottes and with attorneys Creely and Amato in order to procure the position of United States District Court Judge. Charging these four false statements, all involving a single issue, in a single Article is consistent with precedent.⁴

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, alleging that the Senate cannot impeach Judge Porteous based on pre-Federal bench conduct. First, Judge Porteous's assertion that pre-Federal bench conduct may not form a basis for impeachment is not supported by the Constitution. Notwithstanding Judge Porteous's assertions to the contrary, the Constitution does not limit Congress from considering pre-Federal bench conduct in deciding whether to impeach, and there are compelling reasons for Congress to consider such conduct—especially where such conduct consists of making materially false statements to the Senate. The logic of Judge Porteous's position is that he cannot be removed by the Senate, even though the false statements he made to the Senate concealed dishonest behavior that goes to the core of his judicial qualifications and fitness to hold the Office of United States District Court Judge. The proposition that the Senate lacks power under these circumstances to remedy the wrong committed by Judge Porteous is simply untenable.

Respectfully submitted,

THE U.S. HOUSE OF REPRESENTATIVES

By

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April 22, 2010.

ENDNOTES

¹ Judge Harry E. Claiborne was acquitted of Article III, charging that he "was found guilty by a twelve-person jury" of criminal violations of the tax code, and that "a judgment of conviction was entered against [him]." See "Impeachment of Harry E. Claiborne," H. Res. 471, 99th Cong., 2d Sess. (1966) (Articles of Impeachment); 132 Cong. Rec. S 15781 (daily ed. Oct. 9, 1986) (acquitting him on Article III).

² Moreover, the Department of Justice's investigation hardly vindicated Judge Porteous. To the contrary, the Department viewed Judge Porteous's misconduct as so significant that it referred the matter to the Fifth Circuit for disciplinary review and potential impeachment, and set forth its findings in its referral letter.

³ Judge Porteous treats Article I as if it alleges the criminal offense of "honest services fraud," in violation of Title 18, United States Code, Section 1346, and that because the

term "honest services" has been challenged as vague in the criminal context, the term is likewise vague as used in Article I. Despite Judge Porteous's suggestion to the contrary, Article I does not allege a violation of the "honest services" statute. Moreover, it could hardly be contended that proof that Judge Porteous acted dishonestly in the performance of his official duties does not go to the very heart of the Senate's determination of whether he is fit to hold office.

⁴ The respective Articles of Impeachment against Judges Halsted L. Ritter, Harold Louderback, and Robert W. Archbald each set forth lengthy descriptions of judicial misconduct arising from improper financial relationships between those judges and the private parties. These consist of detailed narration specifying numerous discrete acts. See "Impeachment of Judge Halsted L. Ritter," H. Res. 422, 74th Cong., 2d Sess. (March 2, 1936) and "Amendments to Articles of Impeachment Against Halsted L. Ritter," H. Res. 471, 74th Cong., 2d Sess. (March 30, 1936), reprinted in "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) [hereinafter "1973 Committee Print"] at 189-197 (H. Res. 422), 198-202 (H. Res. 471); ["Articles of Impeachment against Judge Robert W. Archbald"], H. Res. 622, 52d Cong., 2d Sess. (1912), 48 Cong. Rec. (House) July 8, 1912 (8705-08), reprinted in 1973 Committee Print at 176; and ["Articles of Impeachment against George W. English,"] Cong. Rec. (House), Mar. 25, 1926 (6283-87), reprinted in 1973 Committee Print at 162.

⁵ The Constitution makes it clear that impeachment was not considered by the Framers to be a criminal proceeding. It provides: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const., Art. 3, cl. 7. See also, *United States v. Nixon*, 506 U.S. 224, 234 (1993) ("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 . . .").

⁶ As but one example, if the pre-Federal bench conduct consisted of treason, there could be no credible contention that such conduct would not provide a basis for impeachment.

⁷ It should be noted that Judge Porteous has testified and cross-examined witnesses at the Fifth Circuit Hearing on the subject of his bankruptcy, and the House therefore possesses evidence that was unavailable to the Department of Justice.

⁸ As but one example, Article III of the Articles of Impeachment against Judge Walter Nixon charged that he concealed material facts from the Federal Bureau of Investigation and the Department of Justice by making six specified false statements on April 18, 1984 at an interview, and by making seven discrete false statements under oath to the Grand Jury. "Impeachment of Walter L. Nixon, Jr.," H. Res. 87, 101st Cong., 1st Sess. (1989) (Article III).

IMPEACHMENT TRIAL COMMITTEE
RULES

Mrs. McCASKILL. Mr. President, on April 13, 2010, the Impeachment Trial Committee on the Articles of Impeachment Against Judge G. Thomas Porteous, Jr., adopted two rules to govern aspects of its pretrial proceedings. On July 14, 2010, the committee adopted two additional rules.

The first rule, adopted pursuant to rule 26.7(a)(1) of the Standing Rules of the Senate, establishes seven members as the committee quorum. In the interest of fairness and continuity, and consistent with prior impeachment trials, the committee adopted this rule and established a "natural" quorum of at least seven of its members to receive evidence and conduct the business of the committee.

The second rule delegates the authority of the committee to the chairman

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and vice chairman to conduct the daily operations of the committee. This includes, but is not limited to, hiring staff, issuing administrative orders, ensuring compliance with those orders, communicating with counsel for the parties, determining a course of proceeding, and for any other purposes necessary for the committee to discharge its responsibilities and address any other administrative or procedural matters.

The third rule delegates to the chairman, in consultation with the vice chairman, the committee's authority to issue subpoenas for witnesses called to testify or produce documents during all committee proceedings. Senate impeachment rule XI grants to the Impeachment Trial Committee the power granted by Senate impeachment rule VI to the Senate "to compel the attendance of witnesses."

The fourth rule, adopted pursuant to rule 26.7(a)(2) of the Standing Rules of the Senate, reduces to one member the committee quorum for taking sworn pretrial testimony. Judge Porteous has asked to examine certain witnesses in advance of the committee's evidentiary hearings, which will begin on September 13, 2010. Although the pretrial examination of witnesses in a Senate impeachment trial remains rare, the committee has concluded that it should, in the circumstances of the present impeachment, permit a limited number of them. The rule implements the committee's determination that pretrial examinations may proceed before a quorum of one member. As with prior impeachment proceedings, and pursuant to the rules of this committee, the evidentiary hearings will take place in the presence of a natural quorum of at least 7 of its 12 members.

I ask unanimous consent to have those rules printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

RULE 1—DELEGATION OF AUTHORITY

The Chairman and Vice Chairman are delegated the authority to communicate as necessary with House counsel and counsel to Judge Porteous, for the purpose of determining a course of proceeding, pretrial and trial scheduling, and for any other purposes necessary for the Committee to discharge its responsibilities. The Chairman and Vice Chairman are further delegated the authority to address any other administrative or procedural matters necessary for the Committee to discharge its responsibilities.

RULE 2—QUORUM FOR RECEIVING EVIDENCE

A natural number of seven members shall constitute a quorum for the purpose of receiving evidence.

RULE 3—SUBPOENAS

The Chairman and Vice Chairman are delegated the authority to issue subpoenas on behalf of the Committee.

RULE 4—QUORUM FOR THE TAKING OF PRETRIAL TESTIMONY

One member shall constitute a quorum for the purpose of a pretrial examination of a witness at which sworn testimony is heard and evidence taken.

ORDER FOR FILING OF IMPEACH-
MENT COMMITTEE REPORT

Mr. WYDEN. Mr. President, I ask unanimous consent that the Senate Impeachment Committee be permitted to file their report with respect to the impeachment of Judge Porteus, notwithstanding adjournment of the Senate, on Tuesday, November 16, between the hours of 12 noon to 2 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

**POST-TRIAL BRIEFS, CORRESPONDENCE AND
MEMORANDA SUBMITTED BY THE PARTIES**

**In The Senate of The United States
Sitting as a Court of Impeachment**

**In re:
Impeachment of G. Thomas Porteous, Jr.
United States District Judge for the
Eastern District of Louisiana**

JUDGE G. THOMAS PORTEOUS, JR.'S POST-TRIAL BRIEF

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October 29, 2010

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INTRODUCTION

Judge G. Thomas Porteous, Jr., has spent virtually his entire career as a public servant. He served over ten years as a state Assistant District Attorney (1973-1984), ten years as a state court judge (1984-1994), and since 1994 has served as United States District Court Judge for the Eastern District of Louisiana. He has committed no act that warrants removal from office. The House of Representatives, through the four Articles of Impeachment, alleges a wide variety of misconduct. Yet, in each instance, the accusations are either false, based on unintentional errors, or simply do not rise to the constitutional standard of "high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. Unquestionably, Judge Porteous has made serious errors in judgment, for which he has already been severely sanctioned by the Fifth Circuit. He has promised that he will not return to active service on the federal bench. Judge Porteous simply wants to retire in the coming months without the indignity that would accompany a resignation or conviction – neither of which are warranted.

This case represents a dramatic turning point in federal impeachment precedent, the impact of which will shape and determine future cases, whether they involve another district court judge, a supreme court justice, or perhaps even the President of the United States. The House seeks to expand vastly the type of behavior for which a federal official can be impeached and removed from office by the Congress, stretching the impeachment clause to encompass, for the first time, conduct that occurred *prior to* an individual taking his federal office. Further, the House – for the first time in the modern era – asks the Senate to remove a federal judge for conduct for which he was never charged criminally and the impropriety of which has never been tested in a court of law. Finally, in order to convict Judge Porteous, the Senate would have to elevate conduct constituting no more than an appearance of impropriety to the level of "Treason,

Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. This would represent a truly dangerous result, which could subject federal office holders in the Executive and Judicial Branches to imprecise, partisan-influenced allegations and removals from office.

Judge Porteous has shown that a number of the central allegations made in the House Committee Report to the members of the House are demonstrably untrue. Indeed, on many of the issues detailed below, the House failed to submit at the evidentiary hearing any evidence to substantiate the allegations made to the House prior to its vote concerning the Articles of Impeachment.

EXECUTIVE SUMMARY

The Senate is presented with two categories of issues before a final vote on the impeachment of Judge G. Thomas Porteous, Jr. First, the Senate Impeachment Trial Committee previously held in abeyance (without oral argument) the defense's motions to dismiss each of the four Articles of Impeachment. These motions raise threshold constitutional questions of critical importance not just to this case but also to future impeachments. Depending on how the issues raised in those motions are resolved, this impeachment could substantially alter the interpretations and more than two centuries of precedent of this body on such issues as the reliance on pre-federal conduct to remove a federal judge. The Senators should be allowed to hear the parties on those issues before closing arguments so that their votes are made in full understanding of the implications and issues of this case.

The second category of issues involves the factual and evidentiary questions raised by the specific Articles of Impeachment at the evidentiary hearing in this matter. Given the sheer number of allegations raised by the House (a majority of which are not expressly referenced in the actual Articles of Impeachment), this Brief is necessarily long and, in points, complex. These factual disputes have been the subject of a multi-year investigation by the Department of Justice, the Fifth Circuit Judicial Conference, the Task Force on Judicial Impeachment of the House Committee on the Judiciary, and the House of Representatives. Unlike every prior modern impeachment, they have not been the subject of any trial since Judge Porteous has never been charged with any crimes for any actions he took as a state or a federal judge.

The following is an Executive Summary of the issues and arguments presented in this matter, which are discussed more fully below.

Pre-Federal Conduct

Looming over these proceedings is the unprecedented reliance of the House on alleged misconduct occurring before Judge Porteous took the federal bench (referred to as “pre-federal conduct”). While Article I ostensibly alleges federal misconduct, the underlying basis for those charges all stems from events that purportedly occurred before Judge Porteous became a federal judge. Article II is almost entirely based on pre-federal conduct.

In the history of this Republic, the United States Senate has never before removed a federal official, through the impeachment process, for “pre-federal” conduct. In fact, as in the impeachment trial of Judge Robert Archbald, the Senate has specifically rejected Articles of Impeachment based on conduct that occurred prior to the accused entering the office from which he was to be removed. In the Archbald matter, several Senators openly stated that the timing of the alleged misconduct was the reason that they voted to acquit. As just one example, of which there are many detailed below, Senator Works (R-CA) stated that “the respondent can not be impeached for offenses committed before his appointment to the present office.”

This unbroken precedent reflect the clear intent of the Framers in crafting the impeachment standard. The House’s contrary reliance on pre-federal conduct is accentuated by the House’s application of evidence of such pre-federal conduct to facially inappropriate theories for removing a federal judge from office, such as the alleged denial of honest services and even the mere appearance of impropriety. The House’s strained effort, contrary to centuries of precedent, occurs despite Judge Porteous’s expressed desire to retire from the federal bench in a matter of months.

Article I

Article I was submitted to the House in March 2010. At the time, the House Managers knew that the Supreme Court was expected to reject the “honest services” theory stated in the Article I. Nevertheless, they chose to apply this vague, “catch-all” theory since there was a conspicuous absence of any criminal allegation or prior criminal charge. In June 2010, the House Managers lost that gamble when the Supreme Court rejected the “honest services” theory as a basis for charging a violation of the law. Tellingly, Article I is a glaring example of the vagueness problems articulated by the Supreme Court – an effort to convict an individual not on the basis of a defined violation but on general allegations of conducting one’s federal office in a less than honest manner, without being forced to allege or prove the exact law violation that is implicated. Here the House would use this rejected standard as a substitute for “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. The House compounds this danger by basing the claim of a denial of honest services on an alleged appearance of impropriety – an ethical charge that is equally inexact and uninformative, and which rarely results in a sanction.

Further, Article I is anchored to the concept that a federal judge may be removed from office because of his rulings as a judge, creating a potentially dangerously slippery slope that could threaten the independence of the entire federal judiciary. In Article I, the House alleges that, while a federal judge, Judge Porteous (1) improperly denied a motion to recuse himself from the *Lifemark Hospitals v. Liljeberg Enterprises* case and failed to disclose the full extent of his friendship (including the assignment of curatorships) and past financial dealings with his friends Jacob Amato and Bob Creely; (2) made intentionally misleading statements at the hearing on that same recusal motion, thereby depriving the parties and the public of his “honest

services;" (3) engaged in corrupt conduct after the *Lifemark* bench trial, but while the case was still pending, by soliciting and accepting things of value from Amato and Creely, including a \$2,000 gift; and (4) thereafter, ruled in favor of Amato's client.

The House specifically did not allege and did not prove that Judge Porteous solicited or accepted any bribe or entered into any *quid pro quo* arrangement. Moreover, the House specifically claims and describes, as the basis for Judge Porteous's refusal to recuse himself from the *Lifemark* case, alleged misconduct that occurred while Judge Porteous was on the state bench. As previously discussed, such pre-federal conduct cannot serve as the basis for a conviction in the Senate.

Finally, in its allegations, the House ignores entirely the most shocking and corrupt aspect of the *Lifemark* case. A lawyer named Don Gardner was hired by attorney Joe Mole to serve as co-counsel for the defendant solely because he was a close friend of Judge Porteous. Mole provided Gardner with a retainer agreement that paid him \$100,000 upfront and guaranteed him an additional \$100,000 bounty if Judge Porteous recused himself from the case. The House cannot explain why – if Judge Porteous was as corrupt as they allege – he refused to withdraw from the case when doing so would have earned his close friend a small fortune.

With regards to the other specific allegations asserted in Article I:

Ruling in Favor of Amato's Client – The House has charged that Judge Porteous's refusal to recuse himself, as well as his decision ultimately to rule in favor of the plaintiffs in the *Lifemark* case, are stand-alone bases for impeachment. Although the House seeks to infer some form of impropriety in these decisions, none is specifically alleged by the House and none has been proven. If Judge Porteous is convicted by the Senate on the basis of this Article, it would

set a truly dangerous precedent, whereby a federal judge could be removed on the basis of disagreements with his or her judicial opinions.

Judge Porteous's Statements at the Recusal Hearing in the Lifemark Case – During a hearing on a motion to recuse himself, filed by the defendants in the *Lifemark* case, Judge Porteous specifically confirmed, and certainly did not minimize, that he was close personal friends with lawyers for the plaintiffs, Jake Amato, as well as co-counsel Lenny Levenson. Neither Judge Porteous nor anyone else at the hearing ever referenced Amato's law partner, Bob Creely, because Creely had no involvement in the case. In hindsight, it is regrettable that Judge Porteous did not disclose at that hearing that, as a state court judge years earlier, he had received on occasion gifts from Creely and had assigned a number of small matters known as curatorships to Creely under perfectly appropriate procedures. This is understandable, however, because, contrary to the contention of the House, neither Creely nor Judge Porteous understood their relationship while Judge Porteous sat on the state bench to be inappropriate or corrupt.

Wedding Gift – Judge Porteous does not dispute that in 1999, around the time of his son's wedding and while Judge Porteous was experiencing financial difficulties, he asked his long-time close friend, Jake Amato, for financial assistance. Amato, sensing the emotional strain that his close friend was facing, gave approximately \$2,000 to Judge Porteous. By any measure, it was a mistake for Judge Porteous to have requested and accepted this gift, since as he concedes, it created a considerable appearance of impropriety, as the *Lifemark* case was still pending before him. Amato has testified unequivocally, however, that he did not give the money to Judge Porteous as a bribe, that it was not a kickback, and that he did not expect any *quid pro quo* or favorable treatment from Judge Porteous. According to Amato, it was simply a case of one friend helping another. There is no evidence that the gift influenced Judge Porteous's ruling in

the *Lifemark* case. Nonetheless, Judge Porteous concedes his poor judgment and has accepted a severe sanction from the Fifth Circuit Judicial Conference for this mistake. In the end, the receipt of this gift represents a lapse in judgment, as it created an appearance of impropriety, but it does not rise to the level of an impeachable offense. If Judge Porteous is convicted on this Article, it would create dangerous precedent for future federal judges and federal officials.

Curatorships – Creely testified unequivocally that there was no agreement, no link, and no connection between curatorships to which he was assigned by Judge Porteous and any gifts that he gave to Judge Porteous. Instead, the House bases its claims regarding the supposed corrupt nature of the curatorships on the second-hand testimony of Creely's partner, Amato, even though Amato admitted that that he and Judge Porteous never discussed any such relationship. Although the House focuses forcefully on the alleged impropriety of Creely's relationship with Judge Porteous, it involves exclusively pre-federal conduct which is not a proper basis for removal from a federal office.

Lunches and Other Small Things of Value – The House also alleges that because Creely and Amato occasionally paid for Judge Porteous's lunch or provided him with other gifts, a corrupt relationship had existed for decades. It is now indisputable, however, that no Louisiana law or ethics rule prohibited Judge Porteous's receipt of such gifts, and there was nothing unusual, improper, or corrupt about such events. In fact, such things happened commonly in the legal community of Gretna, Louisiana, where Amato and Creely practiced law and where Judge Porteous sat on the state bench for ten years before becoming a federal judge. Amato and Creely both testified that they never bought lunch for Judge Porteous or ever gave him anything of value for an improper purpose – instead, such things evidence only the close personal relationship that these men had over the course of several decades.

Article II

As with Article I, the allegations in Article II are based almost entirely on conduct which is alleged to have occurred prior to Judge Porteous becoming a federal judge. If, however, the Senate declines to adhere to long-standing precedent and chooses to consider the pre-federal conduct as a basis for removing Judge Porteous from office, it then will find that the allegations in Article II have not been proven by the House or, when placed into context and understood, do not constitute grounds upon which Judge Porteous should be removed from office.

The House impeached Judge Porteous in Article II on the basis of three types of allegedly improper conduct: (1) that he took official actions in exchange for things of value from local bail bondsmen Louis and Lori Marcotte (brother and sister); (2) that he used the power and prestige of his office to assist the Marcottes in forming relationships with other judges; and (3) that he knew that Louis Marcotte made false statements to the FBI to help Judge Porteous during the confirmation process.¹ Notably, the House has conceded that Judge Porteous never sought or received cash from the Marcottes, although during the Committee proceedings, the Marcottes admitted they had given cash, in unmarked envelopes, to approximately three dozen state court judges, several of whom are still serving on the bench.

Specifically, the House argues that Judge Porteous, while a state judge, set bonds at level that would maximize the Marcottes' profit margin. To the contrary, however, both of the Marcottes admitted that they have never had a conversation where they discussed with or demanded that Judge Porteous take official actions on their behalf. The House concedes that it cannot point to any specific judicial action regarding any bond set by Judge Porteous that was

¹ This allegation is identical – word for word – to an allegation asserted by the House in Article IV. Judge Porteous's response to this allegation is located in the overall response to Article IV.

improper or taken for the purpose of benefiting the Marcottes. In fact, the one specific fact the House had previously relied upon – a claim that Judge Porteous signed an abnormal amount of bonds for the Marcottes during his last month on the state bench – has been shown to be without basis. Further, at the hearings before the Senate Impeachment Trial Committee, witnesses testified that it was Judge Porteous's standard operating procedure to double check any information he received from the Marcottes (and other bail bondsmen), that Judge Porteous turned down bonds requested by the Marcottes, and that he never raised the amount of a bond for the Marcottes – all contrary to the allegation that Judge Porteous acted for the purpose of maximizing the Marcottes' profit.

In order to support the allegations in Article II, the House relies on vague and broad generalizations that gloss over the absence of specific proof of the allegations in Article II. When these issues are placed into context, however, the working relationship between Judge Porteous and the Marcottes becomes less sinister. Of particular significance in this regard are the following facts: Judge Porteous's background in criminal matters; his national advocacy of the efficacy of commercial bonds; the Marcottes' near-monopoly (90-95%) over the local bond market; and the severe problems the Gretna, Louisiana community faced in terms of rising crime and jail overcrowding – including a strict court order that mandated the release of prisoner when the jail reached a certain level.

The House references two specific actions by Judge Porteous while a state judge pertaining to the expungement and setting aside of the criminal records of two individuals (Jeffrey Duhon and Aubrey Wallace), tangentially associated with the Marcottes. The House argues these actions were taken for the purpose of benefitting the Marcottes. The House failed to prove its allegations or that there was anything improper in the judicial actions taken by Judge

Porteous in connection with these matters. The House does not even allege that the 1993 Duhon expungement was improper, instead merely stating that it was “noteworthy.” At the impeachment trial, the House adduced no evidence on that point, and could point to no law, rule, or custom that was violated.

As to the Wallace set aside, only one witness with experience in these matters testified at the impeachment trial and he told the Committee that Judge Porteous’s order merely corrected a previous judicial mistake and was a legal, proper, and correct judicial action. This conclusion is supported by the fact that the assistant district attorney, who had been present for and aware of Judge Porteous’s actions, did not object at the time. The House has claimed a nefarious purpose behind the fact that Judge Porteous’s action regarding the Wallace set aside took place shortly after he was confirmed to the federal bench but prior to his having taken his commission. Contrary to the House’s allegation, however, Judge Porteous never hid his actions. Instead, he stated in open court, *prior* to his confirmation for the federal judgeship, that he would take that action, just as soon as Wallace’s attorney requested he do so. Finally, contrary to the implications of the House’s allegation in Article II, Judge Porteous never expunged Wallace’s record, leaving Wallace without the ability to work as a bail bondsmen for the Marcottes – which the House claims was the benefit Judge Porteous improperly provided to the Marcottes.

With no proof of any inappropriate judicial action Judge Porteous took for the Marcottes, his alleged receipt of small things of value (meals, etc.) loses its import. As an initial matter, there was no ethical rule or law in place at the time in Louisiana that barred Judge Porteous from receiving such items. Moreover, a close analysis reveals that many of the House’s claims are unsupported by the evidence. Judge Porteous concedes that he occasionally dined with the Marcottes but the House vastly overstated the frequency and costs associated with these meals.

The House's specific allegations are suspect since there is no documentary evidence of any meal Judge Porteous allegedly had with the Marcottes while he was on the state bench. Similarly, there is no documentary evidence of any alleged car repair, home repair, or trip to Las Vegas paid for by the Marcottes, as claimed by the House. In fact, it appears that the one trip which Judge Porteous did take to Las Vegas with the Marcottes was paid for by the national bail bonds association when he was a speaker at their convention.

Realizing the constitutional infirmity of relying solely on pre-federal conduct, the House also claims that while Judge Porteous was a federal judge, his relationship with the Marcottes continued to the extent that he allegedly attended six lunches with them over the course of ten years and had a single conversation regarding the Marcottes with another judge at a cocktail party. Notably, the House concedes that, while a federal judge, Judge Porteous did not confer any judicial benefit on the Marcottes, despite the Marcottes' admission that they requested his assistance on a number of issues while Judge Porteous sat on the federal bench.

At core, all the House alleges is that Judge Porteous attended these lunches, where other individuals important to the Marcottes' business were allegedly also in attendance, bringing "strength to the table" and giving credibility to the Marcottes because they could claim association with a federal judge. Nothing that occurred, even if the House's evidence is deemed credible, was improper and could hardly be considered a grounds for removing a federal judge from office. The House did nothing to substantiate its claims, calling no witnesses who attended any of these lunches to corroborate the Marcottes' testimony and producing no evidence showing that Judge Porteous ever tried to pressure any other judges to work with the Marcottes. In fact, the House conceded that "there is no evidence that Judge Porteous specifically communicated to

[these individuals] that he sought or intended for the Marcottes to form corrupt relationships” with these same individuals.

As to the single cocktail reception which is a basis of the House’s allegations, the House argues that Judge Porteous, in a conversation with then-state Judge Ronald Bodenheimer, vouched for the Marcottes’ honesty regarding information pertaining to bonds. Judge Bodenheimer stated that, in his subsequent experience with the Marcottes, he found Judge Porteous’s statement to be accurate and testified that he did not feel any pressure to work with the Marcottes because of his conversation with Judge Porteous. In fact, he testified he did not change his behavior regarding the Marcottes because of Judge Porteous’s comments. Instead, like all judges who dealt with bond issues, he worked with the Marcottes out of necessity, given their dominance over such issues in the Gretna courthouse. There is simply no evidence that Judge Porteous abused his federal office for the benefit of the Marcottes.

Article II should be rejected by the Senate as the basis for a conviction. The Article is fatally flawed by its reliance on pre-federal conduct. Similarly, the majority of the allegations contained in Article II are unsupported by the evidence with the remainder, when placed into context, amounting to proper and understandable behavior.

Article III

Article III alleges that Judge Porteous should be removed from office because of mistakes, errors, and omissions that he and his late wife made in connection with the Chapter 13 bankruptcy case that they filed in 2001. Article III deals exclusively with Judge Porteous’s conduct as a private citizen and makes no allegations regarding his exercise of judicial authority. The Senate should acquit Judge Porteous of all charges in Article III for three reasons.

First, there is no evidence – none – that any of errors and omissions in Judge Porteous’s bankruptcy were the result of deceit or any intent to defraud. To the contrary, the evidence, including extensive expert testimony, establishes that Judge Porteous made honest mistakes, which, while unfortunate, are exceedingly common in all bankruptcy cases. Such errors are the result of the complexity of the bankruptcy laws, forms, and procedures, the immense financial stress that debtors seeking bankruptcy protection are under, and the poor record-keeping and financial discipline that leads debtors to the financial brink in the first place. A number of the errors relied upon by the House resulted entirely from the advice that Judge Porteous and his wife received from their bankruptcy attorney.

The complete absence of any fraudulent or ill intent in this case is further established by the fact that, following an exhaustive, multi-year investigation, the Department of Justice specifically declined to press bankruptcy fraud or any other charges against Judge Porteous in connection with his bankruptcy case. In reaching this conclusion, the Justice Department specifically cited its “concerns about the materiality” of Judge Porteous’s alleged errors and omissions, “the special difficulties of proving *mens rea* and intent to deceive beyond a reasonable doubt in a case of this nature,” and “the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters.”

Second, all of the errors and omissions alleged by the House were either corrected so quickly that no party in interest (not the court, the trustee, or any creditor) was injured or were so minor that they did not have any material effect on the course of the Porteouses’ bankruptcy case. Many of the specific allegations of bankruptcy misconduct by Judge Porteous and his wife were shown to be of little or no consequence, and none of them warrants impeachment or removal.

For example, the House pays particular attention to the fact that Judge Porteous and his wife filed their original bankruptcy petition under a pseudonym. The uncontradicted evidence at trial established that they did so at the suggestion of, and in reliance upon advice provided by, their bankruptcy attorney, Claude Lightfoot. The evidence further established that the sole reason for using a pseudonym was to avoid embarrassment and publicity, not to defraud the court, the trustee, or any creditor. Indeed, Judge Porteous and his wife always intended to, and in fact did, file a corrected bankruptcy petition. The Porteouses filed that corrected petition a mere twelve days after the initial filing, and the very next day after the pseudonym was published in the newspaper. Additionally, the House alleges that Judge Porteous's and his wife's tax refund and certain other small assets were not included in their bankruptcy papers. These omissions, however, resulted from mistakes or from miscommunication with their bankruptcy counsel, Mr. Lightfoot, as did the underreporting of Judge Porteous's income. There is no evidence of willful concealment. In any case, these items were not sufficiently large to have changed the course of Judge Porteous's bankruptcy in any material way.

The House also claims that Judge Porteous improperly incurred new debt, primarily by executing gambling markers at casinos. As discussed more fully below, the House alleges that Judge Porteous and his wife violated a "prohibition" against incurring new debt imposed by the bankruptcy court. The House's argument is negated, however, by the express terms of the court's order, which specifically detailed the consequences for not complying with that instruction (namely, that the new debt would not be discharged through the bankruptcy, but would have to be paid in full by the debtor using other funds). Moreover, the House's assertion that Judge Porteous violated the court's instruction when he executed markers at casinos is predicated entirely on the assumption that markers constitute debt – a proposition that is directly

contrary to Louisiana law. Even if Judge Porteous had violated the instruction, however, the appropriate consequence should have been determined and administered exclusively by the bankruptcy court.

Third, all of the Article III allegations relate to purely private conduct by Judge Porteous and his wife, which has no relationship whatsoever to his official actions or official authority as a judge. Throughout our Nation's history, the Senate has convicted and removed federal judges only where the House has proven that the judge abused the official power entrusted to him as a federal judge. Specifically, all of the judges that the Senate has removed from office committed one or more of the following abuses of their official power: gross misconduct (including drunkenness) on the bench, treason and incitement to revolt, bribery in connection judicial conduct, kickbacks in connection with judicial conduct, or perjury attempting to cover up bribery or kickbacks connected to judicial conduct. None of these grave abuses of official authority bears any resemblance to the allegations asserted against Judge Porteous in Article III. The Senate should reject Article III as an inappropriate and dangerous attempt to expand the scope of impeachable offenses to include conduct that has no relationship to a judge's official actions.

Article IV

Article IV is the House's transparent effort to restate pre-federal conduct allegations as a last-ditch effort to convict Judge Porteous. The Article alleges Judge Porteous failed to disclose to the FBI and the Senate, during their investigation related to his nomination, his supposed corrupt relationship with Amato, Creely, and the Marcottes. As such, Article IV not only depends on the Senate finding that the House has proved the substantive allegations contained in Articles I and II, but also requires the Senate to determine that Judge Porteous should have

disclosed these events even if he did not believe they were inappropriate or could cause him embarrassment.

Specifically, Article IV alleges that Judge Porteous should have disclosed those allegedly corrupt relationships in response to general questions asking him whether he could identify any matters that:

- (1) “could cause an embarrassment” to him or President Clinton if publicly known;
- (2) could be used to “influence, pressure, coerce,” “blackmail,” or “compromise” him;
- (3) would “impact negatively on his character, reputation, judgment, or discretion;” or
- (4) would unfavorably “affect his nomination” as a federal judge.

The House alleges that, as a result of this failure to disclose, Judge Porteous “deprived the United States Senate and the public of information that would have had a material impact on his confirmation.”

Article IV assumes that the underlying relationships were corrupt and that Judge Porteous, in 1994, believed them to be so. The facts adduced during the Committee proceedings definitively showed that Judge Porteous did not so conclude. He never sought to conceal his relationships with Amato, Creely, and the Marcottes, and that his actions on the state bench never violated state law or applicable ethics rules. In short, Judge Porteous simply did not believe that he had anything to be embarrassed about or knew of any facts that could have been used to improperly influence his behavior. Similarly, Amato, Creely, and the Marcottes testified that they did not believe they could have improperly influenced Judge Porteous with information in their possession. Moreover, the House did not present any evidence showing Judge Porteous’s state of mind regarding the falsity of his responses or willfulness in omitting information the House claims should have been disclosed.

The House ignores the vague nature of the questions at issue – these are the types of charges which federal courts have labeled “fundamentally ambiguous” and not the proper subject for prosecution. During the Committee proceedings, an FBI veteran and a federal appointments expert both testified that, over the course of their long-careers, they had never observed a nominee respond affirmatively to the types of questions that are the subject of Article IV. Yet, it is clear that on numerous occasions, embarrassing information has been revealed about a nominee (either by third-parties or the nominee) after his or her nomination or confirmation. Nonetheless, no individual has ever been removed from office, through the impeachment process, for failing to disclose facts during the confirmation process. As a result, a conviction on the basis of Article IV would dramatically lower the constitutional standard of impeachment to include discrepancies between the subjective views of others and the views of the individuals responding to such questions regarding whether the undisclosed information, in hindsight, was “embarrassing” or should otherwise have been disclosed.

Finally, as was shown during the Committee proceedings, the FBI and the Senate were made aware of several of the allegations contained in Articles I and II during their background investigation of Judge Porteous, negating the claim that the Senate was deprived of information prior to its vote to confirm Judge Porteous.

Article IV also reiterates the allegation from Article II, that “Judge Porteous well knew and understood” that Louis Marcotte “made false statements to the FBI in an effort to assist Judge Porteous in being appointed to the federal bench.” The House argues that Marcotte lied about his knowledge of Judge Porteous’s (1) drinking habits, (2) financial condition, and (3) that Marcotte knew Judge Porteous could be coerced because Marcotte was aware of his own relationship with the Judge. These allegations by the House are spurious. The House quibbles

over whether Judge Porteous drank two vs. four drinks at lunch, alleges that Marcotte had full knowledge of Judge Porteous's financial condition because of his observation of the cleanliness of the Judge's cars, and re-asserts that Marcotte could have coerced Judge Porteous, despite Marcotte's instance that he could not have. Apart from the fact that testimony showed that Judge Porteous was never told specifically about Marcotte's answers to the FBI's inquiry, the alleged bases for the House's argument are trivial and rely on assumptions and inferences. They do not establish that Judge Porteous intentionally meant to mislead or misinform the FBI or the Senate. Conviction on this basis would allow permit removals of a wide array of judges – converting life tenure into tenure at the will or whim of Congress.

BACKGROUND – JUDGE G. THOMAS PORTEOUS, JR.

Gabriel Thomas Porteous, Jr. was born on December 15, 1946. (PF 1.)² Judge Porteous graduated from Cor Jesu, now Brother Martin, High School. (Stipulation 4.) He attended and graduated from Louisiana State University in 1968 and Louisiana State University Law School in May 1971. (HF 1.) Judge Porteous married his late wife, Carmella, on June 28, 1969. (Stipulation 2.) Together, they had four children: Michael, Timothy, Thomas and Catherine. (PF 2.)

From January 1973 until July 1974, Judge Porteous was a partner at the law firm of Edwards, Porteous & Amato. (HF 3.) Jacob Amato and Robert Creely both worked at the firm and became close friends of Judge Porteous. (HF 3, 4; Stipulation 40.)

From approximately October 1973 through August 1984, Porteous (as well as Amato) also served as an Assistant District Attorneys in Jefferson Parish, Louisiana. (HF 2.) At that time in Louisiana, individuals were permitted to hold outside employment while working as an Assistant District Attorney. (HF 2.) In 1984, Judge Porteous ran for and was elected state judge in the 24th Judicial District Court (“JDC”) in Jefferson Parish, Louisiana. He took the bench on

² This brief utilizes the following citation system:

Judge Porteous’s proposed findings of fact are cited as “PF [no.]” The House’s proposed findings of fact are cited as “HF [no.]”

Testimony from the Senate Impeachment Trial Committee’s (the “Committee”) evidentiary hearings held on September 13 (Vol. I), 14 (Vol. II), 15 (Vol. III), 16 (Vol. IV), and 21 (Vol. V), 2010, is cited as “Senate Vol. [no.] at [page no.] (witness).”

Exhibits offered by Judge Porteous and accepted into the Senate record are cited as “Porteous Ex. [no.]”

Exhibits offered by the House Managers and accepted into the Senate record are cited as “House Ex. [no.]”

Stipulations of fact agreed to between Judge Porteous and the House (and filed with the Committee on September 8, 2010) are cited as “Stipulation [no.]”

August 24, 1984, and remained in that position until October 28, 1994. (HF 5.) In 1990, Judge Porteous was re-elected without opposition. (Stipulation 7.)

On August 25, 1994, Judge Porteous was nominated by President Clinton to be a United States District Court Judge for the Eastern District of Louisiana. (HF 6.) Judge Porteous's confirmation hearing before the Senate Judiciary Committee was held on October 6, 1994. (HF 7.) Judge Porteous was confirmed as a United States District Court Judge by the United States Senate on October 7, 1994. (HF 8.) Judge Porteous received his judicial commission on October 11, 1994, and was sworn in as a United States District Court Judge for the Eastern District of Louisiana on October 28, 1994. (HF 9-10.)

In the mid to late 1990s, the New Orleans Division of the Federal Bureau of Investigation ("FBI") conducted an investigation into allegations of judicial corruption in the 24th JDC (Stipulation 20.) That investigation, known as "Wrinkled Robe," resulted in the convictions of fourteen defendants, including two 24th JDC judges, the owners of a bail bonding business, and other state court litigants and officials. (Stipulation 20.) As part of this investigation, the FBI investigated Judge Porteous, even opening up a separate and independent investigation in conjunction with the Justice Department's Public Integrity Section. (Stipulation 20.)

Judge Porteous cooperated with that investigation, and signed a series of tolling agreements with the Justice Department that waived his right to assert a statute of limitations defense in connection with various possible federal criminal charges. (PF 12.) Nevertheless, after several years of investigation, the Justice Department "determined that it [would] not seek criminal charges against Judge Porteous." (PF 13; House Ex. 4 (DOJ Declination Letter, at 1).)

In declining to prosecute Judge Porteous, the Justice Department specifically noted that:

In reaching its decision not to bring other available charges that are not time barred, the Department weighed the government's heavy

burden of proof in a criminal trial and the obligation to carry that burden to a unanimous jury; concerns about the materiality of some of the Judge Porteous's false statements; the special difficulties of proving *mens rea* and intent to deceive beyond a reasonable doubt in a case of this nature, and the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters.

(Stipulation 22, House Ex. 4 (DOJ Declination Letter, at 1; emphasis added).) The Justice Department, however, did submit a formal complaint of misconduct concerning Judge Porteous to Fifth Circuit Chief Judge Jones. (PF 14.) Chief Judge Jones thereafter filed a "Complaint of Judicial Misconduct" against Judge Porteous and convened a Special Investigatory Committee to investigate. (PF 15.)

In the midst of these events, Judge Porteous's wife, Carmella, passed away suddenly and unexpectedly on December 22, 2005. (PF 4.) Four months before the loss of his wife, Judge Porteous lost his house to Hurricane Katrina, forcing him to be separated from his family for a significant period of time. (PF 5, House Ex. 6(c).) Following the destruction of his house and the death of his wife, Judge Porteous became extremely depressed and isolated. (PF 6.) Judge Porteous sought medical treatment in early 2006 for his depression. (PF 8.) Some months thereafter, Judge Porteous confided in his children that he had quit drinking alcohol and had previously stopped gambling. (PF 7.) Despite his treatment, Judge Porteous felt unable to perform the duties of his judicial office due to his health issues, and in May 2006 – just six months after the passing of his wife and ten months after his home was destroyed by Hurricane Katrina – filed a petition for a certificate of disability from Chief Judge Jones. (PF 9.) Chief Judge Jones refused to grant Judge Porteous a certificate of disability. (PF 10.)

The Fifth Circuit Special Investigatory Committee held its hearing on October 29 and 30, 2007, after Judge Porteous's request for a continuance while he obtained the services of new

counsel was denied. Therefore, he was forced to represent himself at the hearing without the assistance of counsel.³ (PF 19.) At the Fifth Circuit Special Investigatory Committee hearings, Judge Porteous was presented for the first time with an immunity order – which had been signed by Chief Judge Jones nearly four weeks earlier on October 5, 2007, but not made available to Judge Porteous until the first hearing day on October 29, 2007 – that compelled his testimony. (PF 20.) Since he had not had any opportunity to review the immunity order, Judge Porteous requested a continuance, which Chief Judge Jones denied, stating: “immunity is better than non immunity, sir. Continuance denied. You may take the stand.” (PF 21.) Following the Fifth Circuit Special Investigatory Committee hearings, the Fifth Circuit Judicial Council issued a report adverse to Judge Porteous, including a recommendation that the matter be referred to the Judicial Conference for possible referral to the House of Representatives. (PF 22.)

Fifth Circuit Judge Dennis and three other federal judges disagreed with the Fifth Circuit Judicial Council’s majority report regarding the recommendation of possible impeachment, filing a 49-page concurring and dissenting opinion. In that opinion, the four dissenting judges specifically disagreed “with the council majority’s conclusion that the evidence demonstrates a possible ground for [Judge Porteous’s] impeachment and removal from office.” (PF 23; House Ex. 6(b) (Fifth Circuit Judicial Council Dissent, at 1).) Judge Dennis and his colleagues stressed that “the Congress lacks jurisdiction to impeach, and the judicial council lacks authority to certify for possible impeachment, Judge Porteous for any misconduct prior to his appointment as

³ Judge Porteous was initially represented in the Fifth Circuit proceedings by attorney Kyle Schonekas, until Mr. Schonekas withdrew from that representation on or before July 5, 2007. (PF 16.) Following Mr. Schonekas’s withdrawal, beginning on or before August 2, 2007, attorney Michael H. Ellis represented Judge Porteous in the Fifth Circuit Special Investigatory Committee proceedings. (PF 17.) Just two weeks prior to the start of the Fifth Circuit Special Investigatory Committee hearings, however, Mr. Ellis withdrew from his representation of Judge Porteous. (PF 18.)

a federal judge.” (House Ex. 6(b) (Fifth Circuit Judicial Council Dissent, at 24).) The dissent further stated that:

The evidence here does not support a finding that Judge Porteous possibly abused or violated the federal constitutional judicial power entrusted to him. Instead, the evidence shows that in one case he allowed the appearances of serious improprieties but that he did not commit an actual abuse or violation of the constitutional power entrusted to him.

(*Id.* at 3.)

On September 10, 2008, the Judicial Council of the Fifth Circuit issued an “Order and Public Reprimand” against Judge Porteous, ordering that no new cases be assigned to Judge Porteous and suspending his authority to employ staff for two years. (Stipulation 38.)

On September 17, 2008, the House of Representatives of the 110th Congress passed H.R. Res. 1448, which provided in pertinent part: “Resolved, That the Committee on the Judiciary shall inquire whether the House should impeach G. Thomas Porteous, a judge of the United States District Court for the Eastern District of Louisiana.” On January 13, 2009, the House of Representatives passed H.R. Res. 15, continuing the authority of H.R. Res. 1448 for the 111th Congress. (Stipulation 40.) The House Judiciary Committee formed a Task Force on Judicial Impeachment and held five days of hearings regarding the allegations against Judge Porteous in November and December of 2009, as well as in January of 2010. During these hearings, the House was not presented with several highly material and compelling facts, which will be detailed throughout this brief. On March 11, 2010, the House of Representatives impeached Judge Porteous, sending this matter to the Senate for its consideration.

CONSTITUTIONAL STANDARD

The Constitution defines the impeachment framework in a series of exacting provisions.

Those provisions are:

Art. I, Sec. 2, cl. 5:	The House of Representatives ... shall have the sole Power of Impeachment.
Art. I, Sec. 3, cl. 6:	The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.
Art. I, Sec. 3, cl. 7:	Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.
Art. II, Sec. 2, cl. 1:	The President ... shall have Power to grant Reprieves and Pardons for offences against the United States, except in Cases of Impeachment.
Art. II, Sec. 4:	The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.
Art. III, Sec. 2, cl. 3:	The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;

BURDEN OF PROOF

The House, in its role as prosecutor before the Senate, bears the burden of presenting sufficient evidence to prove that the specific conduct alleged in the Articles of Impeachment actually occurred. This threshold obligation is especially important in this case where, unlike every other modern impeachment, there was no prior indictment, let alone a trial, and thus no prior adjudicated record. In addition, the House has the burden of establishing that the conduct of the accused, as actually proven by evidence, meets the Constitutional standard of “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. No lesser misconduct may result in removal. Since the House cannot and has not carried this heavy burden, the Senate is required under the Constitution to reject the Articles of Impeachment and acquit Judge Porteous.

Judge Porteous established at the evidentiary hearings that a number of the House’s allegations are either simply untrue or unproven. Judge Porteous further demonstrated that much of the conduct relied upon by the House in seeking his removal from office is neither criminal nor in any way improper, and therefore cannot constitute impeachable offenses. Each of these showings fatally undermines the House’s case and exposes its failure to carry its extensive and exclusive burden of proof.

STANDARD OF PROOF

Neither the Constitution nor the Senate's Rules mandate a particular standard by which Senators must judge the evidence presented during an impeachment trial. Instead, the decision has been left, as it is often phrased, to "the conscience of each Senator." *See* CRS Rpt. 98-990, at 5-6, *Standard of Proof in Senate Impeachment Proceedings* (internal quotations omitted). Nevertheless, given that the impeachment process pits two co-equal branches of government directly against one another and threatens a federal constitutional officer with the most severe constitutional sanction that may be visited upon him, the Senate has consistently applied a high standard of proof – rejecting all but seven prior judicial impeachments.

Each Senator is obligated to "mind the line" in preserving a clear and high standard for removal so as not to undermine the independence of the federal judiciary. Senator Arlen Specter, Vice-Chair of the Senate Impeachment Trial Committee empanelled to hear evidence in the 1989 impeachment of Judge Alcee Hastings, summarized the issue this way:

[W]here you have a judge up for removal, the issue of judicial independence requires a very strict standard. This is not a question of whether we would confirm him if he were before us, today. It is not a question of whether we feel comfortable in going before him, but a question of whether we are going to oust him from office that comes into play. I do not have to lecture this group on the very critical issue of separation of powers. I think it has to be exercised with great restraint.

S. Doc. No. 101-18, at 715-716 (emphasis added). For these fundamental reasons, which are foundational to the finely tuned balance of power set up by the Constitution, Judge Porteous urges this Senate to adopt a very strict standard of proof.

Each impeachment trial is a rare historical event, wherein the Senate is called upon to create lasting precedent in a little used, but critically important area of constitutional law. Although the Senate has never done so in the past, the Senate should seize this rare opportunity

to improve the impeachment process by setting a uniform, and high, standard of proof for impeachment. The need for such a uniform standard has been recognized by many scholars of the impeachment process. In Judge Richard Posner's book on the Clinton impeachment, he wrote that the Senate's decision not to articulate a uniform burden of proof or evidence "underscored the failure of the impeachment proceeding to meet minimal standards of legal justice." Richard Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* 94 (Harvard Univ. Press 1999).

The standard for impeachment should not just be uniform, it should also be exacting. Scholars and senators alike agree that the standard of proof in an impeachment trial should be much higher than that of an ordinary civil trial. As one scholar has noted, establishing an elevated standard "will encourage each senator ... to review the provided evidence with enough care to reach an informed determination" and create a "uniform and consistent impeachment trial system." Jennifer L. Blum, *How Much Process is Due: The Senate Impeachment Trial Process After Nixon v. United States*, 44 Cath. U.L. Rev. 243, 272-73 (1994); *see also* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 719 (1988) (commenting that the "preponderance" standard "is insufficient in an impeachment action because of the seriousness of the event").

The need for an elevated standard is even more pressing in an impeachment, such as this one, involving articles of impeachment based on allegations of criminal-like conduct. During the Hastings impeachment trial, Senator Specter argued this very point to his colleagues, urging that "proof beyond a reasonable doubt was an appropriate standard" when impeachment was "based directly on charges which constituted violations of Federal criminal laws[.]" S. Doc. No. 101-18, at 744. "Certainly," he added, "a strong argument can be made that where impeachment

articles are based on charges that constitute violations of criminal law, the criminal law standard of proof ought to be applicable.” *Id.* Senator Specter felt that it was particularly important to adopt the reasonable doubt standard because Judge Hastings had already been acquitted by a jury in a criminal trial. *Id.* at 745. Here, where the Department of Justice specifically declined to bring federal criminal charges (in part, because the Justice Department explained that it could not be sure a jury would convict), the beyond-a-reasonable-doubt standard is even more necessary.

At an absolute minimum, Senators should review the evidence in this case under a standard of clear and convincing evidence. In a constitutional proceeding such as this, where one co-equal branch of the government exercises its narrow but powerful authority to act as a check on another co-equal branch, and where a federal judge stands accused of criminal violations that neither the Department of Justice nor the state of Louisiana have elected to prosecute, it is imperative that the Senate review the evidence both carefully and critically. The House must be required to prove its case, subject to a standard of proof that matches the gravity of these proceedings. If anything, it should be more – not less – difficult to impeach and remove a federal judge via impeachment than to indict and convict that same judge in a criminal proceeding.

ARGUMENT**I. There is No Constitutional Basis or Precedent for the Removal of a Federal Judge For Alleged Pre-Federal Conduct**

Articles I and II rely heavily on allegations of misconduct that occurred years before Judge Porteous took the federal bench. The House's dependence on "pre-federal" conduct in these Articles represents a new and dangerous effort to expand the type of conduct for which an individual might be removed from office. As recognized by the Congressional Research Service,

it does not appear that any President, Vice President, or other civil officer of the United States has been impeached by the House solely on the basis of conduct occurring before he began his tenure in the office held at the time of the impeachment investigation, although the House has, on occasion, investigated such allegations.

Elizabeth B. Bazan & Anna C. Henning, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, Congressional Research Service, April 26, 2010.⁴

The long established focus on conduct occurring during federal service for impeachment cases is based on the clear language and intent of the Framers. James Madison and others

⁴ Similarly, Professor Michael Gerhardt, an expert previously relied upon by the House, has stated that:

No doubt, anyone impeached on such a basis could argue that Congress' consistent failure ever to bring an impeachment on this ground clearly indicates that Congress has never considered misconduct prior to entering federal office to constitute an impeachable offense. One could further argue that this failure, combined with the consistent congressional practice of bringing impeachments only against officials for their wrongful acts in office, establishes the principle that federal impeachments are limited to wrongful conduct of impeachable officials committed while they were in office.

GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS*, at 108. The defense has not referenced or discussed the testimony, before the House, of Professors Michael Gerhardt and Akhil Reed Amar regarding the standard of impeachment because that testimony was specifically excluded by the Committee from the evidence admitted to the record.

tailored the standard of impeachment to refer to conduct of the accused in the relevant federal office. Indeed, in prior cases, the Senate has specifically examined this issue and has declined to convict based on articles of impeachment referring to conduct that was alleged to have occurred before the accused assumed the office that is the subject of the impeachment.

Despite this long-standing precedent, the House Managers crafted the Articles that focus largely on conduct alleged to have occurred prior to Judge Porteous taking the federal bench. If the Constitution could be used to impeach judges for conduct occurring prior to taking the federal bench, then impeachment could be wielded as a dangerous weapon for partisan or other improper purposes by effectively re-litigating, on a random basis, a judge's qualifications to hold office.

A. The Pre-Federal Nature of Articles I and II

Article I alleges, in part, that Judge Porteous acted inappropriately in ruling on a motion for recusal while he was a federal judge. The House argues that, in making his ruling, Judge Porteous failed to disclose financial transactions between he and his friends Robert Creely and Jake Amato. The relevant text of Article I reads:

Judge Porteous failed to disclose that beginning in or about the late 1980s **while [Judge Porteous] was a State court judge in the 24th Judicial District Court in the State of Louisiana** he engaged in a corrupt scheme with attorney's Jacob Amato, Jr. and Robert Creely, whereby Judge Porteous appointed Amato's law partner as a curator in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm.

As is discussed herein, Judge Porteous vigorously disputes that there was any linkage between the assignment of curatorships and the gifts he received from Creely. Even if taken as true, however, all of these financial transactions are alleged to have occurred while he was on the state bench. As a result, the manner in which the House has crafted Article I attempts to force

the Senate to consider purely pre-federal alleged misconduct. In effect, the House has engaged in a end-run around the constitutional requirement that an individual not be removed for pre-federal conduct. It is highly unlikely, and perhaps unfathomable, that the House would seek to impeach a federal judge solely for his failure to disclose a personal relationship with an attorney appearing before him. If that is truly the heart of the House's allegation in Article I, then so be it; the Senate can proceed to determine whether such an allegation is true, and, if it is, whether it amounts to a high crime and misdemeanor worthy of conviction. If, instead, the House is seeking to convict Judge Porteous for the allegations regarding his assignment of curatorships and receipt of money from Creely, then the House has converted this portion of Article I into a purely pre-federal matter, akin to Article II.

Article II openly claims that it is based on pre-federal conduct. The text of Article II explicitly states that this misconduct began "in or about the late 1980s **while [Judge Porteous] was a State court judge in the 24th Judicial District Court in the State of Louisiana.**" (Article II; emphasis added.) The Article specifically alleges that Judge Porteous "solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit..." (*Id.*) The House has conceded and the Marcottes have testified that Judge Porteous never received any car repair, home repair, or trip from the Marcottes while he was on the federal bench. (PF 425, 433, 453.)

Article II then alleges that "**while on the state bench**, [Judge Porteous engaged in] setting, reducing, and splitting bonds as requested by the Marcottes, and improperly setting aside or expunging felony convictions for two Marcotte employees." (Article II; emphasis added.) The Marcottes have both conceded that Judge Porteous never set a bond for the Marcottes or their company, Bail Bonds Unlimited, while he was a federal judge, leading to the necessary

conclusion that the Article II allegations regarding bonds relate solely to Judge Porteous's state court judgeship. (PF 304.) Similarly, the expungement and set aside, referenced in Article II, occurred in 1993 and 1994 respectively, prior to Judge Porteous taking a seat on the federal bench. (PF 523, 472.)

B. By Alleging Pre-Federal Conduct, Articles I and II Violate the Language and Intent of the Impeachment Clauses of the United States Constitution

The Framers struck a delicate balance in crafting the impeachment provisions to allow for the removal of a president or a judge. Some delegates to the Constitutional Convention opposed such a power, particularly with regard to the President. The concern was that the legislative branch could usurp the needed independence of the Executive and Judicial branches. To avoid mischievous and arbitrary action by the Congress, the Framers adopted a high standard for removal, making it difficult, both procedurally and substantively, to remove a federal judge. In this system, the House and Senate have manifestly different functions, with the House serving more as a grand jury and the Senate serving as the adjudicatory body. *See generally* Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999); *see also* MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 205 (Univ. of Chicago Press, 2d ed. 2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 99 (1999). In this capacity, as discussed below, the Senate has often rejected articles of impeachment that do not satisfy the constitutional standard or that contain insufficient facts upon which to base removal. In so doing, the Senate has historically strived to maintain certain bright-line rules of impeachment. One of those lines has been to confine impeachment of a federal judge to conduct while serving in the position for which the judge is being impeached, as opposed to "pre-federal" or "pre-office" conduct. This is

an obvious and necessary distinction since Article III of the Constitution guarantees judges life tenure “during good behaviour” in office. U.S. CONST. art. III, § 1. Likewise, under Section 4 of Article II of the Constitution, the standard for impeachment refers to acts directly violating the oath of office in the cases of treason or bribery – neither of which is alleged in this case. Similarly, the meaning of “other high Crimes and Misdemeanors” historically has been confined to misconduct which occurred during a judge’s tenure in office.

The record from the Federal Constitutional Convention reflects an intent by the Framers to confine impeachment to acts committed in office. Early language was tied directly to an officer’s performance in office, allowing impeachment only for “malpractice or neglect of duty” which became, in the Committee of Detail, “treason, bribery, or corruption.” RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 78 (Harvard Univ. Press 1973). Ultimately, “corruption” was dropped by the Committee of Eleven.⁵ *Id.* The additional Constitutional language, “high Crimes and Misdemeanors,” was added after George Mason suggested on the floor of the Convention that “maladministration” be added to allow impeachment beyond the narrow categories of treason and bribery. *Id.* Madison remarked that “so vague a term [as maladministration] will be the equivalent to a tenure during the pleasure of the Senate,” whereupon Mason substituted “high crimes and misdemeanors,” which was adopted without demur. *Id.* at 91. Justice James Wilson, who had been a leading Framers, referred to “malversation in office, or what are called high misdemeanors.” *Id.* at 78. Alexander Hamilton, in *Federalist* No. 65, observed that:

⁵ Although Article II alleges that a basis for impeaching Judge Porteous is a purported “longstanding pattern of corrupt conduct” – after witnesses specifically denied he had been bribed – the Framers expressly rejected the concept of “corruption” as a proper ground for impeachment.

{t]he subject [of the Senate's] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.⁶

The result was the current standard of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II § 4.

The record from the Constitutional Convention reveals an exclusive focus on conduct in office. While it is accepted that the standard is not just limited to the abuse of judicial functions, it is limited to conduct during office.⁷ If the House's theory of impeachment is allowed, judges would be faced with precisely the open-ended standard that Madison wanted to avoid, serving "tenure during the pleasure of the Senate" since, on an arbitrary fashion dictated by partisan interests, they could be removed for acts going back decades before they became federal judges.

In support of its position that pre-federal conduct can be the basis for impeachment, the House has urged the Senate to consider a hypothetical in which a federal official committed murder prior to his appointment to his federal position. (*See Senate Vol. I at 59-60.*) The House argues that it would be absurd to suggest the Senate could not remove that individual from office. In every other modern case of judicial impeachment (except this one involving Judge Porteous), the actual fact of whether a judge committed a murder would be the subject of a criminal indictment and trial in a court, where the government would bear the burden of proving its charges to a jury, and the defendant would have full due process rights to defend himself. If

⁶ Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 85-86 & n. 380 (1989).

⁷ Some have suggested a "judicial function" doctrine limiting impeachment to official acts. Jonathan Turley, *The Executive Function Theory, the Hamilton Affairs, and Other Constitutional Mythologies*, 77 N.C.L. REV. 1791, 1802 (1999); *see also* Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 268-77 (1998).

the defendant – hypothetically a federal judge – were convicted by a jury, it would not be unreasonable to impeach and remove from federal office the judge on the basis of that conviction alone. Surely, the House is not suggesting that the House would prosecute and the Senate would sit as the original and only jury in connection with allegations of a federal judge committing murder, with all the limitations on due process such a procedure would entail.

Yet, that hypothetical proposed by the House serves to highlight the obvious failings in this case. First and foremost, it serves to magnify the glaring difference in this case and every other modern impeachment case: the absence of *any* indictment or other charges of alleged crimes, let alone a prior criminal charge or trial. Second, the hypothetical illustrates the extreme basis for removal in this case where the House is seeking removal not for murder (a clearly illegal and definable act) and the proposed removal here for the “appearance of impropriety.” Third, the hypothetical assumes (quite reasonably) that the Senate, in confirming the judge in the first place, had no information about the murder. In this case, the general pre-federal allegations were known during the federal investigation of Judge Porteous and his confirmation process.

There would be little controversy about removing a judge from office who was convicted of murder during his term of office, and the precedential value of such an action would be limited. A much more serious precedent is established if a federal judge is removed from office without any allegation of or conviction for a crime. This is particularly true where, as here, the alleged pre-federal conduct was allowed under state judicial rules. It is extremely unlikely that we will ever see a case of a murderous judge who seeks to remain in office after conviction. It is extremely likely that, if the Senate agrees here to the House’s efforts to lower standard for impeachment standard, future Congresses will apply such loose standards as “appearance of impropriety” and false statements of third parties to remove judges on a partisan whim.

C. The Senate Has Convicted Judges Only For Misconduct Committed During Federal Service

Experts who have studied impeachment have previously stressed that “no one has ever been impeached, much less removed from office, for something he or she did prior to assuming an impeachable position in the federal government.” GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS*, at 108. Throughout the history of the United States, only fifteen federal judges have been impeached by the House of Representatives.⁸ Of these fifteen, only seven have been convicted and removed from office by the Senate. An analysis of their cases shows that the Senate has removed from office only those judges who explicitly abused the official federal constitutional powers bestowed upon them while in the office for which they were being impeached:

1. Judge John Pickering was impeached in 1803 and convicted by the Senate in 1804 for allegedly rendering judgment on the merits of a case while refusing to hear relevant testimony offered by the attorney general, disregarding and attempting to evade federal law, and refusing to permit an appeal; further, he appeared on the bench while intoxicated. *See generally* 13 Annals of Cong. 319-368 (1852).
2. Judge West H. Humphreys was impeached and convicted by the Senate in 1862 for actions most akin to treason, incitement to revolt, and rebellion while sitting as a federal judge. Humphreys joined the Tennessee secession and served as a District Court Judge

⁸ The following judges have been impeached by the House of Representatives: (1) John Pickering, Judge, District of New Hampshire; (2) Samuel Chase, Associate Justice, Supreme Court of the United States; (3) James H. Peck, Judge, District of Missouri; (4) West Hughes Humphreys, Judge, Eastern, Middle, and Western Districts of Tennessee; (5) Mark W. Delahay, Judge, District of Kansas; (6) Charles Swayne, Judge, Northern District of Florida; (7) Robert W. Archbald, Associate Justice, United States Commerce Court and Judge, Third Circuit Court of Appeals; (8) George W. English, Judge, Eastern District of Illinois; (9) Harold Louderback, Judge, Northern District of California; (10) Halstead Ritter, Judge, Southern District of Florida; (11) Harry E. Claiborne, Judge, District of Nevada; (12) Alcee Hastings, Judge, Southern District of Florida; (13) Walter Nixon, Chief Judge, Southern District of Mississippi; (14) Samuel B. Kent, Judge, Southern District of Texas; and (15) Thomas Porteous, Judge, Eastern District of Louisiana. *See generally* EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT*, (Congressional Quarterly 1999).

in the Confederate States of America without retiring from the federal bench. *See generally* Cong. Globe, 37th Cong., 2d Sess. 1062-2953 (1862).

3. Judge Robert W. Archbald was impeached in 1912 and convicted by the Senate in 1913 for bribery and abuse of his position as a federal judge by inducing numerous litigants to allow him profitable financial deals, and hearing cases as a federal judge in which he had a financial interest. *See generally* 62 Cong. Rec. S1105-1678 (1913).
4. Judge Halsted L. Ritter was impeached and convicted by the Senate in 1936 for creating kickback schemes while a federal judge, continuing to work on a case as a lawyer while already a federal judge, evading federal income tax while a federal judge, bartering his federal judicial authority for a vote of confidence, and bringing his court into scandal and disrepute. *See generally* 74 Cong. Rec. S1-684 (1936).
5. Judge Harry Claiborne was impeached and convicted by the Senate for tax evasion in 1986. Prior to his impeachment, Claiborne had been convicted in court of criminal tax evasion for substantially under-reporting his income in 1979 and 1980 while he was a federal judge. The income he failed to report was the profit gained from bribes that Judge Claiborne had received. *See generally* 99 Cong. Rec. S2-31 (1986).
6. Judge Alcee L. Hastings was impeached in 1988 and convicted by the Senate in 1989 for conspiracy to solicit a bribe and perjury while a federal judge. *See generally* 101 Cong. Rec. S1-77 (1989).
7. Judge Walter L. Nixon was impeached and convicted by the Senate in 1989 for perjury while a federal judge. Prior to his impeachment, Nixon had been convicted in court on federal criminal charges of perjury and was serving a five-year sentence. Nixon's perjury conviction arose out of statements he made to a grand jury, which was investigating bribery charges alleging that Nixon accepted a gratuity in exchange for attempting to influence a state's drug prosecution against a business partner's son. *See* 101 Cong. Rec. S10,673 (1989).

Records of past impeachment proceedings also demonstrate that evidence relating to misconduct prior to assuming the current federal office for which the incumbent was impeached falls outside the proper scope of an impeachment inquiry. The closest analogous precedent, Robert W. Archbald's impeachment in 1912, shows a clear rejection by the Senate of claims that a judge can be impeached for pre-office conduct, especially if the former office was in state court.

Archbald served as a district court judge in the Middle District of Pennsylvania from 1901 to 1911. *See* ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL

IMPEACHMENT TRIALS 217-18 (Univ. of Illinois Press 1992). In 1911, Archbald was assigned to a circuit judgeship on the United States Commerce Court, a federal judgeship. *Id.* at 218. During his time on the Commerce Court, Archbald was also appointed to, and confirmed for, a seat on the United States Court of Appeals for the Third Circuit. *Id.*

In 1912, the House of Representatives⁹ filed thirteen Articles of Impeachment against Archbald, alleging misconduct in his then-current circuit judgeship (Articles 1 through 6) as well as in his prior district judgeship (Articles 7 through 12).¹⁰ The Senate convicted Archbald on Articles 1, 3, 4, 5, and 13, but acquitted Judge Archbald on the articles relating solely to Archbald's former office (Articles 7 through 12).¹¹ In so doing, many Senators formally denounced impeachment based on pre-office misconduct. For example:

- Senator Bryan (D-FL) stated: [I am] “convinced that articles of impeachment lie only for conduct during the term of office then being filled.” (S. Doc. No. 1140, 62d Cong., at 1635 (1913).)
- Senator Brandegee (R-CT) stated: “I vote ‘not guilty’ on article 13 because it alleges offenses some of which are alleged to have been committed by the respondent while he was... [in an] office he does not hold at present and did not hold at the time the articles were adopted[.]” (*Id.* at 1647.)

⁹ Previously, the House has relied on a quote from the Report of the Committee on the Judiciary, House of Representatives, which appeared to support the impeachment of an individual for pre-federal conduct. *See* House Consolidated Opposition to Judge G. Thomas Porteous, Jr.’s Five Motions to Dismiss the Article of Impeachment at 36, n. 70. This is no more persuasive authority than the House Report in this matter. As previously discussed, the House and Senate serve different roles during impeachment proceedings, with the Senate serving as the ultimate judge and jury as to the accusations.

¹⁰ Article 13 was a “catch-all” count that charged Archbald with making a “regular business of profit” from the conduct alleged in the preceding articles. (*See* 62 Cong. Rec. S1647 (1913).) It specifically incorporated conduct from Archbald’s district court judgeship, circuit court judgeship, and Commerce Court judgeship. For more detail regarding Article 13, *see* pages 42 - 44, below.

¹¹ *See* 62 Cong. Rec. S1647 (1913) at Index p. XIV (listing “guilty” and “not guilty” votes for each of the rejected articles).

- Senator du Pont (R-DE) stated: “My vote of ‘not guilty’ upon the articles of impeachment against Judge R.W. Archbald numbered 7, 8, 9, 10, 11, 12, and 13 was based, in the main, upon the fact that the offenses therein charged were alleged to have been committed...when he was not holding his present office.” (*Id.* at 1647.)
- Senator Works (R-CA) stated: “I am of the opinion that the respondent can not be impeached for offenses committed before his appointment to his present office.” (*Id.* at 1635.)
- Senator M’Cumber (R-ND) stated: “[Articles 7-12] charge offenses committed while Judge Archbald was holding another and distinct official position...I therefore voted ‘not guilty’ on each and all of said articles[.]” (*Id.* at 1659-60.)
- Senator Catron (D-NM) stated: “[t]he charges (Nos. 7, 8, 9, 10, 11, and 12) against Judge Archbald of acts committed during the time that he was a district judge and before he became a circuit judge, in my opinion, have no validity in them...I do not believe that the House of Representatives had the right to go back of the present office held by Judge Archbald to hunt up any of his acts to charge against him so as to remove him from the office he now holds.” (*Id.* at 1661.)
- Senator Crawford (R-SD) stated: “I find respondent guilty of misconduct, but it occurred before he became the incumbent of his present office...I do not believe impeachment can be sustained...for the reason stated.” (*Id.* at 1655.)

Several Senators concluded that impeachment for pre-office conduct would violate the Constitution. Senator M’Cumber (R-ND) framed the issue as one of improper jurisdiction:

[T]he purpose of the Constitution in providing for impeachment proceedings was to purge the official roll of the country of improper officers, and nothing further. The Constitution therefore provided that the judgment of the Senate should not go beyond removal from office [T]herefore **impeachment proceedings can not lie against a person for an act committed while holding an official position from which he is separated.**

(*Id.* at 1660) (emphasis added). Various Senators likewise held that the Constitution expressly precludes impeachment for pre-office conduct:

- Senator Catron (R-NM) stated: “Section 4 of Article II of the Constitution is restricted by the terms of that section to the actual President, Vice President, or any civil officer who is actually such at the time the charges are made, and, in my judgment, is limited to the acts done by him in that particular office.” (*Id.* at 1661.)
- Senator Works (R-CA) stated: “[t]he Constitution provides, in express terms, that judges appointed ‘shall hold their offices during good behavior.’ Therefore if a judge

has maintained his good behavior during that time he has done nothing to forfeit his office . . . [n]either can such misbehavior, committed before his appointment, warrant a judgment disqualifying him from holding office[.]” (*Id.* at 1635-36.)

- Senator Bryan (D-FL) stated: “the ‘good behavior’ required by the Constitution relates to the future and not to the past; to what the officer does after, and not to what the citizen had done before, he is nominated and confirmed.” (*Id.* at 1635.)

Senators in the Archbald trial also noted that impeachment for pre-office conduct could lead to extreme partisan abuses. As Senator William J. Stone (D-MO) emphasized, impeaching Archbald on Articles 7-12 would create precedent subjecting all civil officers to impeachment for minor pre-office misconduct regardless of how long ago it occurred:

It would not be difficult to conceive . . . [a case] where one who had been a district judge had been appointed to the Supreme Bench...who thereafter had served for many years . . . [and] under great pressure, when the country was in a state of high political excitement and when some supposed political exigency was influencing a partisan public opinion, a hostile partisan majority might hark back to some alleged misbehavior of the judge when he held the former minor judicial position.

See id. at 1652. Senator du Pont (R-DE) reiterated this point by stating: “[t]he legality of the impeachment, so far as such offenses is concerned, is questionable, and in any event a precedent fraught with danger is created.” *Id.* at 1647; *see also id.* at 1634 (Senator Borah (R-ID), voting not guilty on Articles 7-12 “because of a doubt I entertain as to the law”); *id.* at 1675 (Senator F.M. Simmons (D-NC), voting not guilty on Articles 7-12 because “I felt it my duty to give the respondent the benefit of this doubt”).¹²

By impeaching Judge Porteous for pre-federal conduct, the House of Representatives seeks to reverse the Senate’s long-standing precedent as set in the Archbald impeachment. (*See*

¹² Other Senators expressed similar doubt, but chose to excuse themselves rather than vote not guilty. (*See* S. Doc. No. 1140, at 1632 (Senator Stone (D-MO), requesting excusal because “I have not reached a conclusion satisfactory to myself as to whether these alleged offenses [in Articles 7-12] could be reached by impeachment”); *id.* at 1634 (Senator Smith (D-GA) same); *id.* at 1636 (Senator Newlands (D-NV) same).)

H.R. Res. 1031, 111th Cong., at 18 (2010).) Indeed, if Judge Porteous is convicted on the basis of pre-federal conduct, it would repudiate the Senate's vote of "not guilty" on each and every article relating exclusively to Judge Archbald's pre-office conduct (Articles 7-12) and over-rule 206 years of Senate precedent.

Amazingly, the House, in previous filings, ignored this persuasive and relevant history and has actually cited the Archbald precedent to support the notion that pre-office conduct is impeachable despite the Senate's express refusal to convict on the basis of such claims on constitutional grounds. (*See* House Report at 17, stating that ("[i]ncluding [pre-federal] conduct as a basis for impeachment is consistent with the impeachment of Judge Archbald...").) The House Report states: "The Archbald Impeachment Report specifically addressed the fact that Articles 7 through 12 were based on judicial conduct that occurred prior to Judge Archbald being appointed to the Circuit Court (from which removal was sought)." (*Id.* at 18.) What the House Report failed to emphasize was that the Senate declined to convict on those grounds; instead, the fact that Judge Archbald was acquitted of Articles 7-12, is buried in a footnote. (*Id.*)

Given the acquittal on Articles 7-12, the House Report urges reliance on Judge Archbald's conviction under Article 13 – described by the House as the "catch-all" Article. (*Id.* at 18, n. 72.) Article 13 in the Archbald impeachment proceedings read, in relevant part, as follows:

That during the time in which the said Robert W. Archbald has acted as such United States district judge and judge of the United States Commerce Court he...sought wrongfully to obtain credit from and through certain persons who interested in the results of suits then pending and suits that had been pending in the court over which he presided as judge of the district court, and in suits pending in the United States Commerce Court, of which [he was] a member.

That the said Robert W. Archbald, being United States circuit judge and being then and there a judge of the United States Commerce Court...did undertake to carry on a general business for speculation and profit...for a valuable consideration to compromise litigation pending before the Interstate Commerce Commission, and in furtherance of his efforts to compromise such litigation...willfully, unlawfully, and corruptly did use his influence as a judge of the said United States Commerce Court to induce [relevant individuals]...to enter into various [] contracts and agreements in which he was then and there financially interested....¹³

The House Report's reliance on the conviction on the basis of Archbald's Article 13 is misleading, because several Senators expressly stated that their votes of "guilty" on Article 13 were based solely on the Commerce Court misconduct. *See* S. Doc. No. 1140, at 1660 (Senator M'Cumber (R-ND), voting "not guilty" on Articles 7-12 because pre-office conduct is not impeachable, but voting "guilty" on Article 13 because "in doing so my vote was intended to express my conviction only as to those specific charges included in Article 13 upon which I had already voted 'guilty'"); *see also id.* at 1675 (Senator Simmons (D-NC), voting not guilty on Articles 7-12 because there was "doubt as to whether [senators] had the right to impeach the respondent for acts committed in an office which he no longer held," but voting guilty on Article 13 because "the charge contained therein was sustained if he was guilty of some of the material acts of misconduct therein charged while he was holding the office of circuit judge").¹⁴ In regard to Article 13, Senator George Sutherland (R-UT), discussed the dilemma created by voting on an Article so general that it touched upon most of the charges leveled against Archbald. (*Id.* at 1642.) Sutherland noted that Article 13 included the various articles that preceded it, on some of

¹³ Report No. 946, dated July 8, 1912, at 32.

¹⁴ It should be noted that Article 13 barely had the requisite two-thirds majority vote, and thirty-two senators were absent or abstained from voting. *Id.* at 1646-47 (listing 42 "guilty" votes, 20 "not guilty" votes, and 32 "absent or not voting"). In fact, if the votes of Senators M'Cumber and Simmons were switched for the reasons stated above, Judge Archbald would have been acquitted on Article 13.

which he had voted guilty and on some not guilty: “It occurs to me that I can not consistently vote upon this article one way or the other.” (*Id.*) Eight other senators asked to be excused on the same grounds. *Id.*

The House also misconstrues the Archbald precedent by analogizing Archbald’s pre-office conduct in a federal office to Judge Porteous’s pre-federal conduct in a State office. The House argues that “the ‘prescribed functions’ of Judge Porteous’s prior office as State court judge were ‘of the same general nature’ as the office of district court judge that he presently occupies, and were thus ‘susceptible to the same malversations and abuse.’” (House Report at 18.) In contrast to Judge Porteous’s position as a state court judge before becoming a federal judge, the Brief on Behalf of the House of Representatives for Archbald’s impeachment emphasized the interchangeability of the federal district and circuit court offices, and noted that the senior circuit judge could “designate and appoint any circuit judge of the circuit to hold said district court.” *See* S. Doc. No. 1140, at 1063 (“There is such a close interrelation between the duties and powers of United States **district** and **circuit** judges as to make the two offices substantially the same within the contemplation of the constitutional provisions relating to impeachments”) (emphasis added). The Archbald Impeachment Report accordingly argued that Archbald held “civil office, within the meaning of the Constitution, of the same judicial nature as the office held by him at the time of the commission of the offenses.” *Id.* This commonality of function and office is obviously different under our Constitutional system when the office in which the questioned conduct allegedly took place was a *state* judgeship and the office from which the impeachment occurs is a *federal* judgeship. (*See, e.g.,* LA. CONST. art. V, § 22 (requiring Louisiana States judges to be elected, rather than appointed.) The effort to fudge the difference between federal and state offices and requirements of conduct is both transparent and

unavailing. To cross this constitutional rubicon would allow future judges to be impeached for any prior conduct that suggests some failing that, while expressly not treason or bribery, could be claimed to show a corrupt tendency.

The House's attempt to impeach Judge Porteous for pre-federal conduct represents a new and dangerous precedent on many levels. It would erase centuries of precedent where the Senate has confined removal offenses to federal or in-office conduct. It would remove a federal judge for alleged ethical misconduct as a state judge that Louisiana has never sought to punish. Finally, it would use impeachment to address acts that Congress, itself, has stressed should be dealt with in informal proceedings. Such a new standard would leave judges with little idea of what acts over decades of pre-federal conduct could be used as the basis for removal. It would produce the very situation that the Framers sought to avoid: judges serving at the pleasure of Congress, which can impeach for conduct not limited to their federal office or even period of federal service.

II. Article I

Article I alleges that Judge Porteous deprived the public and litigants of “honest services” by failing to recuse himself from presiding as a District Court Judge in the case of *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, Inc.*, No. 93-cv-1794 (E.D. La.) (the “*Lifemark* case”), disclosing inadequate information about his relationship with a lawyer representing one of the parties to that litigation (who was well known to be one of his oldest and closest friends), and later accepting gifts from that lawyer. For the first time in history, the House is attempting to remove a judge on a legal theory that was rejected by the Supreme Court between the time of an impeachment and a Senate trial. Even if the Senate were to ignore the ruling of the Supreme Court in *Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (June 24, 2010), Article I does not contain a basis for the removal of the judge and seeks to lower the impeachment standard to a mere finding of the “appearance of impropriety.”

At its core, Article I seeks to remove a District Court judge because of rulings he made in the *Lifemark* case. There are no allegations in Article I that these rulings were the result of bribery or any *quid pro quo*. Although Article I alleges, correctly, that Judge Porteous received approximately \$2,000 from an old friend, who was also a lawyer representing the Liljebergs in the *Lifemark* case, the House does not allege and has not proven that that gift in any way influenced Judge Porteous’s decision in the case. Indeed, as discussed below, attorneys on both sides of the case testified that they believed that Judge Porteous afforded them a fair trial, and various House witnesses denied that they believed Judge Porteous could ever be bribed. At most, Article I points out that Judge Porteous received money from an old friend who was one of the Liljebergs’ counsel and later ruled in favor of the Liljebergs on some of the issues in the case. This demonstrates extremely poor judgment in the creation of an appearance of impropriety, an

error in judgment that Judge Porteous admitted to before the Fifth Circuit and for which he accepted a severe sanction from the Court.

In the absence of any evidence to support an allegation of *quid pro quo* or bribery, Article I tries to convert the allegation of a common “appearance of impropriety” charge into a denial of honest services claim – the very theory rejected in *Skilling*. Indeed, the Supreme Court rejected the theory as unconstitutionally vague as a basis for a criminal charge. The Porteous case demonstrates the wisdom of the *Skilling* decision. Here the House is attempting to use the vagueness of “honest services” to make up for the lack of any clear crime. The Senate has never based a removal on a theory rejected by the Court and, in this case, the House would knowingly import an unconstitutionally vague theory into the constitutional standard for impeachment and removal. To make this constitutional nightmare complete, the unconstitutionally vague claim of “the denial of honest services” as based on “an appearance of impropriety” – effectively wrapping a vague term in an ambiguous standard.

Appearance of impropriety is a poorly-defined standard that has never, until now, been urged as impeachable conduct in and of itself. This is a very dangerous precedent that could lead to impeachment of federal judges around the country whose decisions may be unpopular to one or another faction or where a majority wants to open judicial seats for new nominees. All that would be required would be an allegation of the appearance of impropriety under this proposed Porteous standard. The Senate should not embark on the slippery slope of impeaching federal judges for the mere appearance of impropriety, absent any proof of actual bribery or any comparable crime.

Regardless of what theory is applied, the House has failed to prove several of its core allegations, as well as failed to establish that its allegations can constitute an impeachable

offense under the Constitution. While either of these failures alone would warrant acquittal, their combination compels that the Senate not convict Judge Porteous on the basis of Article I.

A. What Article I Does – and Does Not – Allege

The House's Article I allegations concern Judge Porteous's handling of a single civil lawsuit, the *Lifemark* case. That case was randomly assigned to Judge Porteous in 1996, nearly two years after he became a federal judge (in 1994). (PF 186.) The House alleges that Judge Porteous is "guilty of high crimes and misdemeanors and should be removed from office" because, "while a federal judge," he deprived the public and the litigants in the *Lifemark* case of his "honest services" by (a) denying a motion for recusal while failing to disclose the full extent of his friendship and past financial dealings with his friends and former law partners Jacob Amato and Robert Creely, whose firm was counsel for the Liljebergs, a party in the *Lifemark* case; and (b) after denying that recusal motion, accepting "things of value" such as gifts, meals, and entertainment from Messrs. Amato and Creely while that case was under advisement. (PF 25-30.)

Article I does not allege treason, bribery, or any kickback scheme or any form of *quid pro quo*, either in the *Lifemark* case or otherwise, as a basis for removal. (PF 31-35.)¹⁵

B. The Core of Article I Is Constitutionally Invalid After *Skilling*

The House chose its charges in Article I with obvious care. The "honest services" allegation in Article I is based on 18 U.S.C. § 1346, which extends the scope of the mail and

¹⁵ In any trial, it is critical that the jury knows precisely what the allegations are. Otherwise, it is impossible to determine if those allegations have been proven. The same is true here – the Senate cannot fulfill its constitutional duty to "try all Impeachments" without first understanding exactly what conduct the House has alleged as warranting the extreme measure of removal. Indeed, if the Senate allows House Managers to simply improvise or augment articles, it would defeat the responsibility of the entire House to vote on the specific grounds for impeachment. U.S. CONST. art. I, § 3, cl. 6.

wire fraud statutes (18 U.S.C. §§ 1341 and 1343, respectively) to include “a scheme or artifice to deprive another of the intangible right of honest services.” Had the House had proof of bribery, kickbacks, or other improprieties in connection with Judge Porteous’s handling of the *Lifemark* case, the House would have made such an allegation. It did not. Instead, Article I alleges that, by purportedly making misleading statements and failing to disclose certain information at the recusal hearing in the *Lifemark* case, and then denying the motion to recuse, Judge Porteous “deprived the parties and the public of the right to the honest services of his office.” (PF 25; 111 Cong. Rec. S1645 (Mar. 17, 2010).) Despite knowing that experts were predicting that the honest services theory would be curtailed or eliminated in the then-pending *Skilling* case, the House based Article I on a controversial theory that was at best questionable under the Constitution. The gamble failed on June 24, 2010, when the Supreme Court handed down the *Skilling* ruling.

In *Skilling* (and two companion cases), the Supreme Court directly rejected the theory underlying Article I and ruled that the statute on which it was based could be enforced only in a very limited set of circumstances.¹⁶ The *Skilling* decision exposes the type of claim found in Article I as unconstitutionally vague and subjective. This is the very evil that the Framers sought to avoid in crafting the exacting constitutional impeachment standards – namely that the removal standard must not be so vague as to constitute service merely “during the pleasure of the Senate.” RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 91 (Harvard Univ. Press 1973).

¹⁶ While impeachment is admittedly different than the criminal proceeding addressed in *Skilling*, the fundamental concepts of unconstitutionally vagueness that guided the Supreme Court should apply with equal – if not more – force in this proceeding, where the Senate is called upon to decide whether or not to remove a member of the independent federal judiciary.

By basing Article I on the criminal honest services provision, the House continued its longstanding practice of framing articles of impeachment in terms analogous to specific crimes.¹⁷ Such framing normally would serve the important public goal of ensuring that federal judges have no doubt as to what conduct can result in their removal from office. This goal is defeated here, however, because Article I does not delineate with any precision what conduct, constituting a “deprivation of honest services,” justifies removal from office. Thus, it fails for exactly the same reason the Supreme Court in *Skilling* found the charges there constitutionally defective.

In *Skilling*, the defendant was accused of denying honest services by “withhold[ing] material information, *i.e.*, information that he had reason to believe would lead a reasonable employer to change its conduct.” *Skilling*, 2010 WL 2518587, at *12. Rejecting such a vague claim, the Supreme Court ruled that, in order to meet constitutional scrutiny, 18 U.S.C. § 1346 must be narrowly construed and that any claim of criminal honest services would be unconstitutional if it went beyond “fraudulent schemes to deprive another of honest services through bribes or kickbacks.” *Id.* “[N]o other misconduct falls within [the statute’s] province.” *Id.* at *26, 30. The Court expressly rejected the notion that “non-disclosure of conflicting financial interest,” such as “the taking of official action by [a public official] that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he

¹⁷ See Report of the House Judiciary Committee Report concerning the Porteous Impeachment (the “House Report”), H.R. Rep. No. 111-427 (Mar. 2, 2010), at 14 n.58 (explaining that the last four judicial impeachments, of Judges Kent (2009), Nixon (1989), Hastings (1988), and Claiborne (1986), followed earlier criminal proceedings, and that in each instance the House’s articles of impeachment “were to a great extent patterned after the Federal criminal charges”).

owes a fiduciary duty,” can constitute a criminal deprivation of “honest services.” *Id.* at *28-29.¹⁸

The honest services debate and its resolution in *Skilling* mirror the debate that occurred in the Constitutional Convention’s discussion of impeachment. In drafting the impeachment provision, some argued for the inclusion of the term “maladministration,” which would have allowed for a far greater range of impeachable acts. *BERGER* at 78, 91. James Madison and other Framers steadfastly opposed such a term because it lacked clarity as a standard to guide judges. Madison objected that “so vague a term [as maladministration] will be the equivalent to a tenure during the pleasure of the Senate.” *Id.* The Framers were concerned that adopting general standards would create continuing uncertainty among federal officers of what could be used as the basis for their removal. The chilling effect on judges of unpredictability is precisely what the Framers sought to avoid by creating an independent judiciary. Put simply, a charge such as “deprivation of honest services” is the modern equivalent of “maladministration.” Just as the *Skilling* Court found “honest services” too vague to put criminal defendants on notice, it is equally flawed in giving notice to federal judges in an impeachment setting. This is particularly the case when incorrect recusal decisions are routinely handled as simple matters for review or, at most, judicial discipline, and rarely result in formal inquiries, let alone removal.¹⁹

¹⁸ Justice Scalia wrote a concurring opinion with Justices Thomas and Kennedy that agreed on the narrower interpretation of honest services but would have gone even further to invalidate the entire statutory provision. *Id.* at *32 (Scalia, J., concurring). Scalia agreed with the defendant that the honest services provision “fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits.” *Id.*

¹⁹ The *Skilling* Court reached the same result in the other two cases. While *Weyhrauch v. United States*, No. 08-1196, 2010 WL 2518696 (June 24, 2010), was simply reversed in light of the ruling in *Skilling*, the Court issued a stand-alone decision in *Black v. United States*, No. 08-876, 2010 WL 2518593 (June 24, 2010), that again ruled against the type of theory articulated in Article I. There, the Court reversed the appellate decision on the basis of an improper instruction

The House's claim that Judge Porteous was involved in "corruption" similarly does not meet the hard standards imposed by the Constitution for impeachment. The Framers also found "corruption" – a far more ambiguous concept than bribery – to be an unacceptable standard for impeachment as well. A early proposal of basing impeachment on "malpractice or neglect of duty" initially was converted by the Committee of Detail into "treason, bribery, or corruption." BERGER at 78. The Committee of Eleven then dropped "corruption" as a standard. *Id.* Yet, Article I adopts this very same general claim of "corrupt" practices, specifically rejected by the Framers as a standard for impeachment. The result is that Article I directly contravenes the intent of the Framers *and* is based on a theory roundly rejected by the United States Supreme Court. While the House acts as a grand jury in bringing charges, it is the Senate that preserves clear lines of impeachable conduct in convicting or acquitting the subjects of the impeachment. *See generally* Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999); *see also* MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 205 (Univ. of Chi. Press 2d ed. 2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999).

Once the "honest services" allegations of Article I are removed, all that remains are allegations that Judge Porteous created the appearance of impropriety by not recusing himself from the *Lifemark* case and, years later, accepting gifts and entertainment from those old friends

to the jury "that a person commits honest-services fraud if he 'misuse[s] his position for private gain for himself and/or a co-schemer' and 'knowingly and intentionally breache[s] his duty of loyalty.'" *Black*, 2010 WL 2518593 at *3. By the House's own description, Article I alleges "financial entanglements with persons having business before the court." (House Report at 15.) This is precisely the kind of nebulous misconduct that the Supreme Court held could not support an "honest services" prosecution.

while the case was still pending. Such allegations, especially where the House has specifically not alleged any actual impropriety, and where Judge Porteous has already been properly and severely sanctioned for conduct creating the appearance of impropriety, cannot warrant removal from office.

C. Pre-Federal v. Federal Conduct

The allegations of Article I rely heavily on conduct that allegedly occurred *before* Judge Porteous joined the federal bench. Indeed, all of the information that the House alleges Judge Porteous should have disclosed at the *Lifemark* recusal hearing relates to the incidents of friendships that began as far back as the early 1970s and events that occurred when he was a state court judge in the 1980s and early 1990s. As discussed above, such pre-federal conduct cannot serve as the basis for impeachment or removal and should not be given the status of an independent ground for impeachment. In fact, Article I does not allege Judge Porteous's pre-federal conduct itself as grounds for impeachment, despite the House's attempt to emphasize such conduct at trial in an effort to infect or influence the Senate's consideration and evaluation of Article I. Nevertheless, because the House placed such emphasis on the pre-federal conduct (presumably in an attempt to give a sinister context to the *Lifemark* case), and because the spin placed on the pre-federal conduct is so stunningly inaccurate, we must address it here in some detail.

D. Pre-Federal Conduct (Pre-October 1994)

1. The Small, Tight-Knit Legal Community in Gretna, Louisiana

As noted above, Judge Porteous spent nearly twenty-five years practicing law, primarily as a state prosecutor, and serving as a state court judge in Gretna, Louisiana. (HF 2; PF 62, 65.)

Gretna, Louisiana is small community located across the river from New Orleans on the West Bank of the Mississippi River. The legal community in Gretna consists of a small, tight-

knit group of lawyers and judges, many of whom went to high school, college, and/or law school together, and who know and have interacted with one another socially over many years. (PF 55.) As a result, lawyers practicing in Gretna regularly appear before judges who are former classmates, as well as friends or acquaintances with whom they interact socially. (PF 56, 66-67.)

2. Close, Long-Standing Friendships: Amato, Creely, and Gardner

Having practiced law and served as a judge in and around Gretna, Louisiana, for decades, Judge Porteous developed close friendships with a number of attorneys. Judge Porteous's closest friends included Jacob (Jake) Amato, Robert (Bob) Creely, Don Gardner, and Leonard (Lenny) Levenson. (PF 61.)

Jake Amato. Judge Porteous and Jake Amato met one another for the first time in the early 1970s, when Judge Porteous started working as an Assistant District Attorney ("ADA") in the Jefferson Parish District Attorney's Office. (PF 41.) Jake Amato was assigned to train Judge Porteous and teach him how to be an ADA. (PF 41.) As ADAs, Judge Porteous and Jake Amato went to lunch together frequently, a practice which they continued throughout their decades-long friendship, including into the early 2000s. (PF 45, 80, 175.)

At trial, Jake Amato testified that he considered Judge Porteous to be one of his best friends, and that he considered himself to be one of Judge Porteous's best friends. (PF 44.) As a part of that friendship, Jake Amato knew all of Judge Porteous's children, who referred to him as "Uncle Jake." (PF 46-47.) Indeed, Judge Porteous's son Timothy testified that he would kiss Jake Amato on the cheek when he saw him as a sign of affection. (PF 48.)

In 1973, pursuant to state rules that allowed ADAs to maintain a private practice in addition to working in the District Attorney's Office, Judge Porteous, Jake Amato, and a third

attorney opened a law practice together. (PF 42-43; HF 3.) Shortly thereafter, in 1973 or 1974, Bob Creely began working at that law firm as a law clerk.²⁰ (PF 49; HF 4.)

Bob Creely. Judge Porteous and Bob Creely were close friends for nearly 30 years, from the early 1970s onward. (PF 51.) Bob Creely knew all of Judge Porteous's children, who referred to him as "Uncle Bob." (PF 52-53.) In fact, Bob Creely, Jake Amato and one of his sons, and Judge Porteous and his sons would frequently go fishing together. (PF 54.) Judge Porteous's son Timothy testified at trial that, during these fishing trips, Bob Creely taught him how to fish, and Jake Amato taught him how to cook. (PF 54.)

As part of their friendship, Bob Creely and Judge Porteous would go to lunch together regularly. (PF 80, 175.) While he does not know how many times they went to lunch together in total, Bob Creely estimated that he and Judge Porteous had lunch approximately two times a month between 1984 and 1994 (during Judge Porteous's tenure as a state judge). (PF 89-90.) Bob Creely and Judge Porteous saw each other less frequently after Judge Porteous became a federal judge. (PF 176.)

Don Gardner. Don Gardner was another of Judge Porteous's close friends. (PF 92.) In addition to going to lunch together regularly, Don Gardner and Judge Porteous and their respective families would occasionally buy gifts for one another. (PF 92.) Moreover, Don Gardner was close with Judge Porteous's children, including his son Timothy, who Don Gardner testified he has known since the day that Timothy was born. (PF 183.)

²⁰ Jake Amato and Bob Creely subsequently left this firm and opened a separate law practice, which they named Amato & Creely, P.C. (PF 50.) Messrs. Amato and Creely continued to practice law together until 2005. (PF 50.)

3. Despite Being Friends For Decades, Creely and Amato Appeared in Court Before Judge Porteous Very Infrequently

Bob Creely only recalls appearing in court before Judge Porteous a total of three times, twice in state court and once in federal court. (PF 110.) Indeed, Creely described himself as having “very, very, very limited business in front of [Judge Porteous].” (PF 110.) Creely does not feel that he ever received any special treatment or favoritism from Judge Porteous during these infrequent appearances. (PF 111.) Instead, he testified that Judge Porteous ruled on the basis of the law, not their friendship. In fact, Creely recalled that Judge Porteous issued a ruling against him in state court that resulted in his client’s inability to collect on a \$400,000 jury verdict, and ruled against him in federal court in connection with a temporary restraining order, which cost a different client about \$1 million. (PF 112-13.)

Jake Amato likewise appeared before Judge Porteous only infrequently. (PF 114.) At this Senate deposition, for example, Amato could recall only one specific state court case in which he appeared before Judge Porteous, which he lost. (PF 114.) With regard to Judge Porteous’s conduct as a judge, Amato testified that he believed that Judge Porteous ruled on judicial matters fairly. (PF 115.) He also testified that Judge Porteous has a reputation for giving smaller plaintiffs a fair shake in his courtroom and that he tended to be a judge who moved his docket and resolved cases. (PF 116-17.) Amato further testified that he has never known Judge Porteous to throw a case for cash or for friendship. (PF 118.)

4. No Link Between Curatorships and Gifts

The House’s core pre-federal Article I allegation is that Judge Porteous engaged in a purportedly “corrupt scheme” with Amato and Creely concerning certain ministerial judicial appointments known as curatorships. The House alleges that – while a state judge – Judge Porteous assigned curatorships to Creely and then requested and received a portion of the

proceeds from those appointments. (PF 26; 111 Cong. Rec. S1645 (Mar. 17, 2010).) This allegation, however, simply is not true and is not supported by evidence presented by the House. In fact, Creely testified unequivocally at trial that there was no relationship between curatorships that he received and any gifts that he gave to Judge Porteous. (PF 123-30, 147-50.)

Curatorships. A curatorship is an appointment by a Louisiana state court of a private attorney to represent the interests of an absent defendant. (PF 137.) Curatorships involve largely administrative tasks, which are typically handled by secretaries. The appointed person must publish notices in a newspaper seeking the absent defendant and then must advise the court whether anyone responded. (PF 138.) In exchange for completing these administrative tasks, the assigned lawyer is paid a small fee, which was \$200 or less during Judge Porteous's tenure on the state bench. (Stipulation 98.)

Judge Porteous – like all state judges – was responsible for assigning curatorships between 1984 and 1994. Following standard practice in Gretna in the 1980s and 1990s, Judge Porteous frequently assigned curatorships to lawyers who were his friends and acquaintances.²¹ (PF 140-42.) One of the reasons that judges assigned curatorships to lawyers with whom they were friends was that the judges could be confident that all aspects of the curatorship process would be timely and accurately completed, something that did not always happen with certain lawyers. (PF 143.)

Over the course of his 10 years on the state bench, Judge Porteous assigned some number of curatorships to Creely. (PF 140.) Like Amato, Creely received curatorship appointments from several of the judges in the 24th Judicial District Court in Gretna. (PF 139-40.)

²¹ Professor Ciolino, a legal ethics expert and law professor at Loyola University New Orleans, testified at trial that, throughout the 1980s and 1990s, it was common for Louisiana state judges to assign curatorships to friends, campaign contributors, and former law clerks. (PF 142.)

Gifts. Judge Porteous occasionally asked certain of his close friends for small amounts of money. As his long time friend Don Gardner described it at trial, Judge Porteous was a “bummer” – meaning that if he was out of cigarettes, he would “bum” one from a friend, and if he did not have cash in his wallet, he would “bum” some from a friend. (PF 136.) Gardner explained that when Judge Porteous asked to bum a small amount of money from him, such as twenty or forty dollars, Gardner would give it to him because they were friends. (PF 136.) Gardner specifically described this as “a friend giving money to another friend,” and nothing more. (PF 136.) Gardner testified he never expected to receive any special treatment from Judge Porteous as a result of these small gifts. (PF 136.)

Creely was one of the close friends from whom Judge Porteous occasionally requested small amounts of money. Creely recalls Judge Porteous first asked him for a small amount of money to help pay some daily living expenses. (PF 122.) He testified that he simply took the small amount of money out of his pocket and give it to Judge Porteous. (PF 122.) Creely also testified that he did this because Judge Porteous was his long-time friend. (PF 123.) While Creely does not recall when this occurred, he noted that it could have been before Judge Porteous became a state judge. (PF 122.) What Creely does recall, however, is that he began giving small gifts of money to Judge Porteous well before he ever received any curatorship appointments from Judge Porteous. (PF 130.)

The House alleges that there is some significance in the fact that Creely gave Judge Porteous cash, as opposed to checks, and insinuates that this is evidence of the allegedly furtive nature of these gifts. Creely debunked this theory at trial. He testified that he did not give Judge Porteous cash in an attempt to conceal anything. (PF 131-32.) In fact, Creely highlighted that he has never denied or tried to hide his giving of gifts to Judge Porteous. (PF 132-33.) Moreover,

Creely's giving gifts of cash is consistent with the manner in which he and Amato withdrew income from their law firm. Specifically, they had a practice of taking equal, weekly cash draws from their firm partnership accounts. (PF 133.) As a result, on those days that he took a draw, Creely would leave the office with as much as \$1,500 in cash in his pocket. (PF 133.)

It is undisputed that Judge Porteous, while on the state bench, never asked Amato for any money, and that Amato never directly gave Judge Porteous any money.²² (PF 119, 121.) Moreover, Creely testified that he has no recollection of ever telling Judge Porteous that any of the gifts that Creely gave him came from Amato. (PF 172.)

No Bribe, No Quid Pro Quo, No Kickback. In an effort to establish that there was some form of "corrupt scheme," the House has attempted to link the curatorships that Judge Porteous assigned to Creely with the gifts that he received from Creely. The problem with this theory, however, is that Creely – the House's own witness – expressly and repeatedly denied such a relationship. The House was left relying on a third-party's testimony (Amato) concerning Creely's understanding – even though Creely himself denies ever stating or having such an understanding.

Creely testified at trial that there was never any agreement between him and Judge Porteous to exchange money for curatorships, and that Judge Porteous never asked Creely for any portion of the money that he earned from curatorships. (PF 147, 150.) In fact, Creely testified that he never saw any link or relationship between the gifts that he gave to Judge Porteous and the curatorships that he was assigned.²³ (PF 148.) Moreover, Creely specifically

²² Nevertheless, as further evidence of the prevalence and propriety of gifts given by lawyers to judges in Gretna, Amato testified that he has given gifts, including wedding presents and Christmas gifts, to many state court judges over the years. (PF 59.)

²³ This absence of any link is further established by Creely's testimony concerning a telephone call that Judge Porteous allegedly placed to Creely's law firm at some unknown date

stated that had Judge Porteous never assigned him even a single curatorship, he still would have given money to Judge Porteous. (PF 149.) This is entirely consistent with Creely's testimony that he gave Judge Porteous money because they were friends, not as a bribe, *quid pro quo*, or kickback, and not in an attempt to influence his actions as a judge. (PF 123-25, 127-28.) This, in turn, is consistent with Judge Porteous's immunized testimony before the Fifth Circuit Special Investigatory Committee that he never received a kickback from Creely (or his law firm) in connection with curatorships. (PF 126.)

In the face of this definitive testimony, the House has resorted to second-hand information and innuendo in an effort to salvage its allegations against Judge Porteous in Article I. The only testimony at trial suggesting any link between curatorships assigned to Creely and gifts that he gave to Judge Porteous came from Creely's partner, Jake Amato. Although Amato was ultimately willing to agree with the House's characterization of the existence of a "curator scheme" whereby Judge Porteous received kickbacks of "curator money," Amato testified at trial that he never discussed with Judge Porteous whether there was ever any relationship between curatorships assigned to Creely and gifts given to Judge Porteous. (PF 151, 153.) Moreover, Jake Amato freely admitted that his only knowledge concerning any such purported relationship stems from a single conversation that he thinks he had with Creely (prior to which he had no idea that Creely had given any gifts to Judge Porteous). (PF 152-54.) Further, Amato testified that he

and time. According to Creely, his secretary told him that Judge Porteous had called the law firm once to determine if Creely had received a curatorship that Judge Porteous had assigned. (PF 146.) Creely did not speak to Judge Porteous on that occasion and knows only what he recalls his secretary telling him; he does not know why Judge Porteous made such a call (if, in fact, he did). (PF 146.) Instead of attempting to supplement this inherently unreliable hearsay testimony, the House elected not to call Creely's secretary to testify at trial – presumably because her testimony was not to the House Managers' liking. Hearsay and reliability problems aside, however, the important point is that Creely testified that such a call would have upset him because he did not see any connection between curatorships that were assigned to him and gifts that he gave to Judge Porteous. (PF 146.)

did not have anything to do with the “mechanics” of the alleged relationship between curatorships and gifts. (PF 155.) Finally, Amato testified that he was never concerned about appearing in court before Judge Porteous while Creely was receiving curatorship appointments because there was no relationship between the curatorships and the gifts Creely gave Judge Porteous and how Judge Porteous ruled on cases before him. (PF 170.)

Given Creely’s (and Judge Porteous’s) clear and unequivocal testimony that there was no relationship, link, or connection between curatorships and gifts, the thin reed consisting solely of Amato’s second-hand testimony concerning what he thinks he was told simply cannot support the House’s allegation of a link between the curatorships and gifts given to Judge Porteous.²⁴

Guesstimates and Estimates. The House has further attempted to bolster its theory of a curatorship scheme by comparing the gifts that Creely gave to Judge Porteous during their decades-long friendship with the fees that the Amato & Creely law firm earned as a result of curatorships assigned to Creely. The House argues there must have been an improper kickback scheme at work because House counsel and the House Managers have convinced Creely and Amato that the gifts given by Creely to Judge Porteous were equal to roughly half of the amount of the fees paid to Creely in connection with the curatorships assigned to him by Judge Porteous.

This theory, however, is pure gossamer and has no basis in hard evidence. Neither Creely nor Amato have any independent recollection as to the amount of the gifts Creely gave to Judge Porteous or the amount of the curator fees they received. (PF 156-67.) Instead, House counsel identified the number of curatorships that they claim were assigned by Judge Porteous to

²⁴ Even if there had been any such relationship (which there was not), that relationship necessarily ended in 1994 – nearly two years before he was assigned any role in the *Lifemark* case – when Judge Porteous left the state bench and became a federal judge. It is undisputed that federal judges have no role in assigning curatorships and that Bob Creely never directly gave any money to Judge Porteous while he was on the federal bench. (PF 169, 177-79.)

Creely and the average fees paid for administering curatorships during the relevant periods. Only after extensive suggestions by the FBI, House counsel, and the House Managers, have Creely and Amato agreed to an estimate of the amount of gifts that approximates one-half of the amount of fees supposedly paid to Creely for administering curatorships assigned by Judge Porteous. (PF 165-68.)

At trial, Creely estimated that, throughout their decades-long friendship, he may have given Judge Porteous (in the form of numerous small gifts) a total of approximately \$10,000. (PF 156.) Bob Creely did not keep records of the gifts that he gave to Judge Porteous, and this figure is only an estimate; the House presented no record evidence to support that estimate or provide it credibility. (PF 134, 156, 161.) Moreover, while this estimate includes the 10-year period that Judge Porteous was a state judge, it also includes any gifts that Bob Creely may have given before Judge Porteous became a judge. (PF 156.) Importantly, therefore, this approximation is specifically not limited to the gifts that Creely gave to Judge Porteous during the time period that Judge Porteous assigned him curatorships, and any attempt to represent or use it as such necessarily fails. (PF 156.)

Amato's recollection of the money given to Judge Porteous is even less clear. (PF 162-64.) Amato testified that he cannot estimate how much money either he or Creely may have given to Judge Porteous. (PF 163-64.) Instead, he could only guess ("not estimate but guesstimate") at the total. (PF 164.) While Amato has agreed with the estimate that he and Creely together gave Judge Porteous approximately \$20,000 over the course of his ten years as a state court judge, Amato did not come up with that figure. (PF 165-66.)

To the contrary, Amato testified that he never suggested or estimated the \$20,000 figure prior to his questioning by the FBI and/or House impeachment counsel. (PF 166.) Amato

explained at his Senate deposition that he had no knowledge concerning how much money had been given to Judge Porteous²⁵ and that “something between ten and twenty thousand dollars has been batted around, but no, I never sat down and put a pencil to it.” (PF 167.) In fact, Amato testified at trial that he believes that it was FBI Agent DeWayne Horner who came up with the \$20,000 figure, which Agent Horner derived by looking at the number of alleged curatorship cases assigned to Creely, multiplying that figure by the average fees earned in connection with curatorships at the time, and then dividing that number in half (apparently assuming a 50/50 split of the fees). (PF 165.) This reverse-engineering the numbers and shoehorning the facts to fit the pre-conceived theories of the House bears no relationship to hard evidence and is highly questionable.

Creely and Amato have even less specific recollections concerning the number of curatorships assigned and fees received. Creely testified that, prior to meeting with the House Managers and House impeachment counsel, he did not know how many curatorships Judge Porteous had assigned to him. (PF 158.) He further stated – consistent with his testimony that there was no relationship between curatorships and gifts – that he never “calculated” the amount of money that he gave to Judge Porteous, or determined that the amount was about half of the value of the fees that he earned from curatorships. (PF 157.) Amato similarly testified that, prior to this controversy arising, he had no specific recollection of how many curatorships had been assigned to either him or Creely, and that he did not know the amount of fees that attorneys received for handling curatorships. (PF 159-60.)

²⁵ This is consistent with Amato’s 2007 testimony before the Fifth Circuit Special Investigatory Committee, where he testified that he did not have a clear memory concerning how much money he or Creely may have given to Judge Porteous. (PF 162.)

Creely's and Amato's vague and at least partly-manufactured "estimates" and "guesstimates" constitute slender reeds on which to base a claim of pervasive corruption sufficient to warrant removal from office – especially where the alleged corruption has been expressly disavowed by the alleged participants therein. This is particularly true where, as here, the suggested basis for removal is not the alleged "corrupt curatorship scheme" itself, which undisputedly ceased by the time Judge Porteous became a federal judge (federal judges do not assign curatorships), but the purported failure to disclose, in connection with the *Lifemark* recusal motion, that such a "scheme" had once existed. If, as here, the evidence shows that no such "corrupt scheme" ever existed, then Judge Porteous's "failure" to disclose it in the course of the recusal hearing would hardly be surprising, and certainly not grounds for removal from office.

5. Lunches, Fishing Trips, Hunting Trips

Recognizing the weaknesses in its curatorship allegations, the House has attempted to prop-up its assertion of a "corrupt scheme" between Judge Porteous, Amato, and Creely by focusing, in addition, on the fact that Judge Porteous and Creely or Amato regularly went to lunch together (for which Creely or Amato, or someone else, usually – but not always – paid), went fishing together, and went on hunting trips together. Under the applicable Louisiana judicial and legal ethics rules at the time, however, there was nothing unusual, improper, or "corrupt" about such events.

With regard to lunches, the House spent considerable time at trial eliciting testimony that Judge Porteous went to lunch regularly with his long-time friends, including Amato and Creely, and that Judge Porteous typically did not pay for his lunch during such outings. All of this testimony is irrelevant to the grave constitutional issues before the Senate. Judge Porteous – like all other state court judges in Gretna in the 1980s and 1990s – regularly went to lunch with

friends of his who were attorneys, including Amato, Creely, and Gardner. (PF 80, 92, 93.) There was nothing secret, sinister, or “corrupt” about these lunches. In fact, one of the restaurants near the Gretna courthouse specifically reserved a table just inside its front door for lawyers and judges to sit at and have lunch together.²⁶ (PF 96.) Indeed, both Amato and Creely confirmed that they were friends with – and frequently would buy the meals for – many state court judges in addition to Judge Porteous.²⁷ (PF 57-58, 98-101.) This was customary and entirely proper, and does not constitute evidence of any “corrupt scheme.” (PF 99-101.)

With regard to paying for such lunches, it is undisputed that, in the 1980s and 1990s, judges almost never paid for meals that they had with other lawyers. Dane Ciolino, a Louisiana law professor and ethics expert,²⁸ testified at trial that in the 1980s and 1990s there was no rule barring judges from having lunches purchased for them by attorneys.²⁹ (PF 69.) Professor Ciolino specifically noted that it was very common for lawyers and judges to go to lunches together and, historically, judges did not pay for such lunches. (PF 93-95.) Nevertheless, Judge

²⁶ Lunch at this restaurant, known as the Courthouse Cafe or Whitesides, cost between \$4 and \$6 a plate. (PF 97.)

²⁷ One state court judge that Amato was particularly close with, would buy lunches for, and gave campaign contributions to, was his high school classmate George Giacobbe. (PF 60.) Judge Giacobbe appointed Amato to sit for him on the bench *ad hoc* and handle his judicial dockets approximately two to three times per year. (PF 60.) No one, to Amato’s knowledge, ever suggested that there was anything improper or untoward about his relationship with Judge Giacobbe, or with Judge Giacobbe’s decision to repeatedly appoint Amato to sit for him *ad hoc*. (PF 60.)

²⁸ See Senate Vol. IV at 1627:13 – 1629:11, 1631:18 – 1632:24 (House counsel stipulating that Professor Ciolino is an expert on both legal and judicial ethics).

²⁹ Instead, the only rule in effect in Louisiana during this time period provided that a judge could not accept a gift if it reasonably might appear to affect the judge’s official conduct. (PF 70.) Professor Ciolino explained that this rule required consideration of the totality of the circumstances and is community-dependant, meaning that it is judged differently in different communities and by different people. (PF 71, 73.) Professor Ciolino further explained that he is not aware of any judge or lawyer ever being disciplined under the Louisiana ethics rules in effect prior to 2009 for accepting social hospitality, such as lunches. (PF 79.)

Porteous did in fact occasionally pay for his meal and that of the other attorneys with whom he ate, including Amato.³⁰ (PF 83, 92.)

Amato specifically testified that he never bought Judge Porteous lunch for any improper purpose. He testified that he did not pay for lunches that he had with Judge Porteous in order to bribe him or otherwise influence him. (PF 84-85, 88, 99.) Instead, having worked with Judge Porteous and tried cases with him, against him, and before him over a period of many years, Amato was adamant that he did not believe that he could influence Judge Porteous, by buying him lunch or otherwise. (PF 85.) To the contrary, Amato “always felt that he [Judge Porteous] was always going to do the right thing” on the bench, irrespective of their having had lunch together; a view that Amato still holds today. (PF 86-87.)

For his part, Creely testified that he, too, regularly went out to lunches, dinners, and/or drinks with most of the state court judges in Gretna. (PF 58, 101.) That type of socializing was very common and (unless a campaign committee sponsored the meal) Creely confirmed that either he or the individual who invited him paid for the meal – as was customary in Gretna. (PF 91, 101-02.) In fact, Creely could recall only one state court judge who had ever bought him a meal, and that judge paid for only one such meal. (PF 103.) Like Amato, Creely testified that he paid for the lunches that he attended with judges out of friendship with those judges. (PF 104.) He never expected to receive any advantage from those judges and never drew any connection between lunches and the treatment that he received from judges. (PF 104-05.)

Allegations relating to fishing and hunting trips are likewise irrelevant to the issues before the Senate. It is undisputed that during their 30-year friendships, Amato, Creely, and

³⁰ In fact, Don Gardner testified that every year Judge Porteous and a group of eight to ten lawyers from Gretna would attend a continuing legal education event, at which Judge Porteous would buy lunch or dinner for the group. (PF 92.)

Judge Porteous went on fishing and hunting trips together. (PF 107.) Similar to his analysis of the lunches, Professor Ciolino testified that it was very common for lawyers and judges to go hunting and fishing together and that there was nothing improper about such outings under Louisiana ethics rules then in effect. (PF 93, 107.) The House's attempt to resurrect its allegation of a "corrupt scheme" by focusing on who paid for these fishing and hunting trips fails in view of Amato's and Creely's testimony that neither of them has a recollection whether Judge Porteous's attendance on the trips resulted in additional expenses (or, alternatively, if he participated on a complimentary ticket) or, if there were extra expenses, who paid them. (PF 108.) Instead, what Amato does remember is that, when he and Judge Porteous would go hunting and fishing, Judge Porteous would bring various food, drinks, and other items to contribute to the trip, and that he was one of the very few people who would actually help prepare meals and clean up afterwards. (PF 107, Senate Vol. I at 161:13-18.)

In the end, the House's attempt to prove its case on the basis of lunches and fishing and hunting trips must fail. Such lunches were exceedingly common, and entirely permissible under applicable ethical rules. Moreover, neither Amato nor Creely ever took Judge Porteous to lunch or went on a trip with Judge Porteous as part of any "corrupt scheme." They testified that they went because they were long-time friends, who wanted to spend time together, and they never expected or received anything in return.

6. Timothy Porteous's 1994 Senate Internship

The House's final pre-federal Article I allegation is that Judge Porteous's friends contributed small amounts of money to help defray some of the costs associated with his son Timothy's internship in the United States Senate during the summer of 1994. These allegations are wholly irrelevant, and certainly do not establish any sort of corrupt scheme. First, Timothy Porteous interned in the Senate in the summer of 1994 – *before* Judge Porteous was confirmed to

the federal bench. As such, any gifts to help Timothy Porteous pay the expenses associated with his internship are entirely pre-federal and cannot serve as a basis to impeach or removal Judge Porteous. (PF 180.) In addition to being pre-federal, any such contributions occurred years before Judge Porteous ever had any role in the *Lifemark* case. (PF 184.)

Second, and more fundamentally, Timothy Porteous testified at trial that any money that Creely³¹ or Amato may have given him in connection with his 1994 internship was a gift to him, not his father, and was “done out of love for [him].” (PF 182.) Don Gardner similarly testified that he gave Timothy Porteous a “few dollars” to help pay for the expenses associated with his Senate internship because he was proud of Timothy Porteous, whom, as the son of his close friend, he had known since the day Timothy was born. (PF 183.)

E. Federal Conduct (Post-October 1994)

The preceding discussion involves exclusively pre-federal conduct – none of which can serve as the basis for removal. Indeed, the only potential relevance of the above conduct to the issues before the Senate is that the House has alleged that Judge Porteous should have disclosed more information about his relationship with Amato and the Amato & Creely law firm during the *Lifemark* recusal hearing, and that he should have ultimately recused himself from the *Lifemark* case. Specifically, the House alleges that, in connection with the *Lifemark* case, Judge Porteous:

- (1) “failed to disclose” that he “engaged in a corrupt scheme with attorneys Jacob Amato, Jr., and Robert Creely” relating to curatorships;
- (2) “made intentionally misleading statement at the recusal hearing intended to minimize the extent of his personal relationship with [Amato and Creely]”;
- (3) “denied a motion to recuse himself from the case” despite having a “corrupt financial relationship with the law firm of Amato & Creely, P.C.”;

³¹ During his Senate deposition, Creely testified that he did not know of any money that was given to anyone in connection with Judge Porteous’s son’s internship in Washington, D.C. (PF 181.)

- (4) “solicited and accepted things of value from both Amato and his law partner Creely” following the *Lifemark* trial; and
- (5) “ruled in favor of [Amato’s] client, Liljeberg.”

(PF 25-29; 111 Cong. Rec. S1645 (Mar. 17, 2010).)

Each of these allegations fails as a basis for conviction. The first and third allegations fail because – as described above – Judge Porteous did not engage in any corrupt scheme and did not have any corrupt financial relationship with Amato, Creely, or their law firm. The second allegation fails because it is simply not true: Judge Porteous did not make intentionally misleading statements during the recusal hearing to minimize his relationship with Amato and Creely. To the contrary, he specifically disclosed that he was close, long-time friends with Amato, as well as with his co-counsel on the case, Lenny Levenson. Creely was never discussed during the *Lifemark* recusal hearing since he neither appeared nor played any role in that case. With regard to the final two allegations, the House has never alleged, much less provided any proof, that Judge Porteous’s receipt of a gift or other “things of value” from one of his life-long best friends had any influence whatsoever on his handling of the *Lifemark* case. Though receipt of that gift and other things created an appearance of impropriety, there was no corruption, no actual misconduct, and no abuse of official power.

1. Background of the *Lifemark* Case

The *Lifemark* case was an extremely contentious and complex piece of litigation that had bounced around the New Orleans federal courthouse for years. (PF 201; HF 42.) Summarized simply, the *Lifemark* case stemmed from a multi-million dollar dispute between Lifemark Hospitals of Louisiana, Inc. (which was owned by Tenet Healthcare) and the Liljeberg family. (PF 191; HF 42.) The dispute centered on a hospital, known as the Kenner Regional Medical Center, that the Liljebergs constructed with financing from Lifemark. (PF 191.) The Liljebergs

and Lifemark had a contractual relationship whereby Lifemark operated the hospital, while the Liljebergs operated the pharmacy in the hospital. (PF 191.) Over time the parties' relationship soured and litigation ensued.³²

The *Lifemark* case had bounced from judge-to-judge-to-judge. Indeed, as the following chart illustrates, by the time that the case was randomly reassigned to Judge Porteous in January 1996, he was at least the seventh different federal district court judge to preside over it (PF 186):

Lifemark v. Liljeberg 13 TOTAL JUDGE REASSIGNMENTS		
1993	6/2/93	JUDGE #1 U.S. District Court Judge Marcel Livaudais assigned to case
	1/7/94	JUDGE #2 Magistrate Judge Ivan L. Lemelle assigned to case
1994	3/21/94	JUDGE #3 Case reassigned to U.S. District Court Judge Judge Ginger Berrigan
	7/29/94	JUDGE #4 Case is reassigned to U.S. District Court Judge Marcel Livaudais
	8/31/94	JUDGE #5 Case reassigned to U.S. District Court Judge Ginger Berrigan
	10/25/94	JUDGE #6 Case reassigned to U.S. District Court Judge Stanwood R. Duval
	11/1/94	JUDGE #7 Case reassigned to U.S. District Court Judge Okla Jones II
	8/2/95	JUDGE #8 Judge Eldon E. Fallon issues an opinion in the part of the case which he had been assigned
1995	8/14/95	JUDGE #9 Magistrate Judge Joseph C. Wilkinson assigned to case
	8/30/95	JUDGE #10 Magistrate Judge Ronald Fonseca assigned to case
	10/12/95	JUDGE #11 Case reassigned to U.S. District Court Judge Morey L. Sear
	10/13/95	JUDGE #12 Order that pre-trial conference will be conducted by Judge Adrian G. Duplantier
1996	1/16/96	JUDGE #13 Case reassigned to U.S. District Court G. Thomas Porteous

³² At trial, the *Lifemark* case focused on three issues: (1) whether Lifemark was liable to the Liljebergs for damages flowing from their loss of the hospital as a result of a foreclosure sale; (2) whether Lifemark was entitled to terminate the pharmacy contract with the Liljebergs; and (3) whether Lifemark owed the Liljebergs over \$20 million in unpaid pharmacy payments due under the pharmacy contract. (PF 191.)

From the beginning of his involvement in the case, Judge Porteous made it clear that he was going to take control of the *Lifemark* case, put an end to its jumping from judge to judge, and take the case to trial. (PF 187.) This is consistent with Judge Porteous's past practice and reputation as a judge who moved his docket and resolved cases promptly. (PF 117.) Indeed, as shown at trial, the very witness called by the House to establish the need for Judge Porteous to recuse himself due to the involvement of acquaintances in the case (Joe Mole) was shown during the evidentiary hearing to have paid \$100,000 to another friend (Don Gardner) to enter the case and promised him another \$100,000 if he could get Judge Porteous to recuse himself – continuing the case bouncing from judge to judge without resolution.

Judge Porteous's intention to move the case forward, however, was at odds with the strategy of delay that *Lifemark* – effectively the defendant in the case – had long been pursuing. (PF 199.) Indeed, *Lifemark* had been litigating with the Liljebergs for more than a decade, since at least 1985. (PF 200.) Accordingly, it was in *Lifemark*'s interest to get Judge Porteous off of the case – which it attempted to do through a recusal motion and, more nefariously, through a written retainer agreement that offered Judge Porteous's friend, attorney Don Gardner, a \$100,000 bounty if he could get Judge Porteous to withdraw from the case.

Notably, however, for all the effort expended to get Judge Porteous off the case, neither *Lifemark* nor its attorney Joe Mole ever questioned Judge Porteous's judicial abilities. In fact, Mole testified at trial that he considered Judge Porteous to be an intelligent man and a very good trial judge. (PF 206.) Mole and Gardner further agreed that Judge Porteous knew the Rules of Evidence very well and had a good command of the courtroom. (PF 206.)

2. Counsel in the *Lifemark* Case

In addition to numerous judges, the *Lifemark* case involved repeated substitutions of counsel by all of the parties. Relevant to this proceeding are the appearances of attorneys Joe

Mole, Jake Amato, Lenny Levenson, and Don Gardner, as well as the lack of any appearance or participation by Bob Creely.

Joe Mole. In April 1996, Lifemark retained Mole as replacement counsel for its prior attorneys. (PF 204.) At the time that Mole appeared in the *Lifemark* case, trial was set to begin in November 1996. (HF 43.)

Jake Amato and Lenny Levenson. Like Lifemark, the Liljebergs also sought to obtain new counsel in 1996 in advance of trial. To that end, the Liljebergs approached Amato and Levenson – both experienced trial attorneys,³³ who ultimately entered formal notices of appearance in the *Lifemark* case in September 1996. (PF 202.) Following their appearances in the case, both Amato and Levenson assumed very active roles in the *Lifemark* litigation, including arguing motions and examining multiple witnesses at trial. (PF 245.) Amato's and Levenson's active involvement in the case stands in stark contrast to Don Gardner's exceedingly limited participation in the case. (PF 232, 246.)

The House has put much stock into Mole's allegation that Amato's and Levenson's formal appearance in the *Lifemark* case (in September 1996) raised concerns because it occurred less than two months prior to the scheduled start of trial (in November 1996). Such concerns, however, were uninformed³⁴ and unfounded. As Amato testified, prior to formally entering his appearance in the *Lifemark* case, he had spent two to three months thoroughly evaluating and carefully considering the merits of the case. (PF 190.) Amato did this to satisfy himself that the merits favored his potential clients, the Liljebergs, and that their claims deserved to be pursued,

³³ By 1996, Amato had been practicing law for more than 20 years and had tried scores of cases. (PF 190.)

³⁴ Indeed, Mole specifically admitted at trial that, when he filed his motion to recuse, which was based in large part of the timing of Amato's and Levenson's appearance in the case, he had no idea how long prior to formally noticing their appearance they had been working on the case. (PF 211.)

which was particularly important because Amato agreed to represent the Liljebergs on a contingent fee basis, meaning that he would be paid only if the case was successful. (PF 192-93.) Thus, while he may have only formally appeared in the case in September 1996, the undisputed testimony establishes that Amato had been studying and preparing to enter the *Lifemark* case since at least June or July 1996 (only about two months later than Mole entered the case).

Amato further testified that the fact that he was friends with Judge Porteous did not enter into his decision to represent the Liljebergs in the *Lifemark* case. To the contrary, Amato testified that he has never taken any case, including the *Lifemark* case, because he was friends with the judge presiding over it. (PF 192.) In fact, Amato testified that he did not believe that his friendship with Judge Porteous “would make one bit of difference” in terms of winning the *Lifemark* case. (PF 194.)

Don Gardner. Lifemark retained Gardner as additional counsel in March 1997, following the denial of its recusal motion. (PF 233.) Pursuant to the terms of the retainer agreement (discussed in greater detail below) drafted by Mole, Lifemark paid Gardner \$100,000 upon his appearance in the case and agreed to pay him an additional \$100,000 if Judge Porteous recused himself or otherwise withdrew from the case. (PF 234; House Ex. 35(b) (Gardner Retainer Agreement).) If that happened, the retainer agreement further provided that Lifemark’s relationship with Don Gardner would immediately end. (PF 234-35.) As these terms suggest, Lifemark did not hire Don Gardner for his legal acumen. In fact, Mole specifically testified at trial that he brought Gardner into the case *solely* because he was friends with Judge Porteous. (PF 232.) It is further undisputed that, in contrast to Amato’s and Levenson’s active participation in the case, Gardner played little if any role in the *Lifemark* case. Indeed, while he

attended every day of the *Lifemark* trial, he never spoke in court and never examined even a single witness. (PF 246.)

Bob Creely. It is undisputed that Creely never entered an appearance in, and had no role in litigating, the *Lifemark* case. (PF 188.) In fact, he testified at trial that, other than being aware that Amato was involved in the case, he had no idea what role the Amato & Creely law firm played in the *Lifemark* case. (PF 189.) Creely further testified that he attended only a single day of the *Lifemark* trial, and then only for a very brief period of time. (Senate Vol. I at 286:13-24 (Creely).)

3. Disclosures During the *Lifemark* Recusal Hearing

The House has attacked Judge Porteous's conduct during the *Lifemark* recusal hearing in two ways. First, the House alleges that he failed to disclose that – years earlier – he had “engaged in a corrupt scheme with attorneys Jacob Amato, Jr., and Robert Creely” relating to curatorships. Second, the House contends that Judge Porteous made “intentionally misleading statements” in order to “minimize the extent of his personal relationship” with Amato and Creely. The evidence adduced at trial cannot support either allegation.

The House's first allegation is entirely premised on the existence of a “corrupt scheme” relating to curatorships. As discussed above, the evidence presented at trial belies any such scheme. Indeed, Creely specifically testified that there was no agreement, no link, and no connection between the curatorships that he received from Judge Porteous and the occasional gifts that he gave to his old friend.³⁵ (PF 124-30, 147-50.) This evidence is fatal to the House's

³⁵ Moreover, it is undisputed that Judge Porteous neither asked for nor ever received any money directly from Amato at any time prior to the *Lifemark* recusal hearing. (PF 119-21, 219.) Amato never had any discussion with Judge Porteous concerning curatorships assigned to Creely and gifts given to Judge Porteous. (PF 151-55.)

allegation of a failure to disclose – there was no reason for Judge Porteous to disclose a “scheme” that did not happen.

The House’s second allegation likewise fails, but for a different reason. Contrary to the House’s assertion, Judge Porteous did not make any misleading statements designed to minimize his relationship with Amato or Creely.³⁶ Instead, Judge Porteous specifically confirmed the widely known fact – which, indeed, was so widely known that it served as the primary basis for Mole’s recusal motion³⁷ – that he, Amato, and Levenson were long-time friends who went to lunch together regularly and that Judge Porteous and Amato had practiced law together more than 20 years earlier. (PF 208, 210, 215; House Ex. 52 (Recusal Motion); House Ex. 56 (Recusal Hearing Tr., at 4, 6-7).) During the recusal hearing, Judge Porteous specifically stated:

The Court: Let me make also one other statement for the record if anyone wants to decide whether I am a friend with Mr. Amato and Mr. Levenson, I will put that to rest for the answer is affirmative, yes. Mr. Amato and I practiced law together probably 20-plus years ago. ...

* * *

The Court: ... I have made the statement. Yes, Mr. Amato and Mr. Levenson are friends of mine. Have I ever been to either one of them’s house? The answer is a definitive no. Have I gone along to lunch with them? The answer is a definitive yes. ...

* * *

³⁶ With regard to Creely, it is undisputed that he played no role in the *Lifemark* case. As such, neither Judge Porteous nor Mole (nor anyone else) made any statements or representations at the recusal hearing concerning Creely. Since Judge Porteous did not make any statements whatsoever concerning Creely, he necessarily could not have made any “intentionally misleading statements” about him or about their relationship.

³⁷ Mole testified at trial that, shortly after Amato and Levenson appeared in the *Lifemark* case, he began speaking to other attorneys in New Orleans to find out more about their relationships with Judge Porteous. (PF 207.) Mole specifically learned that Judge Porteous, Amato, and Levenson were very close friends, who socialized and went to lunch together regularly (lunches for which he knew those lawyers paid much of the time). (PF 207.)

The Court: I have not denied it [that Judge Porteous, Jake Amato, and Lenny Levenson are very, very close friends], and I don't think they [Messrs. Amato and Levenson] deny it.

(House Ex. 56 (Recusal Hearing Tr. at 4, 6-7, and 16, respectively).) Judge Porteous, thus, explicitly disclosed – and certainly did not minimize – his close friendship with Amato and Levenson. The House's contention, however, that Judge Porteous somehow intentionally misled Mole by not specifying how frequently he went to lunch with Amato and Levenson, or by not also noting that they occasionally went fishing and hunting together (*see* HF 55), has no basis in the evidence presented by the House.

The only other statements that the House points to as “intentionally misleading” relate to a colloquy between Judge Porteous and Mole concerning state court campaign contributions – wherein Judge Porteous simply corrected a factual misstatement by Mole concerning a state court fundraiser that occurred six years earlier. First, both Mole and Amato testified at trial that Mole's statements during the *Lifemark* recusal hearing concerning the state court fundraiser were inaccurate. (PF 217.) Second, the House's allegation that this was an intentional misstatement is predicated on an inappropriate (and self-serving) attempt to conflate campaign contributions with gifts of any kind.

At the *Lifemark* recusal hearing, Mole stated that “[t]he public perception is that they [Amato and Levenson] do dine with you, travel with you, and that they have contributed to your campaigns.” (House Ex. 56 (Recusal Hearing Tr. at 8).) Judge Porteous responded by noting that he had only one opponent in his two state court elections and that “[t]he first time I ran, 1984, I think is the only time when they gave me money.” (*Id.*) This statement, as is clear from the context, related solely to campaign contributions. It is an extraordinary stretch to argue that, in the context of discussing campaign contributions, Judge Porteous was intentionally omitting a discussion of gifts given to him, not by Amato, but by Creely, which had ended literally years

earlier. The Senate should not remove a federal judge from office on the basis of the House's selective misquoting of a transcript³⁸ and its unilateral declaration that that misquote is an "intentionally misleading statement[]."

4. Denial of the Lifemark Recusal Motion

Incredibly, the House has alleged that Judge Porteous's decision to deny Lifemark's recusal motion is itself a basis on which to remove him from office. If the Senate were to accept such an allegation as a legitimate basis for impeachment, the Senate would create dangerous precedent whereby federal judges could be removed from office on the basis of their substantive legal decisions. This would cripple the idea of judicial independence and invite the opponents of unpopular judges and unpopular judicial decisions to seek recourse and retribution via the impeachment mechanism. This is precisely the type of influence from which the Founders sought to insulate federal judges when they envisioned judicial life tenure, subject to removal only in rare instances and only on very limited grounds.

Beyond that, this allegation must necessarily fail because the House expressly tied it to the existence of a "corrupt financial relationship" with the Amato & Creely law firm. Creely's testimony on this point, however, is definitive and unequivocal: there was no relationship between curatorships and gifts.

³⁸ The House has also selectively focused on the subsequent colloquy between Judge Porteous and Joe Mole concerning the Jefferson Parish-wide Justice for All judicial fundraiser. (House Ex. 56 (Recusal Hearing Tr. at 8).) As Judge Porteous explained to Mole at the recusal hearing, that program allowed lawyers to make a single, centralized judicial campaign contribution, which was then divided up among the Jefferson Parish judges, including Judge Porteous. (*Id.*) Such contributions were not given directly to judges, but instead were processed through the Justice for All program.

5. Lifemark's Machiavellian Scheme to Remove Judge Porteous

Following denial of his recusal motion, Mole (on behalf of his client, Lifemark) did something truly jaw-dropping: he recruited Don Gardner to enter the case pursuant to a retainer agreement that paid him \$100,000 upfront and an additional \$100,000 if he could get Judge Porteous to recuse himself or otherwise withdraw from the case. (PF 234; House Ex. 35(b) (Gardner Retainer Agreement).) In effect, Mole sought out one of Judge Porteous's closest friends and offered him a \$100,000 bounty if he get Judge Porteous off the case.

At trial, Mole admitted that, shortly after the denial of his recusal motion, he began looking for an attorney to "help [him] solve [his] problem" of having Judge Porteous in the *Lifemark* case and moving it seasonably toward trial. (PF 226.) At the suggestion of Tom Wilkinson – the brother of the federal magistrate judge presiding over the *Lifemark* case – Mole contacted Gardner and discussed bringing him into the case as additional counsel for Lifemark. (PF 226-29.) Mole explained at trial that he wanted Judge Porteous to recuse himself from the case and thought that Gardner's participation would accomplish this goal. (PF 230.) Indeed, Mole specifically stated that Gardner was brought into the case solely because he was friends with Judge Porteous. (PF 232; HF 57.) Initially, Gardner told Mole repeatedly that he would not be able to influence Judge Porteous's handling of the *Lifemark* case in any way, and that he would not approach Judge Porteous and ask him for any favors, something which he testified he never in fact did. (PF 231, 240.)

Undeterred, Mole prepared the following retainer agreement – the likes of which not even he had ever seen – and sent it to Gardner. (PF 234-35.)

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DIAL FAX NUMBER

599-8006

February 18, 1997

Don C. Gardner, Esq.
c/o Thomas G. Wilkinson, Esq.
320 Huey P. Long Ave.
Gretna, LA 70053

Re: Lifemark Hospitals of Louisiana, Inc.
v. Liljeberg Enterprises, Inc.
Our File: 203-960142

Dear Don:

Lifemark is willing to offer you a fee for assisting with the Liljeberg case as follows:

1. Retainer of \$100,000 payable upon enrollment of counsel of record.
2. A fee of \$200,000 if after trial there is a judgment allowing Lifemark to terminate the pharmacy agreement with no liability for future damages.

The following sums would be added to the above retainer and fee based upon the level of damages contained in a judgment, provided that the judgment allows Lifemark to terminate the pharmacy agreement with no liability for future damages:

3. A fee \$100,000 if the damages for past actions are less than \$15 million in principal. (Total fee of \$400,000)
4. A fee of \$200,000 if the damages are less than \$5 million in principal. (Total fee of \$500,000)
5. A fee of \$300,000 if the damages are zero. (Total fee of \$600,000)

Further, Lifemark will pay you \$100,000 as a severance fee in the event that Judge Porteous withdraws or if the case settles prior to trial. This would result in a total of \$200,000 (\$100,000 retainer plus \$100,000) if the case settles or if Judge Porteous ceases to be our judge. This is to satisfy your concern that involvement in

FRILLOT, PARTRIDGE, KOHNKE & CLEMENTS, L.C.

Don C. Gardner, Esq.
February 18, 1997
Page 2

this time consuming case will harm your present practice. As you explained, if the trial is continued beyond June because Judge Porteous withdraws and gives the case to a new judge, you will not be able to remain involved. Also, Lifemark wants to give you some incentive to be involved, even if the case settles.

To reiterate, Lifemark is willing to offer you an outcome determinative fee. You would receive the following fees based upon the results described:

1. \$200,000 if Judge Porteous withdraws, or if the case settles prior to trial (\$100,000 retainer plus \$100,000 severance).
2. \$300,000. This would be the minimum payable for any result that allows Lifemark to terminate the pharmacy agreement with no liability for future damages.
3. \$400,000 for a judgment or other result allowing Lifemark to terminate the contract with no liability for future damages, and with damages for past actions in an amount less than \$15 million in principal.
4. \$500,000. This sum would be payable if the damages are less than \$5 million in principal, and Lifemark is able to terminate the contract as described above.
5. \$600,000. This fee would be payable if the trial resulted in a judgment allowing Lifemark to terminate the contract and damages are zero.

I look forward to meeting with you later this week.

Very truly yours,

Joseph N. Mole

JNM:kcb

cc: Gary K. Ruff, Esq.

Gardner finally agreed to the retainer agreement as drafted by Mole, formally appeared in the case, and collected the promised \$100,000. (PF 233-34, 242.) Gardner thereafter paid \$30,000

of that \$100,000 to Tom Wilkinson, the attorney who recommended Gardner and the brother of the magistrate judge who was then-presiding over portions of the *Lifemark* case. (PF 226, 242.)

While Mole testified at trial that he believes that the Gardner retainer agreement was ethical, Louisiana legal and judicial ethics expert Dane Ciolino disagreed. (PF 236-38.) Professor Ciolino testified that, based on its language, the retainer agreement appears to contemplate involving Gardner in the *Lifemark* case in an effort to get Judge Porteous disqualified from the case, which would be “blatantly unethical.” (PF 237-38.) What all of the witnesses agreed upon was that no one had ever before seen such a contract – where an attorney was offered as much as \$200,000 to get a federal judge off a case. (PF 234-35) Yet, the House based its case for recusal on the testimony of the man who wrote that very contract, Joe Mole – the House’s witness concerning the propriety of judicial recusal.

Notwithstanding Mole’s and his client’s unethical attempt to “level the playing field” by bringing Gardner into the case and offering him a total of \$200,000 if Judge Porteous were to withdraw, it is undisputed that Judge Porteous remained in the case. The House has never explained, however, why – if he was as corrupt as the House alleges – Judge Porteous refused to withdraw from a case when doing so would have earned his close friend Gardner an additional \$100,000. The House has further failed to explain how Amato could influence Judge Porteous’s substantive ruling in the *Lifemark* case with a mere \$2,000 gift and other small “things of value” (described below), while his equally close friend Gardner couldn’t get him to withdraw from the case when there was \$100,000 on the line. Finally, the House offers no explanation for the glaring discrepancy that, while Mole has never been disciplined for his scheme with Gardner, Judge Porteous should be impeached and removed from office for not recusing himself, even though \$200,000 had been offered for that precise result.

6. Conduct Following the Lifemark Trial

The House's most serious Article I allegation concerns Judge Porteous's conduct following the 1997 trial in the *Lifemark* case. As set out in the Article, the House asserts that Judge Porteous "solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash." (PF 29; 111 Cong. Rec. S1645 (Mar. 17, 2010).) At trial, the House attempted to prove only the following "things of value": (1) a single gift in 1999 of approximately \$2,000 from his longtime friend Amato given to help pay for part of Judge Porteous's son's wedding; (2) miscellaneous expenses paid by Creely in association with Judge Porteous's son's 1999 bachelor party in Las Vegas; and (3) lunches. (HF 65-70, 78.) Critically, the House never alleged and provided no evidence at trial to suggest – much less prove – that any of these gifts ever had any actual influence on Judge Porteous's handling of the *Lifemark* case or of any of his other official duties.

1999 Fishing Trip. Although the House failed to prove numerous key facts at trial,³⁹ Judge Porteous has never disputed that in 1999 his long-time friend Jake Amato gave him approximately \$2,000 in order to help him pay expenses associated with his son Timothy's wedding. (See House Ex. 6(c) (Porteous Fifth Circuit Reply Memorandum, at 9).) This gift, admittedly, created a serious appearance of impropriety – an appearance for which Judge Porteous has already been severely punished.⁴⁰ That gift does not warrant impeachment, however, because it was not corrupt and did not constitute any actual impropriety.

³⁹ Indeed, the House was unable to establish: (1) when the fishing trip occurred, (2) whether any specific amount of money was ever requested, (3) how much money was given, (4) when that money was given, or (5) how that money was delivered. (PF 263, 266, 268-69, 277-80.) In fact, with regard to the date of the fishing trip, Amato testified at trial that the calendar the House Managers rely upon to establish the date was "miscopied." (PF 266.)

⁴⁰ In 2008, the Fifth Circuit Judicial Council publicly reprimanded Judge Porteous for this conduct and suspended him from hearing any cases for two years – the maximum disciplinary

Amato testified at trial that he gave this gift to Judge Porteous because they were longtime, close (indeed “best”) friends and because Jake Amato felt sorry for Judge Porteous. (PF 44, 273.) He explained that he and Judge Porteous were out on a fishing trip one night in 1999 when, after they had each had a few alcoholic drinks, Judge Porteous became more distraught than Amato had ever before seen him. (PF 267.) Judge Porteous confided in Amato that his son Timothy’s wedding was coming up and that he feared he would not be able to pay for some of the wedding-related expenses. (PF 267.) Sometime later, Jake Amato gave Judge Porteous \$2,000 to help cover some of the expenses for Timothy’s wedding. (PF 268.)

Amato testified unequivocally at trial that he did not give this money to Judge Porteous as a bribe, that it was not a kickback, and that he did not expect any *quid pro quo* of any kind from Judge Porteous in return. (PF 270-72.) With regard to the *Lifemark* case, the trial of which had ended two years earlier, he expressly stated that he did not think that the gift would influence Judge Porteous in any way. (PF 274.) Instead, Amato testified that he believed that Judge Porteous would rule on the *Lifemark* case exclusively on the basis of the facts and the law.⁴¹ (PF 274.)

Judge Porteous should not have asked for or accepted this gift from Amato. By doing so, he created the appearance of impropriety. However, the House has produced no evidence – none – that this gift constituted anything more than an appearance of impropriety. The Constitution

punishment allowed by law. (House Ex. 8 (Fifth Circuit Order and Public Reprimand, at 2, 4-5).)

⁴¹ The only testimony suggesting any connection whatsoever between this gift and the *Lifemark* case was extracted from Amato through repeated, leading questioning by the House Managers. (PF 275.) In fact, during his direct examination at trial by the House, Amato twice testified “no,” to the question of whether his financial interest in earning legal fees as a result of the outcome of the *Lifemark* case influenced his decision to give Judge Porteous this gift. (*Id.*) It was only after being pressed repeatedly by House Manager Schiff that Amato changed his answer to that question. (*Id.*)

requires, and this body should demand, proof of more than a mere appearance of impropriety before removing a federal judge.

Timothy Porteous's May 1999 Bachelor Party. The House alleges that Judge Porteous improperly received things of value from Amato and Creely during a May 1999 bachelor party trip held in Las Vegas for Judge Porteous's son Timothy. Here again, however, there is no allegation, and no proof, that such "things of value" were in any way corruptly given or corruptly received. Instead, such things created at most an appearance of impropriety, for which Judge Porteous has been punished, and which had no connection with or effect on Judge Porteous's exercise of official power, including his rulings in the *Lifemark* case.

Among the approximately 30 people who attended Timothy's Porteous's bachelor party were a number of Judge Porteous's close friends, including Creely and Gardner. (PF 281-82.) It is undisputed that Amato did not attend and that he has no idea how any of the costs associated with the trip were paid. (PF 282, 284.) Creely and Gardner attended the bachelor party because they were they were long-time friends of Timothy Porteous and of the Porteous family, not because they had occasionally appeared in court before Judge Porteous. (PF 283.)

During the bachelor party weekend, everyone on the trip went to a large, group dinner together. (PF 286.) At that dinner, Creely – like a number of people there that night – paid for a portion of the total meal (approximately \$450) to cover the cost of the food and drinks ordered by the four people at his table. (PF 286.) There is no evidence that Judge Porteous in fact knew that Creely did this or, more importantly, that it was done for any reason other than as a customary gift to a bridegroom at his bachelor party. Moreover, there is absolutely no evidence to support the allegation that Creely paid for part of the bachelor party dinner in order to

influence – in any way – Judge Porteous’s handling of the *Lifemark* case or any of his other official actions as a judge.

Beyond the dinner, the House has also alleged that Creely paid for Judge Porteous’s hotel room during the 1999 bachelor party. Creely testified at trial, however, that he does not recall making any such payment. (PF 287.) And here again, even if he had, there is no proof that that act – of one friend paying for another friend’s hotel room – was ever intended to or did influence Judge Porteous’s actions as a judge.

Finally, the House alleges that Creely paid \$200 for a lap dance at a strip club for Judge Porteous and another individual on the bachelor party trip. The only evidence to support this allegation is Creely’s testimony that he gave \$200 to a bouncer at a strip club in Las Vegas, but then promptly left the club to return to the hotel. (PF 288.) There is no evidence to show what the bouncer did with that money, and no evidence that Judge Porteous ever received a lap dance. (PF 288.) Moreover, Judge Porteous’s son Timothy expressly denied such a scene and the government could not produce a single witness to corroborate its salacious allegation. (PF 288.) Like so much else in the case, this unsupported allegation is offered solely to prejudice the Senate despite the fact that it has absolutely nothing to do with Judge Porteous’s official actions as a federal judge.

Lunches. The final “thing[] of value” that Judge Porteous allegedly received during the pendency of the *Lifemark* case from Amato and Creely were lunches. As discussed above, Judge Porteous regularly went to lunch with Amato, Creely, Gardner, and/or Levenson. This is something that he had done for decades with his life-long friends, and it did not change as a result of the *Lifemark* case. (PF 250.) Since the House failed to allege and cannot prove that

these lunches had any impact on Judge Porteous's handling of the *Lifemark* case or any of his other official duties, such lunches cannot serve as a basis for impeachment.

7. Ruling in the *Lifemark* Trial

The House's final Article I allegation is that Judge Porteous should be removed from office because he "ruled in favor of [Jake Amato's] client, Liljeberg." (PF 29; 111 Cong. Rec. S1645 (Mar. 17, 2010).) Like the allegation that Judge Porteous should be removed because he denied Lifemark's recusal motion, this allegation – if accepted by the Senate – would create dangerous precedent permitting federal judges to be removed on the basis of their substantive judicial decisions. The Senate should never undermine the independence of the federal judiciary by impeaching a federal judge because of a controversial or unpopular ruling.

Moreover, the fact that Mole, and later the Fifth Circuit, disagreed with Judge Porteous's decision in the *Lifemark* case is of no moment. The *Lifemark* case was a hotly contested piece of complex litigation with vigorous advocates on all sides. It is hardly surprising, therefore, that a ruling one way or the other would be attacked by the losing side – such is the fate of most litigation. Moreover, the fact – confirmed by Lifemark's attorneys Mole and Gardner – that Lifemark made a series of settlement offers ranging from \$18 million to just under \$30 million attests to the merits of the Liljebergs' claims. (PF 248.) Indeed, Amato testified at trial that he believed – and still believes today – that Judge Porteous's ruling in the *Lifemark* case was "absolutely correct" and that the Fifth Circuit panel's decision overturning Judge Porteous was "wrong, wrong, wrong." (PF 262.)

F. Conclusion

Judge Porteous has acknowledged that his disclosures at the *Lifemark* recusal hearing could have and should have been more fulsome. He has likewise acknowledged that the appearance of impropriety that resulted from his socializing with and later accepting a cash gift

from a lifelong friend involved in the *Lifemark* case is serious, and that he did not do enough to address it. Judge Porteous has already been severely punished for those failings, however. It would be a gross overreaction for this body now to remove Judge Porteous on the basis of an appearance of impropriety for which he has already been punished and which, importantly, could have been completely resolved by more disclosure or by recusal. Given how routine recusal controversies are,⁴² it would do great injury to the Constitution – and its intentionally exacting impeachment standard – to allow impeachment on the basis of an appearance of impropriety and the denial of recusal motion. Indeed, absent bribery or some other serious actual impropriety – neither of which is alleged here – mere failure to recuse has never before been proffered by the House or accepted by the Senate as grounds for the impeachment of a federal judge.

At most, Article I alleges that Judge Porteous, through his interactions with Jake Amato and Bob Creely, created an appearance of impropriety. Since there is no evidence of any actual impropriety, and Judge Porteous has already been punished – severely – by the Fifth Circuit, the Senate should vote to acquit on Article I. Any other vote would unnecessarily and unwisely expand the scope of impeachable offenses, as well as improperly and irrevocably undermine the independence of the federal judiciary.

⁴² Recusal issues regularly affect judges at all levels of our judicial system, from Supreme Court justices like Antonin Scalia to municipal court judges. *See, e.g.*, Gina Holland, *Justice Scalia: No Apologies for Hunting Trip with Cheney*, WASH. POST, Feb. 11, 2005; *In re Sybil M. Elias, Judge of the Mun. Court*, No. ACJC 2007-096 (N.J. Adv. Comm. on Jud. Conduct, May 19, 2008) (censuring municipal court judge for conflicts of interest in disposing of traffic ticket).

III. Article II

As previously discussed, the bulk of the allegations in Article II relate to events that allegedly occurred prior to the time Judge Porteous assumed his federal judgeship. If, however, the Senate concludes contrary to substantial contrary precedent, to consider pre-federal conduct as the basis for conviction, the Senate must turn to the substance of the allegations in Article II.

Article II alleges three types of improper activity by Judge Porteous: (1) that he took official actions in exchange for things of value he received from Louis and Lori Marcotte; (2) that he used the power and prestige of his office to assist the Marcottes in forming relationships, and (3) that he knew that Louis Marcotte made false statements to the FBI regarding the FBI's background check of Judge Porteous. (111 Cong. Rec. S1645 (Mar. 17, 2010), hereinafter "Article II", *see also* PF 290-93.)

The House has failed to prove these allegations, under any reasonable standard of proof, and the allegations are false. As to the first, it is true that the Marcottes occasionally purchased meals and other small gifts for Judge Porteous while he was a state court judge. Such gifts were neither illegal nor improper under state ethical principles in force at the time. Furthermore, the House produced no evidence linking anything of value Judge Porteous received from the Marcottes and any official action he took to their benefit or on their behalf. In fact, both of the Marcottes admitted that they never had a conversation with Judge Porteous where they discussed or demanded that Judge Porteous take official actions on their behalf or to their benefit in exchange for anything of value. (PF 297.) In terms of the official actions Judge Porteous is alleged to have taken, the House concedes that it cannot point to any specific bond or action related to a bond in which Judge Porteous acted improperly or for the benefit of the Marcottes.

Without any evidence that the Judge Porteous signed any improper bonds, the House has fallen back on generalized and unsubstantiated allegations of improper conduct that are not

specifically enumerated in the article itself. Most notably, the evidentiary hearing showed that the allegation that Judge Porteous took improper judicial action (in the form of set-asides and an expungement) with regard to two individuals associated with the Marcottes is completely untrue. Witnesses established that Judge Porteous acted entirely within state law and accepted practice in those two cases.

As to the second allegation of improper activity – that Judge Porteous improperly used the power and prestige of the federal bench – the House concedes it has no direct evidence of abuse and instead attempts to stretch a handful of lunches and a conversation at a cocktail reception into a sinister plot of corruption. The House argues that Judge Porteous's mere attendance at approximately six social gatherings over a ten year period with certain state court judges and the Marcottes rises to the level of an impeachable offence, on par with treason. In the absence of any proof of a *quid pro quo* or any inappropriate actions by Judge Porteous, the House contends that the Senate should remove a federal judge because he continued to socialize with the Marcottes.

The third allegation – that Judge Porteous knew that Louis Marcotte made false statements to the FBI – is repeated word for word in Article IV and is dealt with in Section V. B.

Before responding to these allegations, it is important to note what Article II does not allege and what the House has conceded Judge Porteous did not do:

- Judge Porteous never asked for or received cash from the Marcottes or their company, Bail Bonds Unlimited. (PF 302.) The Marcottes conceded that they made improper cash payments (up to \$10,000 in envelopes) to approximately three dozen other state court judges, several of whom are still on the bench today, but not to Judge Porteous. (PF 296, 580-86.)
- Judge Porteous never asked for nor received from the Marcottes a percentage of the money the Marcottes received for bonds signed by Judge Porteous. (PF 295-96.)
- Judge Porteous never asked for nor received a campaign contribution from the Marcottes or Bail Bonds Unlimited. (PF 303.)

- Judge Porteous did not ask or instruct Louis Marcotte to lie to the FBI on his behalf. (PF 294.)

These are striking admissions that completely undercut the allegations in Article II. The case the House seeks to establish is that, since both the Marcottes and certain other judges acted corruptly, and since Judge Porteous had dealings with the Marcottes, his dealings also must have been corrupt. This is guilt by association, not evidence of wrongdoing. The House has produced no evidence that Judge Porteous demanded or received cash payments similar to what some other judges were accused of receiving. The House has not shown that Judge Porteous, at any time during his alleged 10 year relationship with the Marcottes, demanded or received anything of value in exchange for actions he took on the Marcottes' behalf. The House simply failed to offer any substantive evidence of Judge Porteous ever engaging in a corrupt scheme with the Marcottes. There was not a single email, letter, handwritten note, voicemail, surveillance tape, or other piece of evidence evidencing such behavior. This absence exists despite the fact that the FBI investigated the Gretna courthouse for years and the Justice Department's Public Integrity Section opened up their own investigation of Judge Porteous.

Without such substantive support, the House is forced to rely upon the testimony of the House's star witnesses – all convicted felons – and particularly on the testimony of Louis and Lori Marcotte. Louis Marcotte is convicted felon, having pled guilty to a corruption scheme and having spent eighteen months in jail. (PF 308.) He faced significantly more time for his crimes but cut a deal with the government that was predicated upon his continued cooperation with government authorities. (PF 309, House Ex. 71(b).) He admitted during the evidentiary hearings that he had previously lied to the FBI and federal investigators on several occasions, going as far as to say "I wouldn't have had any reason to tell the truth." (PF 306.) He also testified that he previously signed a declaration, under oath, relating to his relationship with Judge Porteous,

which he now claims was “completely false.” (PF 307.) Similarly, Lori Marcotte is also a convicted felon who made a deal with the government which allowed her to avoid jail time, having been sentenced to three years probation and six months of home confinement. (PF 310.) Like her brother, Lori Marcotte’s plea agreement was predicated upon her cooperation with government authorities. (PF 311, House Ex. 73(a).)

The House has all but conceded the Marcottes’ lack of credibility, telling Judge Bodenheimer, during the run-up to the evidentiary hearings, that “the strength of [his] testimony was to bolster Louis Marcotte, because they, meaning the House attorneys, had no faith in his [Louis Marcotte’s] credibility by itself, and they wanted [Bodenheimer] to bolster it.” (PF 312.)⁴³ In short, testimony of the Marcottes is the only direct evidence that the House presented in support of Article II. Even with the pressure of their plea agreements, however, the Marcottes denied any bribe had been given Judge Porteous or that he issued any improper official order or signed any improper bond.

A. Judge Porteous Never Took Any Judicial Action for the Purpose of Benefitting the Marcottes

Article II alleges that Judge Porteous acted for or on behalf of the Marcottes by: (1) improperly setting, reducing, or splitting bonds, and (2) improperly setting aside or expunging

⁴³ Moreover, the evidentiary hearing proved that the House Managers overstated and exaggerated the relationship between the Marcottes and Judge Porteous. For example, the text of Article II states that the Marcottes’ relationship with Judge Porteous began “in or about the late 1980s.” Yet, under cross-examination, Louis Marcotte admitted that he did not meet Judge Porteous until sometime in the 1990s and was not even heavily involved in bond matters prior to 1991. (PF 315-17.) Lori Marcotte conceded that she only began working in the bail bonding industry in 1988 or 1989 and that prior to 1993, had no direct or close interaction with Judge Porteous. (PF 318-22.) Louis Marcotte similarly agreed that he and his sister did not have a close relationship with Judge Porteous prior to September 1993. (PF 319.) Thus, it appears that the working relationship between Judge Porteous and the Marcottes existed only between September 1993 and October 1994 (when Judge Porteous left for the federal bench), a period of no more than thirteen months. (PF 323.)

the felony convictions of two individuals tangentially associated with the Marcottes.⁴⁴ Both allegations are demonstrably false.

1. There is no evidence that Judge Porteous ever improperly set, reduced, and/or split a bond

In its pre-trial statement, the House stipulates that the House does “not allege that Judge Porteous set any particular bond ‘too high’ or ‘too low.’” (PF 298.) In line with this stipulation, the House never presented evidence that Judge Porteous improperly set, reduced, split, or altered any bond – whether for the Marcottes or anyone else. This is despite the fact that the House had full access to:

- each and every bond Judge Porteous set while he was a state court judge;
- witnesses to the setting of these bonds, such as Louis and Lori Marcotte, Aubrey Wallace, Jeff Duhon, Darcy Griffin, Rhonda Danos, and others;
- the records maintained by or seized from the Marcottes and their business, Bail Bonds Unlimited; and
- the materials obtained by the FBI and the Department of Justice in their investigation of the Marcottes and various judges in the 24th Judicial District Court (“JDC”).

In the absence of such direct evidence of allegedly improper activity by Judge Porteous, the House instead asserts broad generalizations and vague allegations regarding Judge Porteous’s bond-setting and his relationship with the Marcottes, including:

- The Marcottes would go to Judge Porteous in cases where the bonds were set too high (and thus they needed, in effect, a bond reduction) or when the bonds had not been set at all and he was asked to set bond as an initial matter. (HF 113.)

⁴⁴ The relevant text of Article II reads:

Judge Porteous solicited and accepted numerous things of value . . . while at the same time taking official actions that benefitted the Marcottes. These official actions by Judge Porteous included, while on the State bench, setting, reducing, and splitting bonds as requested by the Marcottes, and improperly setting aside or expunging felony convictions for two Marcotte employees (in one case after Judge Porteous had been confirmed by the Senate but before being sworn in as a Federal judge).

- When the Marcottes would approach Judge Porteous about setting bonds, they would ask Judge Porteous to set a bond that would maximize their profits . . . On occasion, the Marcottes would be very specific as to how much a prisoner could afford. (HF 114.)
- Judge Porteous would set bonds for the Marcottes that other judges did not want to handle. (HF 116.)
- Judge Porteous would spend extra effort to figure out ways to set or reduce bonds in order to help the Marcottes. He would be inventive and take risks in “splitting bonds. (HF 117.)”⁴⁵

At the same time, the House misleads the Senate by ignoring the nature and process for the use of commercial bonds in Jefferson Parish, Louisiana between 1984 and 1994 (the time in which Judge Porteous served on the state bench). Once placed in that context, even if Judge Porteous had acted as alleged, his conduct was neither sinister nor corrupt.

As a result of the severe problems Jefferson Parish was facing at the time in regards to its prison, which included a Court order demanding prisoner be released when the jail reached a certain level, and an increase in crime in the jurisdiction, as well as Judge Porteous’s significant experience with criminal law matters, he became a leading advocate for the use of commercial bonds. Given the fact that the Marcottes maintained a monopoly on the local bond market, it was inevitable, and entirely proper, that the Marcottes and Judge Porteous would work together on bond issues.

a. How Bail Bonds Work

In a normal case, when an individual is criminally charged, the court and law enforcement authorities must either incarcerate or release the individual pending final disposition of the case. There are a number of ways to release a criminal defendant pending trial or

⁴⁵ The House also alleges that “an inherent and inevitable consequence of Judge Porteous’s willingness to set bonds at levels requested by the Marcottes was that some families would suffer financially by being charged the very maximum they could afford, instead of the amount that was necessary to secure a member’s appearance in court.” (HF 119.) The House fails to cite any authority, testimony or evidence for this proposed finding of fact, and it should be disregarded.

sentencing: (1) Surety or Commercial Bond – where the defendant is lent bail money by a bail bond dealer; (2) Cash Bail – where the defendant posts his own cash with the Court or in other occasions posts property such as his or a relative's house as bond; and (3) Release on Personal Recognizance – where there is no financial bond but the defendant promises to reappear at court for trial or sentencing. (Porteous Ex. 1134, DEF02605.) In some situations, judges would “split” a bond:

Split Bonds

During the House proceedings, the term “split” bonds was used repeatedly, without sufficient explanation or context, to suggest it was a vehicle invented by Judge Porteous and the Marcottes to accomplish sinister motives.

As an example, when a judge splits a bond, a portion of the bond is designated a personal bond and the remainder is a surety bond, backed by an asset, such as the equity in an individual's house (often the residence of the parents of the arrestee). For example, a judge might split a \$100,000 bond, requiring a \$50,000 personal bond – meaning the arrestee must post 10% of the \$50,000 – and then requiring the arrestee to identify and post a asset, such as the equity in a residence for the remaining half (\$50,000) of the initial \$100,000 bond. As a result, the arrestee must only post \$5,000 in cash as opposed to \$10,000 to secure his release. The Court, however, has also increased the likelihood that the arrestee will return by including a secured asset in the bond calculation.

As Louis Marcotte admitted, Judge Porteous did not invent the concept of splitting bonds and was not the first judge on the 24th JDC to split bonds. (PF 374-75.) In fact, according to Judge Bodenheimer, every single judge on the 24th JDC split bonds. (PF 381.)

Many judges used split bonds often, believing them to be a useful approach in dealing with artificially high bonds. (PF 373, 376, 378-79.) Former District Attorney John Mamoulides said there was “absolutely” nothing wrong with the concept of splitting bonds. (PF 380.)

In the early to mid 1990s, the Marcottes enjoyed a monopoly over the bond market in Gretna, Louisiana, controlling between ninety and ninety-five percent of the total market share.⁴⁶

⁴⁶ The House argues that “Judge Porteous knew that by setting bonds for the Marcottes, he was helping them make money.” (HF 118.) While possibly true (but unproven by the House), this does not describe any form of impropriety or corruption. Every commercial bail bondsman is in business to make money. Because the Marcottes were handling 90-95% of the bonds in the 24th JDC, whenever *any* judge set a bond in the Parish, they probably were helping the Marcottes

(PF 367.) Every witness asked about this business, including the Marcottes, Rafael Goyeneche, Judge Bodenheimer, Robert Rees, and Rhonda Danos testified to this fact. (PF 367.)⁴⁷ As a result, any judge who needed to issue a bond (a common and frequent duty) as a practical matter had to do so with the Marcottes. (PF 570, Judge Bodenheimer stating “since the Marcottes were doing the lion’s share of the bonds, you did have to deal with them.”)

Commercial bonds are an effective way for judges to get defendants to appear for trial. Studies have shown that “defendants released on surety bonds are 28% less likely to fail to appear than similar defendants released on their own recognizance.” (PF 337.) Studies focused specifically on Jefferson Parish showed similar findings. (PF 338.) Various witnesses who testified in the evidentiary proceedings agreed with these conclusions. (PF 346.) John Mamoulides, who served as the District Attorney in Jefferson Parish between 1972 and 1996, agreed that those released on surety bonds were more likely to re-appear on their scheduled court date than those released on their own recognizance. (PF 335, 337.) Moreover, the higher a bond was set, the more likely it was for an individual to return for his or her scheduled court date. (PF 347.)

b. Due to a “Strict” Court Order Regarding Jail Overcrowding, Arrestees
Were Often Summarily Released

In the late 1980s and throughout the 1990s, Jefferson Parish was under a “strict” court order to prevent overcrowding that required mandatory release of prisoners after the jail

make money. The House implicitly concedes this point. (See HF 88, stating “every time a judge set a bond at the Marcotte’s request, the Marcottes made money.”)

⁴⁷ It should be noted that, in 2002 Judge Bodenheimer was charged and ultimately pled guilty to several different violations of federal law, including plotting to frame an FBI informant on a drug charge, scheming to fix a millionaire’s child-custody case and admitted to accepting gifts from a bail bondsman in exchange for business assistance.

population reached a certain level. (PF 345.) For example, in September 1994, the Jefferson Parish jail was ordered to cap the total number of prisoners at 700, meaning that once that level was reached, each time a new offender was admitted to the jail, another was required to be released. (PF 353.) Witnesses testified that “the numbers were astronomical of the people who were released for overcrowding.” (PF 352.) John Mamoulides, the Jefferson Parish District Attorney during this time frame, stated that Jefferson Parish “had a serious overcrowding problem.” (PF 348.)

Moreover, the jail overcrowding issue escalated during the same time period. For example, there were 22% more reported crimes and 76% more criminal cases filed in the 24th JDC in 1992 than in 1982. (PF 354.) The majority of these crimes were for non-minor offenses – in April 1994, 56% of the Jefferson Parish jail’s inmates were rated Code-6, the designation for arrestees who were dangerous repeat and/or violent offenders. (PF 355.) As one witness testified, “sometimes there were people as bad as multiple burglars or armed robbers that were released on strictly overcrowding.” (PF 350.)

Judge Porteous, already viewed as one of the most experienced judges regarding criminal matters given his prior work as a prosecutor, became a leader in trying to find a solution to the overcrowding problems. (PF 334, 351.) As a result, Judge Porteous often publicly spoke with lawyers and judges about the value of commercial bonds. (PF 333.) Other judges considered Judge Porteous to be a “strong advocate” for the use bonds. (PF 349.) Given his leadership and public role, Judge Porteous was invited to serve as a speaker at a number of bail bonds conventions regarding the value of commercial bonds. (PF 339, 341-43.)

c. The 24th JDC Designed a Rotating Duty Judge System to Deal with the Growing Demands on Judges; Although in Practice, Many Judges Failed to Fulfill Their Duties

Starting in 1991, in response to the growing demands on the local judges, the Jefferson Parish Court designed a rotation system, whereby individual 24th JDC judges would each serve as the “magistrate” or “duty” judge for a given week. (PF 357.) The assigned magistrate or duty judge would be the judge primarily responsible for reviewing and ruling on warrants and bonds during his or her assigned week. (PF 357.)

In practice, many judges within the 24th JDC disliked magistrate duty and gained a reputation for being unavailable when they were supposed to be available, often at odd hours, to perform these responsibilities. (PF 358.) Lori Marcotte admitted that there were a number of judges that “didn’t like to do bonds.” (PF 359.) In fact, Darcy Griffin, a court employee, who worked for Judge Porteous as his criminal minute clerk from 1992-1994, worked for Judges Tiemann of the 24th JDC, and now works as the criminal clerk supervisor, stated that “I would say that none of them really enjoyed it” and that some judges “absolutely” did not enjoy serving as magistrate judge. (PF 361.) Judge Ronald Bodenheimer, who served as a prosecutor in the 24th JDC and then served as one of the judges testified similarly, stating “Most of the judges didn’t like that duty ... I don’t think any of them liked it.... There were some who did it, some who were diligent about doing it, and some who just didn’t do it.” (PF 360.) Judge Bodenheimer further stated that “some judges wouldn’t answer their phone, not even if another judge called, they wouldn’t answer their home phone, they wouldn’t answer the magistrate phone, they wouldn’t answer anything, and they just basically disappeared when it was their duty week.” (PF 362.)

As a result of the difficulty with certain magistrate judges or the unavailability of other judges, the Marcottes (and other bail bondsmen) would often seek out other judges – often going

chamber to chamber – to review, set, or split bonds. (PF 372.) Louis Marcotte testified that he would approach “most of” the judges and request their assistance regarding bonds. (PF 369.) This included, but was not limited to, Judge Porteous, who as previously discussed, was considered one of the more experienced judges regarding criminal matters and bond issues. (PF 390.)

Similarly, prosecutors would also seek out judges who were not designated as magistrate judges to approve certain requests. (PF 363.) Former District Attorney John Mamoulides testified that the way in which bonds were handled was very similar to the way in which warrant requests were handled. (PF 364.) Mamoulides stated that “some of the judges would not be available to the detectives who would have to go find another judge. . . . Any district judge could sign a warrant or search warrant.” (PF 365.) Mamoulides went further, stating that the:

detectives knew which judges were more able to accommodate them. Yeah go see Judge such and such, he’s here, across the river, this one is over here. They knew the judges and they could call and say Judge, I can’t find the assigned judge, would you let me come talk to you about a warrant, a search warrant or whatever it’s going to be.

(PF 364.) In short, detectives knew that “some judges were simply more available” and the detectives would go to those judges more often. (PF 366.)

d. Judge Porteous Employed A Standard Operating Procedure for Bond Requests

Once approached by the Marcottes or any bonding agent regarding a bond, Judge Porteous employed a standard operating procedure whereby he would have a member of his staff call the jail and obtain information related to the criminal background of the arrestee. (PF 382.) On occasion, Judge Porteous would make these calls to the jail on his own, rather than have his staff perform the duty. (PF 383.) Judge Porteous would also seek out information from a relevant detective, police officer, or prosecutor before he set, reduced, or split a bond. (PF 384.)

As a practice, Judge Porteous never would agree to a bond solely on the basis of the information provided to him by the Marcottes. (PF 385.) Various witnesses, including the Marcottes, confirmed that he would not take their word for the merits or underlying facts of a bond -- and would often speak to prison officials and prosecutors on whether to grant a bond.

This was a practice shared by other state court judges. According to Darcy Griffin, Judge Porteous's practice of locating and confirming background information on an arrestee mirrored that of the other judges she worked for. (PF 386, 388.)

After locating and/or confirming the background information from an arrestee, Judge Porteous would consider the bond request, whether it be to set a bond at a certain level, reduce a bond to make it affordable for the arrestee or the arrestee's family, or split the bond.

Between 1984 and 1994, in the 24th JDC, there was no guidebook for judges in regards to how much any given bond should be set for and that decision was left largely to the discretion of each judge. (PF 371, *see also* HF 113, stating "Judge Porteous had great discretion in setting bonds.") That being said, if the District Attorney's office objected to the setting, reducing, or splitting of a bond, a judge (including Judge Porteous) would typically follow the recommendation of the district attorney's office. (PF 370.)

e. There is No Evidence to Support the House's Implied Claims
Regarding Improper Bond Setting, Reducing, or Splitting

The House argues that "when the Marcottes would approach Judge Porteous about setting bonds, they would ask Judge Porteous to set a bond that would maximize their profits, that is at the greatest amount the prisoner could afford." (HF 114.) There is no evidence and there was no testimony that the Marcottes ever discussed their attempt to maximize profits with Judge Porteous. To the contrary, witnesses testified that these bonds were a standard practice for all

judges and that Judge Porteous spoke publicly and nationally about the need to use such bonds as a critical part of managing a court docket, particularly during a period of overcrowding.

Instead, the Marcottes would tell Judge Porteous what level of bond the arrestee could afford. With the jail overcrowding remaining a primary concern, and Judge Porteous's belief in the efficacy of commercial bonds, such information was obviously important and useful in setting bonds. If Judge Porteous set the bond too high and the defendant could not afford the bond, the arrestee would remain imprisoned, exacerbating the overcrowding problems and necessarily making it more likely that that prisoner or another arrestee would be released without having posted a commercial bond. This, in turn, made it less likely that that arrestee would reappear in Court for trial.⁴⁸ As such, the Marcotte's legitimate goal of making a profit would have been aligned with Judge Porteous's legitimate goal of dealing with mandatory court orders due to overcrowding.

Nonetheless, the House suggests that Judge Porteous's only goal in setting bonds, handled by the Marcottes, must have been a corrupt one. There is no evidence to support such a bizarre presumption. Even after years of investigation by the FBI and a full evidentiary hearing, the House has not presented any evidence of any specific or individual bond being improperly set, reduced, split or altered by Judge Porteous.⁴⁹ (PF 300.) In fact, as noted earlier, the House

⁴⁸ If Judge Porteous set the bond too low, the defendant would not have the necessary incentive to return to Court. Even assuming Judge Porteous did, in fact, set the bonds at the highest amount an arrestee could afford (which is unsupported by any documentary evidence), there is a legitimate reason why the Court would want to do so – the higher the amount the less likely the arrestee would skip bail.

⁴⁹ Similarly, there is no evidence, other than the self-serving testimony of Louis Marcotte, to substantiate the House's claim that Judge Porteous would be "more apt" to do things for the Marcottes after he received things of value from them. (HF 121, 124.) For example, the House could have attempted to show Judge Porteous's alleged receipt of the things of value and then shown the bonds set, reduced, or split that followed such receipt. The defense understands that the clerk's office maintains, in an electronic format, all bond forms between 1984 and 1994, and

has conceded that it does not even allege that Judge Porteous set any particular bond “too high” or “too low.” (PF 298.) The Marcottes admitted that Judge Porteous rejected or turned down certain bonds that the Marcottes requested he set or reduce. (PF 391-92.) On other occasions, Judge Porteous would alter or adjust the amount of the bond outside of the figure requested by the Marcottes. (PF 392.) These facts are plainly inconsistent with the House’s theory that Judge Porteous would simply set bonds at whatever level maximized the Marcottes’ profit. Further, Louis Marcotte testified, and the House concedes, that Judge Porteous only reduced, set, or split bonds handled by the Marcottes, as opposed to **raising** the bond level. (PF 389, HF 113.) If Judge Porteous were truly attempting to maximize the profits of the Marcottes, he would have had to increase the required bond when the Marcottes learned that a particular arrestee could afford a higher bond. The evidence shows this never occurred.

f. The House’s “Floodgates” Theory Has Been Completely Disproven

The House appears to have abandoned their “floodgates” theory, which was a central part of their presentation in securing the impeachment. In their report, provided to members of the House of Representatives before the final vote on impeachment, the House stated “that when Judge Porteous was about to leave the State bench, Marcotte used him to ‘open the floodgates’ in terms of setting bonds.” (House Report at 79.) As shown graphically to the Senate Committee (see below), documentary evidence, analyzed by the defense and produced to the Senate, has shown that Judge Porteous signed only twenty-nine bonds in his last month on the state bench, only two bonds in his last week on the state bench, and only one bond in his last day on the state bench. (PF 400-403.)

could have produced the same to the House upon a request or subpoena. The House’s failure to identify such linkages is a telling sign of the weakness of their assertion.

"FLOODGATES THEORY"

OCTOBER 1994						
How many bonds would you estimate were signed in a given day by judges in the 24th JDC, if you had to estimate? <i>Louis Marcotte: "It seems like anywhere between 1 and 10, depending on what day."</i>			How many bonds in an average day, from the '92 to '94 period, (would) you all generally move in the district? <i>Lori Marcotte: "It's more than a dozen, less than two dozen!"</i>			
		2 Bonds 1. \$4,000 (split) 2. \$10,000				1 Bond 1. \$5,000
	4 Bonds 1. \$5,000 (split) 2. \$5,000 (split) 3. \$1,500 4. \$2,000 (split)	5 Bonds 1. \$16,000 (split) 2. \$4,000 (split) 3. \$5,000 4. \$10,000 (split) 5. \$30,000 (split)	3 Bonds 1. \$20,000 2. \$45,000 3. \$35,100	5 Bonds 1. \$5,000 2. \$6,000 3. \$17,500 4. \$2,000 5. \$2,500		
		2 Bonds 1. \$5,000 2. \$1,500	4 Bonds \$5,000 (split) \$5,000 (split) \$1,500 \$2,000 (split)			
1 Bond 1. \$1,300 (split)			1 Bond 1. \$4,000 (split)	1 Bond 1. \$5,000	Judge Porteous sworn into Federal bench	

Numerous witnesses, including the Marcottes, testified that the amount of bonds signed by Judge Porteous in his last month, week, and days before joining the federal bench, were not high, and in some cases, seemed low, given the demands on state court judges at the time. Lori Marcotte testified that "29 bonds in a . . . 31 day month . . . is pretty normal." (PF 398.) Darcy Griffin testified that if Judge Porteous only signed 29 bonds in a single month, that would be a "low" number. (PF 399.) Louis Marcotte had previously testified that he would have between 1 and 10 bonds move through the Courthouse in a given day in 1993 or 1994. (PF 397.)

As further evidence that Judge Porteous's bond-setting activity in his last month on the state bench were entirely consistent with his behavior in prior years -- including before he knew the Marcottes -- the defense located all of the bond forms signed by Judge Porteous for a chosen

year (1986). In 1986, more than 3,200 bonds passed through the Gretna Courthouse and were handled by the 15 judges assigned to the Courthouse at the time. (PF 393, Porteous Ex. Porteous Ex. 2001.) In September 1986, Judge Porteous signed or approved 51 bonds. (PF 394, Porteous Ex. 2002.) In February 1986, Judge Porteous signed or approved 41 bonds. (PF 395, Porteous Ex. 395.) In December 1986, Judge Porteous signed or approved 29 bonds. (PF 396, Porteous Ex. 2004.) In each of these months, reviewed by the defense, Judge Porteous signed the same number, or substantially more bonds than in the month the House claims Judge Porteous opened up the “floodgates” for the Marcottes.

Faced with this overwhelming evidence, the House, in its proposed findings of fact, amazingly claimed that “the record does not establish that these are all the bonds that Judge Porteous set in that time period [October 1994], as opposed to those being simply some of the bonds that the House was able to locate that corroborate that Judge Porteous set bonds for the Marcottes.” (HF 185.) The House suggested this illogical and unsupported conclusion of fact despite the fact that House investigators (1) had located and produced the bond forms related to October 1994, (2) marked the same as an exhibit before the House and the Senate, and (3) then explicitly claimed that “Marcotte’s testimony [regarding the floodgates theory] has been corroborated by [the same] series of bond forms.” Thus, the House has conceded the fallacy of its previous argument and now seeks to shift the burden of proof to the defense to disprove the unsupported “floodgates” claim. But all the evidence – the House’s evidence included – shows the “floodgates” theory is nothing but a fantasy.

2. Judge Porteous Acted Appropriately in Expunging Jeff Duhon’s Record and in Setting Aside Aubrey Wallace’s Conviction

Article II claims that Judge Porteous “improperly set[] aside or expung[ed] felony convictions for two Marcotte employees (in one case after Judge Porteous had been confirmed

by the Senate but before being sworn in as a Federal judge).” The two individuals at issue are Jeff Duhon and Aubrey Wallace. In light of the evidence presented, however, the House appears to have retreated on its claim that Duhon’s expungement was improper, now (through its proposed findings of fact) only claiming that it was “noteworthy.” Once again, a critical allegation used to secure the impeachment from the House of Representatives was proven to be completely untrue at the evidentiary hearing.

In advancing these allegations, the House apparently failed either to examine the context of the judicial actions involved or to consider the underlying law in Louisiana. Judge Porteous’ actions toward Duhon and Wallace followed appropriate precedent, adhered to local practice, and took place in open judicial proceedings where the government, represented by an Assistant District Attorney, raised no objection. Other than self-serving speculation by Louis Marcotte, the House could adduce no evidence or testimony that indicated that Judge Porteous took these official actions as a favor to Louis Marcotte or in exchange for the receipt of anything of value. Indeed, the House Managers never revealed to the members of the House that Judge Porteous took action in these cases after similar or predicate decisions from other judges had already been made – facts presented before the Senate Impeachment Committee by the defense in both documentary and testimonial evidence. Notably, the House did not present a single witness to refute this evidence or to support its earlier allegations. Once again, the House seeks to convict Judge Porteous on the basis of his judicial decisions, as opposed to any evidence that Judge Porteous acted pursuant to improper motives or as the result of some quid pro quo.

a. Jeffrey Duhon Expungement

The House notes that Judge Porteous “expunged the burglary conviction of Jeffrey Duhon” and establishes that Duhon and Marcotte had a business relationship. (HF 125.) Tellingly, the House, in its proposed findings of fact, does not allege, and cannot point to any

fact that shows that the expungement was improper, undeserved, or unethical. Instead, they simply state that “Judge Porteous’s action in expunging Duhon’s conviction was **noteworthy** because Duhon had been sentenced by Judge E.V. Richards, not Judge Porteous.” (HF 125.) (emphasis added) “Noteworthy” conduct is neither wrongful nor impeachable.

Analysis of the actual facts, as opposed to the House’s speculative fiction, reveals that Judge Porteous’s actions regarding the Duhon expungement, were entirely proper and consistent with the actions of other judges who looked at the same sets of issues.

On June 15, 1976, at the age of eighteen, Jeff Duhon was arrested in Case No. 76-1505. (PF 458.) Several months later, in September 1976, Duhon was arrested again for simple burglary. (PF 459.) Duhon subsequently pled guilty to the charge of simple burglary, served no jail time, and was sentenced to light probation that consisted only of his filling “out a form once a month and sending it to his probation officer.” (PF 460.)

Fifteen years later, in November 1991, attorney Philip O’Neill submitted a “Motion to Set Aside a Conviction and Dismiss Prosecution” for the same matter - Case No. 76-1505. (PF 461, Porteous Ex. 2006.) O’Neill also filed a “Motion to Expunge Record of the Arrest” on the same day. (PF 462, Porteous Ex. 2006.) Judge E.V. Richards, a state court judge on the 24th JDC, scheduled a show cause hearing on the motion to set aside for the following day – November 14, 1991. (PF 463, Porteous Ex. 2006.) On July 22, 1992, Judge Richards granted the motion to expunge Duhon’s record as it related to Case No. 76-1505. (PF 464, Porteous Ex. 2006.)

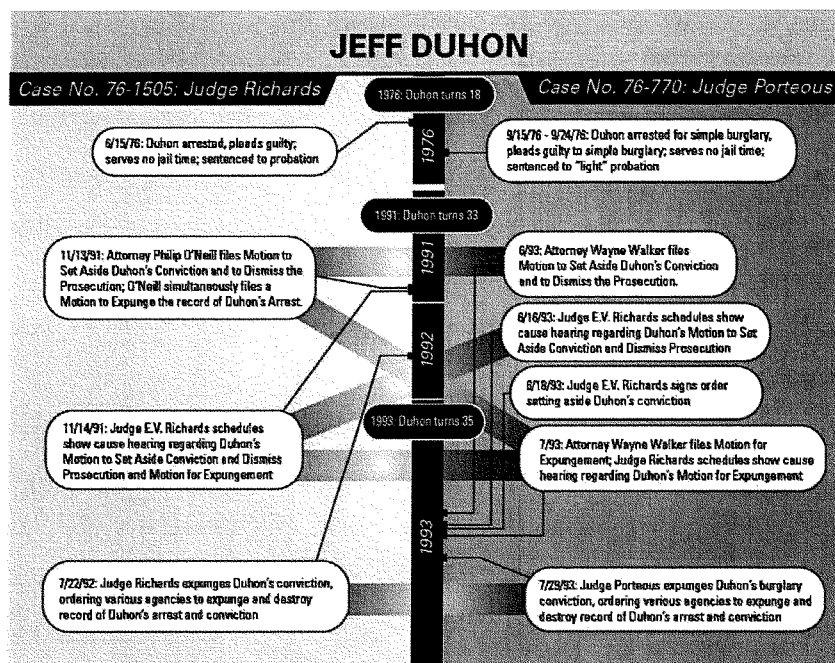
In June 1993, attorney Wayne Walker, on behalf of Duhon, filed a “Motion to Set Aside Conviction and Dismiss Prosecution” in Case No. 76-770. (PF 466, House Ex. 77(c).) The Motion stated that Duhon had successfully completed his period of probation, had not been

convicted of any other criminal offense and had no criminal charges pending. (PF 466, House Ex. 77(c).) The Motion was filed in Division B and again assigned to Judge E.V. Richards. (PF 466, House Ex. 77(c).) On June 16, 1993, Judge Richards entered a show cause order in Case No. 76-770 and set a hearing for the next day, June 17, 1993. (PF 467, House Ex. 77(c).) At or after the hearing, Judge Richards set aside Duhon's burglary conviction in Case No. 76-770.⁵⁰ (PF 468, House Ex. 77(c).)⁵¹

In July 1993, attorney Wayne Walker filed a Motion for Expungement, on behalf of Jeff Duhon, in Case No. 76-770. (PF 471, House Ex. 77(a).) On or about July 29, 1993, Judge Porteous, relying on the previous order of a set-aside issued by Judge Richards, ordered the expungement of Jeff Duhon's record as it related to Case No. 76-770. (PF 472, Stipulation 148.) The following chart helps explain the lineage of the two Duhon expungements and the similarities between the two cases.

⁵⁰ House "expert" Charles Geyh admitted that he was unaware that Judge Richards had been the judge who set aside Duhon's conviction. (PF 558.) Geyh also admitted that in forming his "expert" opinion that Judge Porteous's actions in this matter were improper, he assumed all evidence as alleged by the House was true, and did not watch or observe any of the testimony that preceded his own. Furthermore he admitted that he was not an expert in Louisiana legal ethics, and that before he rendered his "expert" opinion he had not read any Louisiana judicial misconduct opinions, had not reviewed any material from the Louisiana Judiciary Commission, and had never read the relevant state statutes related to Article II. (PF 555-57, 559.) Finally, although Geyh has previously stated publicly that he supported the conviction of Judge Porteous, he admitted that he was unaware that Judge Porteous had already been sanctioned by the Fifth Circuit. (PF 560.)

⁵¹ Louis Marcotte falsely testified that Judge Porteous was the judge who set aside Jeff Duhon's burglary conviction. (PF 469.) ("Marcotte: But at some point, he set aside the conviction - Q: Judge Porteous did? A: Yes, he did and expunged the record.") Marcotte later testified that he was unaware that it was Judge Richards who had set aside Duhon's conviction. (PF 469.)



At the time of the expungement, and according to the House's allegations and the testimony of the Marcottes: (1) the Marcottes had not yet begun having lunch with Judge Porteous (*see* PF 404 "Louis Marcotte testified that he began having lunch with Judge Porteous in 1994 or 1995."), (2) the Marcottes' alleged repairs to the Porteous home had not yet occurred (*see* HF 110, stating the alleged home repairs took place "in or about 1994"), (3) the alleged repairs to Porteous's car had not yet occurred (*see* PF 429, stating that the alleged car repairs only began after Duhon became a bail bondsman, which was some time after the expungement), and (4) the alleged trip to Las Vegas for which the Marcottes supposedly paid for Judge Porteous's travel expenses appears not yet to have occurred (*see* Louis Marcotte testimony,

stating “that the trip took place sometime in 1993 or 1994.”) As a result, if the House’s theory of the case is to be believed, Judge Porteous improperly expunged the record of Jeff Duhon – a serious favor according to the House – with nothing more than a hope of receiving future benefits from the Marcottes. Moreover, during his testimony, Louis Marcotte was not definitive on whether or not he even requested Judge Porteous’s assistance regarding the Duhon expungements. (PF 477: “Q: How certain are you that Judge Porteous expunged Jeff Duhon’s record at your request? A: Well, I was able to get him a bail license.”) Jeff Duhon admitted that he wasn’t even aware that it was Judge Porteous who signed the expungement order. (PF 476.)

Judge Porteous’s order expunging Duhon’s seventeen year old burglary conviction, committed when Duhon had just turned 18 years old, was in line with expungement practices at the time, and was issued only after an attorney had filed the proper motions, the state had been given an opportunity to object,⁵² and after another Judge – who was not called by the House to contradict this testimony -- had already set aside the conviction, an action which naturally led to the expungement after a motion was filed by Duhon’s attorney. In fact, even Louis Marcotte, the House’s star witness, stated that expungements are “routine” in Gretna. John Mamoulides, who served as the District Attorney in Gretna for 24 years, found nothing wrong with Judge Porteous having issued the expungement, as opposed to Richards, stating that “all of the district judges were technically the same in authority.” (PF 480.)

Further weakening the House’s allegation regarding the impropriety of the expungement, Judge Porteous’s order for expungement tracked Judge Richard’s prior order on expungement virtually verbatim:

⁵² Even according to Louis Marcotte, if the state prosecutors had objected to the motion for expungement, judges in Gretna (including Judge Porteous) would have denied the request for the expungement. (PF 479.)

Judge Richards Order of Expungement in
Case No. 76-1505 (Porteous Ex. 2006.)

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA
No. 76-1505 Division "B"
STATE OF LOUISIANA
VS.
JEFFREY J. DUHON
Filed: _____ Deputy Clerk

ORDER

The following motion and annexed affidavit considered, let all agencies and law enforcement officials including, but not limited to, the following:

- Hon. Harry Lee, Sheriff, Jefferson Parish, Louisiana;
- Hon. John M. Hamoulides, District Attorney, Jefferson Parish, Louisiana;
- Hon. Jon C. Geyenbelsmer, Clerk, 24th Judicial District Court, Jefferson Parish, Louisiana;
- Louisiana State Police, Criminal Records Section, 253 South Foster Drive, Baton Rouge, Louisiana 70805;
- Col. Martin A. Florus, Administrator of the Louisiana Bureau of Criminal Identification, Investigation and Statistics, also known as Bureau of Identification, ass R.S. 15:581.1 et seq.

expunge and destroy any record of the arrest, photographs, fingerprints or any other information of any and all kinds of descriptions relating to the following:

Name:	Jeffrey J. Duhon
Sex and Race:	White male
Date of Birth:	January 7, 1959
Item No.:	6-16206-76
Date of Arrest:	June 15, 1976
Arresting Agency:	Jefferson Parish Sheriff's Office

whether on microfilm, computer card or tape, or any other photographic, electronic or mechanical method of storing data. Further, such agencies, entities and law enforcement offices and particularly the ones listed above shall file a sworn affidavit to the effect that such records have been destroyed and that no notations or references including the foregoing motion and this order have been retained in any of their files or central depository which will or might lead to the inference that any record ever was on file with any

Judge Porteous Order of Expungement in
Case No. 76-770 (House Ex. 77(b).)

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA
NUMBER: 76-770 DIVISION: "B"
STATE OF LOUISIANA
VERSUS
JEFFREY J. DUHON
FILED: _____ DEPUTY CLERK:

ORDER OF EXPUNGEMENT

The foregoing motion considered let all entities, agencies and law enforcement offices, including but not limited to the following:

- Harry Lee, Sheriff of Jefferson Parish, State of Louisiana; and
- John M. Hamoulides, District Attorney, Parish of Jefferson, State of Louisiana; and
- Jon C. Geyenbelsmer, Clerk of the 24th Judicial District Court, Parish of Jefferson, State of Louisiana; and
- Louisiana State Police Criminal Records Section, 253 South Foster Drive, Baton Rouge, Louisiana; and
- Col. Martin A. Florus, Administrator of Louisiana Bureau of Criminal Identification, State Police Headquarters, State Capitol, Baton Rouge, Louisiana.

Expunge and destroy any record of the arrest, photographs, fingerprints or any other information of any and all kinds or descriptions relating to the following:

NAME:	JEFFREY J. DUHON
D.O.B.:	January 7, 1959
COMPLAINT/ITEM NO.:	6-16206-76
DATE OF ARREST:	
ARRESTING AGENCY:	Jefferson Parish Sheriff's Office

whether such information be on microfilm, computer card or tape, or any other photographic, electronic or mechanical method of storing data. Further, such agencies, entities and law enforcement offices and particularly the ones listed above shall file a sworn affidavit to the effect that such records have been

BP Exhibit 77(b)

In short, the House has produced no evidence (and, apparently, now does not even allege) that Judge Porteous's actions regarding the Duhon expungement were improper, unethical, or illegal. The House specifically chose not to call Judge E.V. Richards, Wayne Walker, Phillip O'Neill, any expert, or other witness who could testify regarding the propriety of Judge Porteous' actions regarding the Duhon expungement. (PF 482.) Accordingly, the House has failed to meet its burden of proof and the allegation should be rejected.

b. The Amended Sentence and Set of Aside of Aubrey Wallace's Drug Conviction

Judge Porteous, while a state court judge, amended and then set aside Aubrey Wallace's conviction for simple burglary. The House alleges, however, based entirely on the self-serving testimony of Louis Marcotte, that this judicial action was an improper favor performed for his benefit and that he sought to clear Wallace's record so that he could serve a bail bondsmen for the Marcottes. (HF 143.) The House further contends that the timing of Judge Porteous's actions, occurring before and after his confirmation to the federal bench, somehow shows the impropriety of this action.

Similar to the Duhon expungement, the House Managers never revealed to the House that Judge Porteous's actions were entirely proper under state law and routine for Gretna judges who regularly set aside convictions – particularly in the absence of any objection from the prosecution. Robert Rees, an attorney who has practiced in the state courts of Louisiana for 25 years, testified that the amended sentence and set aside were legal, appropriate, and correct. State prosecutors, present at all of the proceedings related to Wallace, never objected to that action, either inside or outside of Court. In neither their case-in-chief nor in rebuttal, did the House call a witness, expert, or other attorney involved in the Wallace sentencing, despite those witnesses having been subpoenaed and present during the evidentiary hearings.⁵³ The House left this testimony uncontradicted.

⁵³ Instead, the House called Rafael Goyeneche, the President of the Metropolitan Crime Commission and elicited from him, that, in his non-expert opinion, "Judge Porteous's action in amending Wallace's sentence was unlawful and not permitted under the Louisiana sentencing laws." (HF 150.) Goyeneche was not involved in the matter, is not a practicing attorney, and had his credibility and impartiality towards Judge Porteous challenged during the evidentiary hearings. For example, Goyeneche gave an interview to the Times-Picayune regarding an interview he had performed of Judge Porteous in June 2006. (PF 548, Porteous Ex. 1033.) In the article, Goyeneche is quoted as stating that he "didn't even have a chance to sit down before the conversation was over" and that Judge Porteous told Goyeneche "I don't have to explain

The House seeks to make an issue of the timing of Judge Porteous's actions, claiming that he took action only after he was confirmed for the federal bench, in order to avoid the embarrassment of doing so prior to confirmation. This argument – made to the House to secure the impeachment – is untrue and was clearly understood to be untrue at the time of impeachment. The fact is that Judge Porteous stated in open court, on the record, and – prior to his confirmation as a federal judge, that he would take the actions Wallace sought. He stated clearly *before his confirmation* that he would grant the motion just as soon as defense counsel moved for such action. The facts show that there was no plan to postpone and hide the set-aside until after the confirmation in order to avoid any repercussions it might have on his confirmation. It would be a curious effort to conceal his orders to state in open court before his confirmation that he fully intended to grant the relief. The House members were never told that Judge Porteous took these actions and made these public statements before his confirmation.

Finally, and perhaps most tellingly, the House ignores the fact that Judge Porteous **did not** expunge Wallace's sentence and that Judge Porteous's amendment and set-aside of the sentence did not provide any tangible benefit to the Marcottes. Even after Judge Porteous set aside the conviction, Wallace was still precluded from serving as a bail bondsman.

anything to you. I'm a federal judge." (PF 548, 550, Porteous Ex. 1033.) Under cross-examination and when presented with the interview notes from the meeting, Goyeneche admitted that the meeting lasted for over a half an hour and that Judge Porteous had never made the statement Goyeneche attributed to him. (PF 547, 550.) ("I was incorrect with what was said in the newspaper" and "Q: So you just made inaccurate statements to the press about Judge Porteous? A: ...Yes")

Moreover, Senator Kauffman asked why the MCC conducted the interview of Judge Porteous, even after he became a federal judge. Goyeneche responded that "we weren't aware that he had been confirmed." This was a clearly false statement, as Goyeneche had already previously testified that his interview of Judge Porteous took place in Judge Porteous's **federal** chambers – a location that would have clearly been unavailable to a non-confirmed nominee. (PF 554; see also HF 146, stating "Goyeneche . . . interviewed Judge Porteous in his chambers at the Federal Court building.")

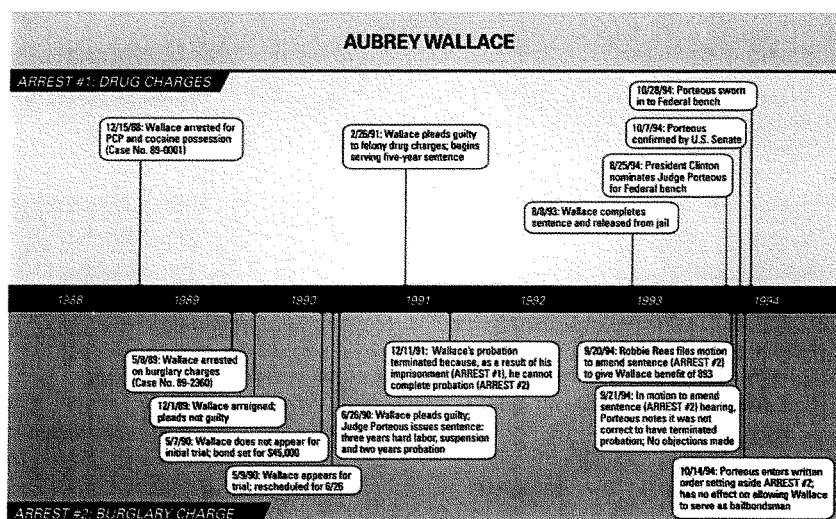
The details of Wallace's charges and sentencing are crucial to understanding the propriety of Judge Porteous's actions.

On December 15, 1988, Aubrey Wallace was arrested for possession of illegal narcotics. (hereinafter referred to as "Arrest # 1.") (PF 483.) Wallace did not plead guilty to this offense (Arrest # 1) until February 26, 1991, more than two years later. (PF 483.)

On May 5, 1989, almost six months after he had been arrested for the possession of illegal narcotics (Arrest # 1), Wallace was arrested for simple burglary ("Arrest # 2"). (PF 484.) The burglary case (Arrest # 2) was assigned to Judge Porteous at the time of the arrest. (PF 485.) Attorney Joseph Tosh represented Wallace at his plea hearing on the burglary charge (Arrest # 2). (PF 486.) On June 26, 1989, sixteen months before he pleaded guilty to the drug possession charges, Wallace pleaded guilty to simple burglary (Arrest # 2). (PF 487.) On that same day, Judge Porteous sentenced Wallace to three years of hard labor which was suspended, and two years of probation, for Arrest # 2. (PF 487.)

On February 26, 1991, Wallace pleaded guilty to the felony drug charges (Arrest # 1) and began serving a five year jail sentence. (PF 488.) Wallace was incarcerated between February 1991 and August 1993 on this charge (Arrest #1). (PF 489.) On December 11, 1991, Judge Porteous, upon the request of the probation officer, terminated Wallace's probation for the burglary charge (Arrest # 2) on the grounds that he could not complete his probation satisfactorily because he had been imprisoned on another charge (Arrest # 1). (PF 491.) At the time, Judge Porteous was not made aware or did not realize that Wallace's arrest for possession of illegal narcotics (Arrest # 1) actually pre-dated the burglary arrest (Arrest # 2). Because Wallace had been arrested for the drug charges (Arrest # 1) prior to the burglary (Arrest # 2), and he had already been sentenced to probation for Arrest # 2, it was improper to have terminated

Wallace's probation on the grounds of the drug-related arrest. The following demonstrative, utilized during the evidentiary proceedings, visually depicts the timeline of these events.



Robert Rees, who testified at the evidentiary hearings, is an attorney who has practiced criminal law in the state courts of Louisiana since 1985. (PF 492, 494.) Rees is a former Lafayette City policeman and former Assistant District Attorney in the 22nd Judicial District of Louisiana. (PF 492.) Between 1991 and 1997, Rees practiced in the 24th Judicial District Court – the same Court in which Judge Porteous served as a state judge. (PF 493.) Rees explained that the problem with Wallace's case was that Wallace "had two pending charges in the same jurisdiction . . . The probations shouldn't have been terminated. . . The Judge had to go back and undo the unsatisfactory termination of the probation . . . because it was based on the prior arrest, which was not grounds to revoke the probation that Judge Porteous had placed him on." (PF 504.) Rees further stated that original termination of Wallace's probation (occurring on

12/11/1991 – well before Judge Porteous was dealing with the Marcottes) was an “incorrect” action. (PF 505.) Further, because it was incorrect, Rees stated that the Judge “would have to go back and fix it.” (PF 505.)

The House argues that in relation to the burglary charge (Arrest # 2), “Judge Porteous did not sentence Wallace under Article 893E of the Louisiana Code of Criminal procedure that would permit the sentence to be set aside if Wallace successfully completed probation.” (HF 136.) The House cites no support for this contention. Contrary to the House’s unsupported position, Rees testified that if Judge Porteous suspended Wallace’s sentence for the burglary charge (Arrest # 2) and sentenced Wallace to probation (which Judge Porteous clearly did), then Article 893 necessarily applied even if the word “893” was not used during the proceedings. (PF 495.) John Mamoulides, the former District Attorney, testified that “if a sentence was erroneously set originally and they recognize it, it could be brought up to be set aside or resentence with the discretion of the Court.” (PF 521.)

Pursuant to that understanding, and after repeated requests from Wallace himself (not from Marcotte, as the House seems to contend),⁵⁴ Rees filed a motion to amend Wallace’s sentence related to the burglary conviction (Arrest # 2) on September 20, 1994. (PF 500, 502.) Rees believed, and still believes, that his motion was backed by supportive precedent and was proper.⁵⁵ (PF 502, 533.) Rees stated that the reason for the brevity of the motion was that, in his experience “it didn’t have to contain anything else.” (PF 507.) Rees further stated that motions,

⁵⁴ The House has focused on the fact that Louis Marcotte initially asked Rees to assist Wallace with the amendment of his sentence and the set-aside. The testimony of Wallace and Rees is clear, however, that while Louis Marcotte initially asked Rees to assist Wallace in having his sentence amended, Wallace personally contacted Rees “several times until the motion got filed.” (PF 500.) Wallace never had any direct conversations with Judge Porteous about his burglary conviction, the motion to amend, or the motion to set aside his conviction. (PF 501.)

⁵⁵ Rees testified that motions to amend are not uncommon. In fact, during his testimony, Rees stated that he was currently handling a different motion to amend. (PF 506.)

such as the one he filed on behalf of Wallace, tended to be brief, as they were accompanied by the full criminal record of the movant. (PF 507.) As was the standard practice, Rees filed two copies of the motion, and one of the copies was to be served on the District Attorney's office. (PF 508.) Even though Rees, in his motion, did not request a contradictory hearing and the law at the time did not require that such a hearing be held, Judge Porteous scheduled a hearing, for the purpose of giving the state an opportunity to object to the motion if it felt it necessary. (PF 509.)

At that hearing, which occurred **prior** to Judge Porteous's confirmation as a United States District Court Judge, attorney Bruce Netterville stood in for Rees, because of Rees' unavailability. (PF 512.) Assistant District Attorney Michael Reynolds represented the state at the hearing and raised no objections to the motion or the Judge's actions. (PF 514.) As reflected by the transcript of the hearing, Judge Porteous noted that he and the DA's office (presumably through ADA Reynolds) had already discussed the motion and Reynolds raised no objections. (House Ex. 246.)⁵⁶ John Mamoulides, the former District Attorney, who was Reynolds's supervisor at the time, testified that if Reynolds had concerns regarding Wallace's motion to amend his sentence, he should have raised such objections at the hearing. (PF 519.)

Judge Porteous then briefly discussed the mistake that had occurred when Wallace's probation had been terminated unsatisfactorily due to an earlier arrest. (House Ex. 246.) Judge Porteous specifically stated that "if you [Wallace or his counsel] want further relief, then file a petition to enforce 893 and then I'll execute that also." (PF 513.) By doing so, Judge Porteous unmistakably put the parties and the public on notice that he would be willing to enforce 893 and set aside Wallace's conviction – just as soon as Wallace's attorney moved to have section 893

⁵⁶ Rees testified that it was routine for the assistant DA and the defense lawyers to meet in chambers with the judge prior to going into the Courtroom. (PF 517.)

enforced. This occurred before Judge Porteous was confirmed by the U.S. Senate to the District Court.

These uncontroverted and established facts directly refute the House's main contention that Judge Porteous's actions regarding the Wallace set-aside were improper. The House argues that Judge Porteous and Louis Marcotte devised a secret plan to postpone action on Wallace's request until after Judge Porteous was confirmed by the U.S. Senate. But the transcript of the September 21, 1994 hearing – occurring weeks before his confirmation – show that Judge Porteous was open and clear about his intentions. If the House's theory is to be believed, it would have been far more logical for Judge Porteous to have delayed the September 21, 1994 hearing until after he was confirmed and certainly not to have stated in open court and on the record, prior to his confirmation, that he intended to order the action Wallace sought.

On September 22, 1994, weeks before his confirmation, Judge Porteous signed the Order amending Wallace's sentence and setting aside the conviction. (PF 522.) On October 14, 1994, another hearing was held in the Wallace matter before Judge Porteous. Rees, representing Wallace, noted the problems that required the amended sentence, stating "Mr. Wallace was placed on probation by your Court. He later received a conviction, but the charge he received the conviction on happened prior to the probation." (House Ex. 69(b), PORT 628.)

Rees then orally moved to invoke Article 893 of the Louisiana Code of Criminal Procedure, stating "We [previously] amended the sentence for 893, and at this time I'm asking that the 893 be invoked." (PF 524, House Ex. 69(d), PORT 625-629.) Once again, Reynolds, representing the state, raised no objection.⁵⁷ (PF 525, 526.) Judge Porteous stated on the record

⁵⁷ The House, based on the testimony of Rafael Goyeneche, alleges that, in October of 1994, Reynolds complained to the Metropolitan Crime Commission ("MCC"), that "Judge

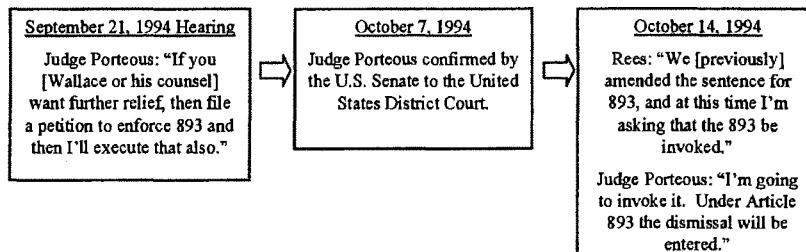
"I'm going to invoke it. Under Article 893 the dismissal will be entered." (House Ex. 69(b), PORT 629.) Thus, just as Judge Porteous had stated at the September 21, 1994 hearing – before the confirmation – he invoked 893 as soon as Wallace's counsel requested it. Rees, the only attorney with significant experience on such matters who testified before the Committee, stated that he did not believe that Judge Porteous's actions in amending the sentence and then setting aside the conviction were incorrect legal rulings. (PF 534.) In fact, Rees states that they were well within Judge Porteous's realm of jurisdiction. (PF 534.) The House did not call any witness to contest Rees' testimony that Wallace's original sentence was necessarily pursuant to Article 893 or to show that Judge Porteous's order amending Wallace's sentence or setting aside the conviction was legally improper.⁵⁸ (PF 535.)

Porteous had illegally set aside the conviction of Aubrey Wallace." (HF 144.) Notably, although Reynolds was subpoenaed and present at the Senate, he was not called as a witness.

Further, Rees and Reynolds were former law school classmates and friends, suggesting that if Reynolds had concerns, he would have raised them to Rees (PF 516.) Rees is not aware of Reynolds raising any objection to the motion to amend Wallace's sentence or the motion to set aside the conviction before the two hearings, in the hearings, or outside of the hearings. (PF 518, 526.)

Finally, the motivation of Reynolds, even if he did make such statements to the MCC, are questionable. Reynolds would later give up his law license after three separate arrests, including an arrest involving the swapping of license plates. (PF 541.) Goyeneche admitted that the MCC pays confidential informants for the provision of information and that, in relation to public corruption cases, the MCC has stated they will pay up to \$100,000 for valuable information. (PF 553.)

⁵⁸ The House attempts to rely on the testimony of Rafael Goyeneche, who "believed that Judge Porteous's actions in amending Wallace's sentence was unlawful and not permitted under the Louisiana sentencing laws which provide authority for a Judge to amend a sentence." (HF 150.)



Despite the amendment of Wallace's sentence and then the subsequent invocation of Article 893 and the setting aside of the sentence, Wallace still could not serve as a bail bondsman, because the drug charges from 1988 (Arrest # 1) were still part of his record. (PF 530.) Judge Porteous took no action with regards to those charges.

The House's elementary approach to demonizing Judge Porteous's actions regarding Aubrey Wallace's conviction can only succeed when one chooses to ignore the details and the evidence. Judge Porteous was open and honest about his intentions, sought to correct a prior mistake, received no objection from the government, and acted entirely appropriate according to the only witness who testified and had experience in such matters.

B. Although Judge Porteous Had Lunch with the Marcottes, There is Little to No Evidence Supporting the House's Allegations Regarding his Receipt of Other Things of Value

In Article II, the House alleges "Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit." (PF 290.) Although Judge Porteous readily admits that he had lunch with the Marcottes on occasion, at their expense, there is simply very little evidence (outside of the testimony of convicted felons) that Judge Porteous received the other things of value that the House insists were given to him. In securing the impeachment from the House, the House Managers never

revealed that these lunches are not just common in Gretna but allowed under ethical rules. Indeed, even under the more restrictive rules recently passed, all but one of those same lunches would have been allowed. (PF 417.)

Even if these items were received, there was no ethical rule or statute that forbade Judge Porteous's receipt of any such small gifts. The House presented no evidence linking the receipt of these items to judicial actions, or any form of *quid pro quo* arrangement. If they occurred, such gifts were nothing more than that -- a gift from the Marcottes -- which was neither improper nor even had the appearance of impropriety. As the Marcottes themselves testified, they, and others who worked at the Court, provided numerous small gifts to various judges and court employees for years.⁵⁹ According to former District Attorney John Mamoulides, it was common for lawyers and others to bring gifts to judges and the fact that a judge received a gift "wouldn't bother" Mamoulides as the parish's chief prosecutor. (PF 590.) The Senate should decline the House's invitation to condemn the receipt of unsolicited and customary gifts as an impeachable offense, on par with treason.

1. Judge Porteous Admits That He Occasionally Ate Lunch with the Marcottes

The parties do not dispute that the Marcottes and Judge Porteous occasionally had lunch together, and that the Marcottes would pay for many, if not most of these lunches which Judge Porteous attended. This is not unlike what occurs, on a daily basis, in most state courthouses, offices, legislatures, and government offices throughout the country. Individuals become acquainted through work, often becoming friends, and invite each other to lunch with the inviter

⁵⁹ The Marcottes testified that they gave numerous gifts to judges and courtroom staff, including large quantities of shrimp, fake Rolex watches, hams, turkeys, cakes, and gingerbread houses. (PF 587.) Aubrey Wallace stated that it was a "regular practice of bail Bonds Unlimited to give gifts to "several judges." (PF 588.) Wallace testified that he would personally "bring little boxes of the little pastries to each division of the judges." (PF 589.)

tending to pay for the lunch.⁶⁰ This is not only the practice of the Marcottes, Judge Porteous, or even the legal community in Gretna, Louisiana. This is simply a practice of most working professionals in the United States.⁶¹

Yet, the House, through exaggeration and innuendo, makes unsubstantiated claims suggesting that the Marcottes bought “hundreds” of lunches for Judge Porteous at “high-end restaurants” over the course of decades, and thereby transformed normal hospitality into a longstanding corrupt practice. These allegations, when tested under cross-examination during the evidentiary hearings, have been debunked and deflated.

First, as to frequency, and as discussed above, the House concedes that the Marcottes’ relationship and friendship with Judge Porteous did not begin until the early 1990s. Louis Marcotte testified that he began having lunch with Judge Porteous in 1994 or 1995.⁶² (PF 404.) Lori Marcotte described the frequency of the lunches as “sometimes once a month.” Darcy Griffin testified that, for those lunches she (and other members of the courthouse staff) attended

⁶⁰ Louis Marcotte testified that he considered Judge Porteous to be a friend. (PF 305.)

⁶¹ As a prime example, Lori Marcotte testified that Bail Bonds Unlimited paid for a lunch, at Ruth’s Chris Steakhouse that then-Senator John Breaux attended. (PF 422.) Lori Marcotte testified that at the time of the Breaux lunch, there was “very important” federal legislation pending regarding bail bonds and that Senator Breaux was “important” to the Marcottes in relation to the legislation. (PF 423.) No one, including the House, has suggested that Senator Breaux committed ethical violations by accepting the paid lunch.

In fact, both the House and Senate rules currently provide a general *de minimis* exception for gifts from private sources and allow for the acceptance of a gift (including the gift of a meal) if the gift has a value of below \$50. House Rule 25, cl. 5(a)(1)(B); Senate Rule 35, para. 1(a)(2). Prior to 1996, there were no limits on the acceptance of free meals by members of Congress. (See House Ethics Manual, Cmte. on Standards of Official Congress, (2008 ed.), at 27-28.)

⁶² In its proposed findings of fact, the House concedes that, at the earliest, the Marcotte lunches with Judge Porteous started in or around October 1992. (HF 92.) Thus, even if the House’s assertion is taken as true, as opposed to Louis Marcotte’s testimony, the Marcottes and Judge Porteous only dined together while Judge Porteous was on the state bench for a period of less than two years – 24 times if Lori Marcotte’s testimony (“sometimes once a month”) – is correct.

with the Marcottes, she did not recall Judge Porteous coming often. (PF 409.) The House has presented no documentary evidence regarding the frequency of lunches between Judge Porteous and the Marcottes while Judge Porteous was on the state bench.

The House could only find a few lunches where Judge Porteous *might* have been a guest. Six of these meals allegedly occurred at an establishment known as the Beef Connection. The receipts produced by the House suggest that a filet mignon at the time cost \$15.00, a tuna entrée cost \$10.00, and a salmon entrée cost \$11.50 – none of which supports the House’s claim that these lunches were overly expensive. The receipts associated with these six lunches show that there were between five and fourteen attendees, and, assuming he attended, Judge Porteous’s share of the bill at these lunches averaged just over \$40 per meal, or less than \$250 in the aggregate for all lunches over a seven year period.⁶³ (PF 411, 413, 414.)

Once confronted with the number of attendees, the House shifted gears and identified the total bill, often in the several hundreds of dollars range given the large number of attendees, and attributed the total amount as a benefit to Judge Porteous because “Judge Porteous liked to have people around him . . . [and] because it made Louis Marcotte look like a business man instead of a bondsman” (HF 96.) This result-oriented spin is unsupported by any evidence other than the Marcottes’ forced testimony.⁶⁴

⁶³ Under applicable Louisiana ethical rules now in place, but which were non-existent in 1994, when determining how much of a specific meal should be attributable to a certain individual, the total costs are to be divided by the total number of attendees. (PF 412.)

⁶⁴ The House failed to call, or even identify, other attendees at these lunches. They failed to establish a link between those unknown attendees and Judge Porteous. However, both Aubrey Wallace and Jeffrey Duhon – Marcotte employees – testified that they attended several lunches with Judge Porteous and the Marcottes. (Senate Vol. II at 663 (Duhon); Senate Vol. II. At 706-07 (Wallace).) Under the House’s theory, Wallace’s and Duhon’s attendance – and the costs associated with their meals – were somehow for the benefit of Judge Porteous. Under the House’s tortured reasoning, the attendance of these two ex-felon bail bondsmen gave Marcotte

Between 1992 and 2001, when all of the lunches involving the Marcottes and Judge Porteous allegedly occurred, there was no ethical rule that prohibited a state or federal court judge from accepting such a meal. (Senate Vol. IV at 1633:21-1636:03; 1640:03-1641:10; *see also* Porteous Ex. 1001(h)-(r).) In 2008, well after these events occurred, the state of Louisiana changed the ethical rules to impose a \$50.00 cap on any gift (including meals) received by a Judge. All but one of the lunches for which the House has provided receipts would comply with current Louisiana judicial ethics rules. (PF 417.)

Moreover, these lunches were in the open and in public restaurants. (PF 407.) As testified by the Marcottes, Judge Porteous, rarely if ever had lunch with just Louis Marcotte, and neither the Marcottes nor Judge Porteous attempted to conceal the fact that they were occasionally lunching together in a rather large and presumably conspicuous group. (PF 405, 407.) In fact, when the Metropolitan Crime Commission (MCC) interviewed Judge Porteous in 1994 regarding his relationship with the Marcottes, Judge Porteous “freely admitted that he has known Mr. Marcotte for a number of years and considers him to be a friend [and] admitted that he has had several lunches with Mr. Marcotte.” (HF 149.)

The conversation at these lunches tended to focus on non-work-related matters and witnesses, such as Darcy Griffin, testified that she was unaware of the Marcottes ever raising bond issues at the lunches she attended with the Marcottes. (PF 408, 409.) In fact, Lori Marcotte testified that she thought it would have been rude to speak about bonds while at lunch, further suggesting that these lunches were seen as nothing more than social gatherings of friends and work colleagues. (PF 408.)

stature as a “businessman” as opposed to a bail bondsman, while their companionship in some inexplicable way provided a benefit to Judge Porteous. The argument is absurd.

2. Single Trip to Las Vegas

The House alleges that, *while Judge Porteous was a state court judge*, the Marcottes paid for Judge Porteous's travel expenses to Las Vegas for a single trip in 1994.⁶⁵ (HF 108.) According to the House, other individuals, including Judge George Giacobbe (who remains a state court judge today) and attorney Bruce Netterville also went on the trip. (HF 108, PF 450.)

The only evidence about this trip is the testimony of Louis and Lori Marcotte, both of whom could not recall the date of the trip. (PF 449, 450, 452.) The House did not introduce any documentary evidence (i.e. receipts, credit card statements, plane tickets) regarding the costs associated with the trips and specifically chose not to call Netterville as a witness, despite his having been subpoenaed and having traveled to Washington, D.C. for the evidentiary hearings. (PF 450-51.) Giacobbe has apparently not been investigated or sanctioned for his alleged receipt of travel expenses related to this trip, further weakening the House's allegation.

The House alleges that the Marcottes and other attendees paid for the costs associated with Judge Porteous's air travel. (HP 109.) Yet, upon cross-examination, the Marcottes admitted that Judge Porteous may have been speaking at a national bail bonds convention during the trip, and that if that was the case, his travel expenses (air and hotel) would have been paid for by the national bail bonds association hosting the convention, not by the Marcottes. (PF 340, 453.)⁶⁶

⁶⁵ In the actual text of Article II, the House incorrectly asserts that Judge Porteous accepted "trips" from the Marcottes. The suggestion that Judge Porteous received multiple "trips" from the Marcottes is now refuted by the House's own proposed statements of fact, which discuss only one trip to Las Vegas. (*See generally* HF 85-185.)

⁶⁶ Of the limited records produced by the House regarding Judge Porteous's attendance at bail bonds conventions, it is clear that Judge Porteous often spoke at conventions held by the Professional Bail Agents of the United States, including two such conventions in 1996 and one in 1999. The defense sought out records relating to the 1993 and 1994 conventions but were

Louis Marcotte stated that he did not have a specific memory regarding this trip because he had gone to the national bail bonds convention for over 25 years and that Judge Porteous had, on occasion, spoken at these conventions. (Senate Vol. II at 571:13-572:08.)⁶⁷ Similarly, Lori Marcotte was unclear about specifics related to the Las Vegas trip that Judge Porteous allegedly attended and conceded that she had never personally traveled to Las Vegas with Judge Porteous. (PF 452, 456.) The Marcottes were definitive, however, in stating that they never gave any cash to Judge Porteous on any trip to Las Vegas and never saw anyone else give cash to Judge Porteous on any trip to Las Vegas. (PF 455.)

The House has alleged that Marcotte asked Netterville to accompany him on the trip because "he knew that bail bondsmen do not enjoy a great reputation and it would not look good informed that such records no longer exist. Nonetheless, it is the House's burden to prove that the Marcottes improperly paid Judge Porteous's expenses for the alleged 1994 trip.

⁶⁷ The following exchange, during his Senate testimony, highlights Marcotte's equivocal testimony regarding this issue:

Q: Now, I want to talk about that Vegas trip. We had talked about that during the deposition. Isn't it true that Judge Porteous went to Las Vegas to speak at that conference?

A: I don't know if it was that conference, but I think one time we went just for -- you know, when I went with Giacobbe and him. And I don't think it was a conference that he spoke at but --

Q: It might have been a convention. I might be using the wrong term. But he spoke at a convention in Vegas. Isn't that what you testified to previously?

A: I know I went to Vegas with him and Jacoby. I don't know if he spoke at the convention at that time. The bail bonds convention was in Vegas for 25 years, and I brought different people, insurance -- so, I mean, I know I was in Vegas with Porteous and Giacobbe, unequivocally, without a doubt.

Q: Do you recall testifying under oath previously when asked did he go to Vegas to speak at this convention, and you answered, "he did"?

A: Yes, I did.

(Senate Vol. II at 571:13-572:08.)

for Judge Porteous to be going to Las Vegas only with him.” (HF 108.) This assertion was refuted by Louis Marcotte’s own testimony, when he admitted that Netterville was invited on the trip because Marcotte and Netterville were such close friends that Netterville was the best man at Louis Marcotte’s wedding. (PF 454.)

The House also suggests that the testimony of Rafael Goyeneche, the President of the Metropolitan Crime Commission, who interviewed Judge Porteous in 1994 as part of an investigation by the MCC, supports their contention that Judge Porteous’s trip to Las Vegas in 1994 was paid for by the Marcottes. (HF 149.) According to the MCC’s report, Goyeneche and his colleague asked Judge Porteous “if he had traveled to Las Vegas with Mr. Marcotte and he confirmed he had. The Judge stated that six or seven people went as a group to Vegas and Marcotte was a member of the group. ... Porteous ... advised that Marcotte did not pay his way to Vegas.” (HF 149, House Ex. 69(d), PORT 594-597.) This account of Goyeneche’s interviews only reinforces the point that there was no evidence Marcotte paid for Judge Porteous’s trip. Under cross-examination, Goyeneche admitted that he was unaware that Judge Porteous had been a speaker at certain bail conventions in Las Vegas, where his travel expenses had been paid for by the Bail Bonds Association, hosting the convention. (PF 552.)

Finally, the House insinuates, without actually stating, that Judge Porteous improperly received things of value from the Marcottes when he attended two different Professional Bail Bonds Conventions in 1996 and 1999. (HF 157, 158) The House alleges that Judge Porteous’ food and drinks at the 1996 and 1999 conventions were paid for by the Marcottes but noticeably fails to describe, list, or identify these expenses with any detail.⁶⁸ The parties have stipulated that the Marcottes hosted and paid for the costs associated with a cocktail reception for all

⁶⁸ The House concedes that Judge Porteous’s travel and lodging expenses were properly paid for by the association hosting the convention. (HF 157, 158.)

attendees invited to the convention, which would have necessarily (and properly) included Judge Porteous as he was a featured speaker at both conventions. (PF 344.) If all Judge Porteous did was to attend a reception paid for by the Marcottes at a convention where he was a featured speaker – and there is precious little evidence to support even such an innocuous set of facts – this aspect of Article II should be summarily dismissed.

The House also attempts to suggest that Judge Porteous acted corruptly when his secretary, Rhonda Danos, traveled with Lori Marcotte to Las Vegas. (HF 107, 111.) The House bases a claim of improper conduct *by Judge Porteous* on the assertion by Lori Marcotte that she only traveled and spent time with Rhonda Danos because Danos served as Judge Porteous's secretary and "gatekeeper;" and that Judge Porteous was aware of this situation (HF 111). The testimony of the Marcottes and Danos rejects this implausible theory.

Rhonda Danos understood that she and Lori Marcotte were friends, particularly since Lori Marcotte often confided in Danos about Marcotte's personal problems. (PF 324.) Lori Marcotte and Rhonda Danos would often socialize together, go on trips together (even sharing a room at one point) and attended music concerts together. (PF 325.) For some of these events, Lori Marcotte conceded that it she was unsure whether she or Ms. Danos paid for the costs associated with the events. (PF 325.) The relationship was so close that Lori Marcotte and Danos celebrated New Year's Eve together on multiple occasions. (PF 326.) During this friendship, Danos maintained two jobs in addition to her work as Judge Porteous's secretary. She was both a travel agent and a booking agent. (PF 328.) Danos would often assist the Marcottes with the planning of trips and parties that the Marcottes intended to take or host. (PF 327.) Danos testified that she never told Judge Porteous that the Marcottes had paid for her travel expenses. (PF 457.)

Danos denied that her receipt of travel expenses from the Marcottes altered her behavior in any way towards the Marcottes. She testified that the Marcottes received no special access to or special treatment in Judge Porteous's chambers and that Judge Porteous never directed Danos to provide the Marcottes special access to his chambers. (PF 331.) In fact, on occasion, Danos would turn the Marcottes away or make them wait to see Judge Porteous – hardly consistent with the House's allegation that Danos "swung open the gates" to the Judge in favor of the Marcottes. (PF 332.) Contrary to the House's assertions, Danos and Darcy Griffin testified that Judge Porteous maintained an open door policy regarding his chambers and that his office was "open to anybody." (PF 329.) In fact, Judge Porteous's chambers were known as a place where lawyers and court personnel could stop by to have coffee. (PF 330.)

3. Home Repairs

The House alleges that, at some unknown date,⁶⁹ but while Judge Porteous was on the state bench, Aubrey Wallace and Jeffrey Duhon repaired a fence for Judge Porteous at his residence. (HF 110.) That single claim is the only allegation regarding the provision of "home repairs" to Judge Porteous during the alleged decades-long "corrupt" relationship between the Marcottes and Judge Porteous. The evidence of this isolated alleged fence repair is based entirely on the parsed and then cobbled together testimony of four felons – the Marcottes, Wallace, and Duhon – as opposed to even a single piece of documentary evidence. (HF 110.)

⁶⁹ It is undisputed that the Marcottes and their employees never performed home repairs for Judge Porteous while he was on the federal bench. (PF 433, 443; HF 110 stating that the alleged act occurred "while Judge Porteous was still a state judge".) The House's witnesses concede that, although they are unaware of the date or even year when the home repairs allegedly occurred, they must have occurred during the decade while Judge Porteous was on the state bench. (PF 433, 443.) Beyond that guesstimate, the date of these supposed repairs is such a mystery to the House that in their report, they stated "The fence repairs occurred either prior to Wallace's February 1991 incarceration or subsequent to his August 1993 release." (Report 111-427 at 68.) In other words, the House speculates that Wallace did not break out of jail to fix Judge Porteous's fence. But there still is no real evidence that the fence repair ever took place.

The House has not produced, and the relevant witnesses have conceded that they cannot locate, any records, receipts, photographs, or account statements showing that work was actually performed, completed, or whether it was paid for by the Marcottes or Bail Bonds Unlimited. (PF 437, 439, 441.) In fact, Louis Marcotte has no recollection of who paid for the repairs and neither Louis or Lori Marcotte ever observed the work that was allegedly performed.⁷⁰ (PF 438, 439.) Moreover, Louis Marcotte noted that he was often concerned that when Duhon and Wallace were assigned to perform construction work, they would fail to perform the work assigned. (PF 444.)

Further, the House's witnesses admitted that Judge Porteous never asked for such assistance or solicited such work from the Marcottes but claim that Louis Marcotte volunteered to assist Judge Porteous with the task. (PF 434-35.)

Thus, the isolated allegation of a fence repair is unsubstantiated and even if taken as true, cannot be relied upon as evidence of an improper receipt of a thing of value from the Marcottes, given the House's failure to establish any monetary value associated with the alleged repair, much less that the Marcottes actually paid for it. Further, even if there were competent evidence that once upon a time the Marcottes paid to fix Judge Porteous's fence, there is no evidence that the repair influenced any official act by Judge Porteous in his capacity as a state judge. At most, Judge Porteous received a small, non-monetary favor from a professional friend, long before he was on the federal bench. This could not rise to the level of an impeachable offense or even an ethical violation, given the rules in lace at that time. (PF 70, 74-76.)

⁷⁰ The House has alleged that "Louis Marcotte paid for the materials." (HF 110.) But, when asked, during the SITC hearings, "And, in fact, you testified earlier that you didn't -- you weren't quite sure who paid for the materials. Isn't that true?," Louis Marcotte responded "Yes, sir." (PF 439; Senate Vol. II at 570:13-16.)

4. Car Repairs

The House alleges that, while a state judge, Judge Porteous accepted automobile repairs and maintenance from the Marcottes.⁷¹ (HF 101-106.) Judge Porteous does not dispute that, on occasion, the Marcottes or their employees would assist the Judge by dropping his car off at a mechanic's shop but he does dispute the allegations regarding the frequency of such events or that Judge Porteous failed to personally pay for the repairs.

The House has presented no documentary evidence (i.e. credit card statements, receipts, records, photographs, etc.) of the repairs or the costs allegedly associated with this work. (PF 427.) The House did not call, as a witness, the mechanics or proprietors who allegedly performed these repairs or received payment for the work performed. (PF 427.) Instead, the House relies on the testimony of four felons – Louis and Lori Marcotte, Aubrey Wallace, and Jeffrey Duhon.

In the House's proposed findings of facts, they do not even allege that Judge Porteous solicited this assistance from the Marcottes. Instead, Louis Marcotte testified that he offered to assist Judge Porteous in having his automobiles repaired. (PF 426.) Without documentary evidence, the House is forced to rely on general and broad statements, such as Louis Marcotte would make repairs to Judge Porteous's cars "once a month or once every three months." (HF 103.) The testimony elicited during trial casts serious doubt on the frequency of these alleged repairs, if they occurred at all. Jeff Duhon stated that he was not sure how often he took care of Judge Porteous's cars but that it was only "once in a while." (PF 428.) Aubrey Wallace testified that he assisted in the maintenance and repairing of Judge Porteous's care for a period covering only six to eight months. (PF 432.) Further, Wallace stated that he did not know whether Judge

⁷¹ It is undisputed that the Marcottes never paid for or assisted Judge Porteous with any automobile repairs or maintenance while Judge Porteous was on the federal bench. (PF 425.)

Porteous ever reimbursed the Marcottes for any car repairs or maintenance that the Marcottes may have initially paid for. (PF 431.)

The House also alleges that “on several occasions, when Mr. Wallace returned the car to Judge Porteous, the Marcottes would leave presents in the car for Judge Porteous, such as liquor and coolers of shrimp.” (HF 105.) The House ignores the fact that Wallace’s testimony also specifically stated that these occasions related to holidays – such as Thanksgiving and Christmas – when the Marcottes would give similar gifts to all of the state court judges in Gretna, as well as many court personnel. (Sen. Vol. II at 685:23-686:11.) At the time, the receipt of such gifts did not violate any ethical rule. (PF 70, 74-76.)⁷²

C. Judge Porteous Did Not Abuse the Power and Prestige of His Office as a Federal Judge

As previously discussed, the only federal bench misconduct alleged in Article II is that Judge Porteous “used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes business.” The House admits that Judge Porteous as a federal judge conferred no judicial benefit on the Marcottes. The House and its witnesses concede that although the Marcottes did handle certain bonds in federal court, Judge Porteous never handled a bond for the Marcottes or Bail Bonds Unlimited while he was on the federal bench. (PF 304.) Moreover, Louis Marcotte testified that once Judge Porteous took the federal bench, Marcotte requested Judge Porteous’s assistance in convincing Federal Magistrate Judge Louis Moore to utilize commercial bonds. (PF 562.) But

⁷² In prior pleadings and proceedings, the House has alleged that Judge Porteous, through one of his sons, received the benefit of free parking in a lot owned by the Marcottes. The House has apparently abandoned this claim. They were well-advised to do so, since Lori Marcotte testified that the Marcottes never provided Michael Porteous with a reserved parking spot, never subsidized his parking, and most importantly that the parking lot that they owned was open to the general public for no fee during the relevant time period. (PF 445-48.)

Marcotte admitted that he had no knowledge of Judge Porteous taking any action in response to this request and, in fact, expressed doubt that Judge Porteous did take any action. (PF 562.)

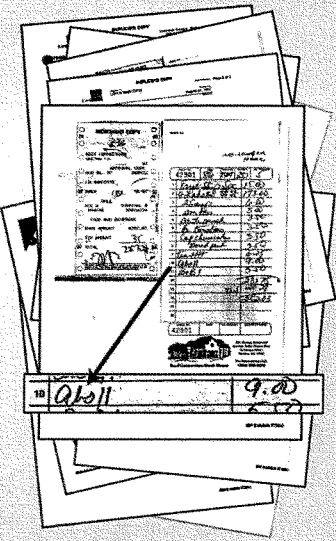
Without proof of any direct action Judge Porteous took for the Marcottes while on the federal bench, the House argues that Judge Porteous used the “strength” and “power” of his office improperly to assist the Marcottes by (1) attending a handful of lunches with the Marcottes, and (2) vouching for the Marcottes’ honesty in conversations with state court judges. In both instances, the House concedes that “there is no evidence that Judge Porteous specifically communicated to these judges that he sought or intended for the Marcottes to form corrupt relationships” with these judges or individuals. (House Report at 20.)

1. Lunches While on the Federal Bench

Once Judge Porteous took his position on the federal bench in October 1994, and for the entire decade during which Judge Porteous actively served as a United States District Court Judge, Louis Marcotte estimated that they only had lunch together between **five and eight times**. (PF 410.) The House was only able to locate and produce documentary evidence that shows six such lunches over this same time period. (PF 411.) Even for these lunches, the only evidence that Judge Porteous attended four of the six lunches is that the lunch bill includes a reference to “Abs” or “Abso” which the House believes references an order for Absolut Vodka – a drink Judge Porteous was said to prefer. (PF 415.) There is, of course, no evidence that Judge Porteous was the only guest of the Marcottes who ever drank vodka.

The following chart, used as a demonstrative during the evidentiary hearings, identifies these lunches in greater detail:

Beef Connection Receipts			
Date	Total Bill	No. of Attendees	Per Person Share
8/6/97	\$287.03	5	\$57
8/25/97	\$352.43	10	\$35
11/19/97	\$395.77	10	\$39
8/5/98	\$268.84	9	\$29
2/1/00	\$328.94	8	\$41
11/7/01	\$635.85	14	\$45



The House alleges that among these lunches, the Marcottes took Justice of the Peace Charlie Kerner to lunch at the Beef Connection in 1997 and that, at the lunch, Judge Porteous explained the bond process to Kerner and told Kerner that “he could trust the Marcottes and that the Marcottes were good people.”⁷³ (HF 161.) As an initial matter, there is nothing inherently wrong with Porteous explaining the bond process to a less experienced colleague or telling that individual that the Marcottes (whom Judge Porteous had entrusted with bonds for years as a state judge) could be trusted. Up until that point, Judge Porteous had no reason to distrust the Marcottes, having never found them to provide him with faulty information regarding the criminal background of a specific arrestee. Moreover, the House does not allege that Judge

⁷³ The House wholly failed to establish the date of this lunch during the evidentiary proceedings.

Porteous urged Kerner to work with the Marcottes, described any type of quid pro quo relationship, or placed any pressure on Kerner to work with Marcottes.

The House then alleges that “Judge Porteous also attended a lunch with Justice of the Peace Kevin Centanni and Lori Marcotte. The House does not allege that Judge Porteous made any comments regarding the bond process or the Marcottes and admits that “nothing resulted from that lunch.” (HF 162.)

The House also alleges that Judge Porteous attended a lunch with Norman Stotts – an insurance company representative. (HF 163.) The House makes no allegations and adduced no evidence at trial regarding any statement made by Judge Porteous at the lunch or any action taken by him on behalf of the Marcottes. Instead, the House appears to argue that Judge Porteous’s mere attendance at the lunch constituted an impeachable offense.

Finally, the House alleges that Judge Porteous attended a lunch in 2002 with newly elected judge Joan Benge and Judge Ronald Bodenheimer. But the evidence produced during the evidentiary hearings showed that Judge Porteous did not attend the lunch, but, instead, showed up after the Marcottes and Judges Benge and Bodenheimer had finished eating. (PF 419-20.) There is no evidence of Judge Porteous having any conversations with Judge Benge and Judge Bodenheimer regarding the Marcottes or the bail bonds system.

In Article II, therefore, Judge Porteous is being impeached because the House disapproves of his personal associations, a remarkably slippery slope for a new standard of impeachment. Penalizing a judge for his choice of lunch companions is purely guilt by association, a small step away, on a very slippery slope, from penalizing him for belonging to an unpopular political party, an unpopular religion or even an unpopular ethnic or cultural group.

Such a standard, potentially, would have subjected some of the leading jurists of the last two centuries to impeachment. For example, Justice Anton Scalia was criticized for accepting hunting trips with former Vice President Dick Cheney before ruling on a case in which Cheney's office was a party. See Gina Holland, *Justice Scalia: No Apologies for Hunting Trip With Cheney*, WASH. POST (Feb. 11, 2004) (quoting Justice Scalia as stating "It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack."). Likewise, Justice Felix Frankfurter and some of his colleagues were accused of *ex parte* communications and other conflicts in leading cases. See generally Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 737 (2002); see also David J. Danelski, *The Saboteurs' Case*, 1 JOURNAL OF SUP. COURT HIST. 61, 69 (1996). As Professor Stempel has summarized, the use of the power and prestige of one's office and the showing of favoritism, along with breaches of intra-bench confidentiality, have been deployed routinely by the most respected judges in American history:

- Justice William Johnson, President Jefferson's first appointment to the Court, regularly engaged in lengthy correspondence with Jefferson in which Jefferson sought to influence the internal functioning of the Court. In many of these letters, Jefferson sought to convince Johnson to work to return the Court to the earlier practice of seriatim opinions rather than the single majority opinion pioneered by Jefferson's arch-rival, Chief Justice John Marshall....
- Justice Samuel Chase, appointed by President Washington in 1796, began his political career as a Republican but converted to the Federalist cause with such enthusiasm that while on the Court he actively and publicly campaigned for the presidency of John Adams. This and some celebrated episodes of intemperance on the bench sufficiently angered Congress that Chase was impeached and tried, but acquitted....
- Justice Joseph Bradley, who served on the Court from 1870 until 1892, was... criticized for hearing a petition for appointment of a receiver brought by an old friend acting as counsel for the petitioner. His choice of receiver was also criticized by some who alleged misfeasance in the sale of the debtor's properties....

- Justice Willis Van Devanter, a 1910 Taft appointee, delivered two opinions in cases involving former client the Union Pacific Railroad. Harding appointee Pierce Butler also delivered court opinions involving his former railroad client, the Great Northern Railroad....
- A perhaps even more suspect extracurricular activity of Justice Frankfurter recently attained considerable attention when his protégé and former law clerk Philip Elman revealed in an interview that he and Justice Frankfurter had numerous conversations regarding internal court discussions. Justice Frankfurter was, in essence, informing Elman, then an Assistant Solicitor General for civil rights cases, of the positions of the Justices regarding segregation, and advising Elman as to how best involve the Government in the litigation chapter of the civil rights movement of the 1940s and 1950s....
- Justice Abe Fortas's close 'kitchen cabinet' relationship with President Lyndon Johnson demonstrated that the problem of the advisor-Justice did not end with Justices Brandeis and Frankfurter. The weight of authority suggests that Justice Fortas was frequently advising the President on matters ranging from Vietnam War strategy to re-election planning. This seemingly was widely known in Washington and tolerated until Justice Fortas's financial dealings brought him under an unfavorable spotlight.

See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOKLYN L. REV. 589, 622-24 (1987) (internal citations omitted).

Here, the House is seeking to convict Judge Porteous for types of conduct that Congress has not previously treated as impeachable offenses. See *Hastings v. Judicial Conference of the U.S.*, 593 F. Supp. 1371, 1382 (D.D.C. 1984) ("Congress therefore did not intend to authorize investigation and formal proceedings against a judge for one or two isolated instances of possibly unethical or inappropriate official conduct unless such conduct, by itself, could amount to an impeachable offense."). To seek impeachment and conviction here is to return to the prior English standard that allowed impeachment for ill-defined "divers deceits."⁷⁴ See Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938); see also Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a*

⁷⁴ "Diver deceits" appeared to refer to an alleged pattern of untrue or misleading statements or actions. Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938).

Madisonian Device, 49 DUKE L.J. 1, 11 (1999). The guarantee of life tenure and judicial independence mean little if lunching with unpopular companions can lead to impeachment.

2. Cocktail Reception with Bodenheimer

The House also alleges that Judge Porteous abused the power and prestige of his office by telling then newly elected state court judge Ronald Bodenheimer, at a cocktail party, that the Marcottes could be trusted in regards to their provision of information regarding bonds. (HF 165.) Louis Marcotte testified that he had no direct knowledge of the conversation between Judge Porteous and Bodenheimer.⁷⁵ (PF 563.)

Bodenheimer, who was of course a percipient witness to his own conversation, testified that Judge Porteous told him “I’ve dealt with [Marcotte] in the past, he’s not going to lie to you about bond information.” (PF 564.) When asked about his subsequent experience with the Marcottes, Bodenheimer testified that “it was true – whatever [Marcotte] told me about a particular defendant, and I would check, I believe I would say I would check every time. The information he gave me, I would call the jail and verify it, and I never, ever caught him in a lie.” (PF 568.) Bodenheimer also testified that he did not feel that Judge Porteous ever used his position as a federal judge to pressure Bodenheimer to work with the Marcottes or issue any bonds. (PF 565.) Moreover, Bodenheimer stated that Judge Porteous never told him what to do in relation to the Marcottes. (PF 566.)⁷⁶ Notably, despite their reliance on Bodenheimer and

⁷⁵ The House also attempts to draw comparisons between Judge Porteous and Bodenheimer, in an effort to convince the Senate that because Bodenheimer ultimately pled guilty and served jail time, the Senate should similarly convict Judge Porteous. As noted by Senator McCaskill during the evidentiary hearings, Bodenheimer’s indictment involved far more than allegations of Bodenheimer taking things of value from the Marcottes. (PF 569.) It also involved Bodenheimer pleading guilty to a conspiracy to plant drugs on an individual. (PF 569.)

⁷⁶ The House appears to have abandoned a claim that Judge Porteous improperly told Bodenheimer, upon his election, that he would never have to buy lunch again. (See House Proposed Findings of Facts, which do not reference the statement.) There is good reason for this

calling him to Washington to testify at the hearing, the House Managers dropped him from their witness list. Had Bodenheimer not been called by the defense, these false representations concerning his prior testimony would have been left uncontradicted.

The House claims that, as a result of Judge Porteous's comments about the Marcottes, Bodenheimer began to do bonds with the Marcottes. (HF 165.) This assertion is directly contradicted by Bodenheimer's testimony. Bodenheimer stated that the pressure he felt regarding bonds stemmed from the "federal court decree that said if you didn't do bonds, they were going to release them with no bonds." (PF 570.) Bodenheimer stated that as a result of the jail overcrowding and the fact that the Marcottes were "doing the lion's share of the bonds, you did have to deal with [the Marcottes]." (PF 570.) Bodenheimer added "But I didn't feel pressure from what I was told by Judge Porteous, no." (PF 570.)

Article II should be dismissed because it is based on pre-federal conduct. It also should be dismissed because the evidence presented by the House does not come close to supporting any allegation of wrongdoing by Judge Porteous before or after he became a federal judge. Article II rests on innuendo and guilt by association. The Framers did not authorize impeachment for socializing with companions whom some Members of Congress find distasteful. The Senate should decisively reject this profoundly deficient Article and the dangerous precedent it seeks to create.

abandonment. Bodenheimer explicitly stated that he "thought it was a funny statement" and viewed it as a quip or joke, made in front of several people, that individuals laughed, and that Bodenheimer did not believe it to be serious advice or a serious statement. (PF 567.)

IV. Article III

While it is the one Article of Impeachment that involves no pre-federal conduct, Article III is also the only Article that deals exclusively with Judge Porteous's actions as a private citizen, not his official actions as a judge. Article III is unprecedented in the history of U.S. impeachment proceedings. The Senate should reject this attempt to expand the scope of impeachable offenses to include purely private conduct.

There is no evidence that Judge Porteous and his wife did anything intentionally to harm their creditors in the personal bankruptcy case that they filed in 2001. Quite the contrary: it is undisputed that he and his wife completed all of their Chapter 13 plan repayments (totaling over \$57,000) and received a discharge of their debts. The Chapter 13 bankruptcy trustee who administered the Porteouses' bankruptcy case was specifically advised by the DOJ and FBI of all of the mistakes relied upon by the House in Article III and yet decided to take no action. With regard to the reporting of Judge Porteous's income, the only mistake that could have materially effected the payouts to creditors, the Chapter 13 trustee specifically advised the FBI that he was not going to take any action to address that issue because, in his expert opinion, doing so would not have "substantially increase[d] the percentage paid to unsecured creditors." (Porteous Ex. 1108 (Beaulieu Letter to FBI).)

The alleged misconduct in Article III consists of mistakes, errors, and omissions that deceived no one and harmed no one. There is no evidence that this alleged misconduct was anything other than honest mistakes, many of which are commonplace in personal bankruptcy cases. Moreover, the evidence presented at trial establishes that these mistakes were the result of erroneous legal advice provided by, and miscommunication with, Judge Porteous's bankruptcy counsel, Claude Lightfoot. After exhaustively investigating Judge Porteous's and his wife's conduct in the bankruptcy, the Justice Department declined to bring any charges against either of

them, citing: (1) its “concerns about the materiality of some of Judge Porteous’s provably false statements”; (2) “the special difficulties of proving *mens rea* and intent to deceive beyond a reasonable doubt in a case of this nature”; and (3) “the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters.” (House Ex. 4 (DOJ Declination Letter, at 1; emphasis added.)

The Senate should acquit Judge Porteous on Article III.⁷⁷

A. Article III Allegations: Mistakes, Errors, and Omissions

Article III alleges that Judge Porteous should be impeached and removed from office – something which has happened in the history of our country only seven times – on the basis of minor mistakes, errors, and omissions in connection with his and his wife’s personal bankruptcy case. Specifically, the House alleges only that Judge Porteous:

1. Used a false name and a post office box address to conceal – for less than two weeks – his identity as the debtor in his bankruptcy case;
2. Concealed certain small assets;
3. Concealed two small allegedly preferential payments to creditors;
4. Concealed gambling losses; and
5. Incurred new debts while his bankruptcy case was pending in violation of a bankruptcy court order.

(PF 597-97; 111 Cong. Rec. S1645 (Mar. 17, 2010).)

Equally important to what the House has alleged is what the House has not alleged. The House does not allege that Judge Porteous abused or in any other way misused his official power and authority as a federal judge. (PF 601.) Article III also does not allege any misconduct or improprieties in connection with financial disclosure forms that Judge Porteous completed while

⁷⁷ Judge Porteous hereby incorporates by reference the arguments set out in his Motion to Dismiss Article III (filed on July 21, 2010), as well as his Proposed Findings of Fact no. 597 through 811 (filed October 1, 2010).

a federal judge.⁷⁸ (PF 600.) Instead, the House seeks to remove Judge Porteous solely on the basis of his conduct as a private citizen attempting to navigate the indisputably complex federal bankruptcy process.

B. Errors and Omissions Are Exceedingly Common in Bankruptcy

At the outset, it is critical that the Senate have something of which the House was deprived entirely: context. Contrary to the implication of the House's charges, errors in bankruptcy cases are exceedingly common. Indeed, consumer bankruptcy petitions are rarely, and possibly never, perfect. (PF 798-801.) As a result, the bankruptcy system has well-developed mechanisms to deal with such issues. Those mechanisms – not the constitutional impeachment process – are the appropriate avenue in which to address the allegations raised by the House in Article III.⁷⁹

Throughout this entire case, the House has adopted an overly simplistic (and self-serving) view of the process involved in filling out bankruptcy schedules and seeking bankruptcy protection. At trial, however, Henry Hildebrand – a leading expert in consumer bankruptcy and a standing Chapter 13 trustee⁸⁰ – testified about the complexities of the bankruptcy process and the great difficulties that debtors have in accurately completing bankruptcy schedules and forms.

⁷⁸ Despite this undeniable fact, the House Managers have attempted improperly to expand the scope of Article III by presenting and relying upon purported evidence of misconduct or impropriety in connection with Judge Porteous's financial disclosure forms. (See HF 190-94.) This effort to insert new allegations against Judge Porteous that the House of Representatives did not adopt is both improper and offensive to the Constitution, and should be rejected forcefully by the Senate.

⁷⁹ At trial, bankruptcy experts Henry Hildebrand and former Bankruptcy Judge Ronald Barliant testified that, in their expert opinions, the most appropriate sanction for uncorrected bankruptcy errors of the sort present in this case would be dismissal of the debtor's bankruptcy case, not contempt sanctions or criminal prosecution. (PF 644-45, 771-73, 811.)

⁸⁰ See Senate Vol. V at 1847:18 – 1848:10 (Chairman McCaskill stating that Henry Hildebrand "will be accepted for the purpose of giving expert testimony in the area of Chapter 13 bankruptcy cases.").

(PF 612, 688, 702, 797-98, 801-06.) He stated that, due to the complexity of those forms, as well as the severe economic stress that they are under, debtors “often do not complete the bankruptcy petition accurately.” (PF 797-98, 801; Senate Vol. V at 1852:17 – 1863:8 (Hildebrand).)

Bankruptcy judges throughout the country also have long recognized that bankruptcy schedules prepared and filed by or on behalf of consumer debtors are rife with problems.⁸¹ This was the subject of significant testimony at trial by Professor Rafael Pardo, an expert in bankruptcy law.⁸² (PF 799, 805-06.) Additionally, bankruptcy commentators have expressly recognized that completed bankruptcy forms often contain errors.⁸³ (PF 799, 806; Porteous Ex. 1068 (Porter study), 1070 (Rhodes study).) In fact, shortly before Judge Porteous and his wife filed their bankruptcy case, the Honorable Steven W. Rhodes, U.S. Bankruptcy Judge for the Eastern District of Michigan, undertook a review of the bankruptcy schedules filed in 200 randomly selected consumer cases pending in his court. Judge Rhodes’s analysis revealed errors in 99% (198 of 200) of the schedules reviewed.⁸⁴ See Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 Am. Bankr. L.J. 653, 678 (1999). (PF 799.)

What all these bankruptcy judges, scholars, and experts have recognized is that preparing bankruptcy schedules is an inherently difficult process, where even experts in the field routinely

⁸¹ See *In re Attanasio*, 218 B.R. 180, 229 (Bankr. N.D. Ala. 1988); *In re Bruzzese*, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997).

⁸² See Senate Vol. IV at 1409:17-22 (Chairman McCaskill stating that Professor Pardo “will be considered an expert by the panel” in matters of bankruptcy law).

⁸³ See, e.g., Teresa A. Sullivan, Elizabeth Westbrook & Jay Lawrence Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 Law & Contemp. Probs. 195, 229 (1987).

⁸⁴ One point noted by Judge Rhodes is particularly relevant to the disclosure issues in this case. Neither the Federal Rules of Bankruptcy Procedure nor the Official Bankruptcy Forms require that a debtor’s schedules of assets and liabilities be dated on or as of any particular date. *Id.* at 675. The House’s assertion in its proposed findings of fact that Judge Porteous was required to file schedules that stated his financial situation precisely as of the date his bankruptcy petition was filed simply is not accurate. (See HF 238.)

make mistakes. (PF 611-12, 798, 805.) Hildebrand testified that, in his expert opinion, based on 28 years of experience as a trustee, there are errors in virtually every Chapter 13 case; indeed, he has never seen a perfect Chapter 13 bankruptcy filing. (PF 797-98, 801-04.) These comments were echoed by Professor Pardo, who also noted that creditors (like debtors) frequently make errors. (PF 805-06.)

Despite this uncontradicted evidence, the House has attempted to present the preparation of bankruptcy schedules by Judge Porteous and his late wife as a black-and-white exercise (instead of the complex field of grey that it is in reality), in which any error constitutes evidence of deceit and fraud. The House takes this view even though the evidence clearly establishes that Judge Porteous heavily relied upon his bankruptcy counsel, a fact which Lightfoot corroborated at trial, and that his bankruptcy counsel made several critical mistakes in connection with the Porteouses' bankruptcy case. (PF 609-12, 615-17, 628, 632, 634-36, 649-53.)

When one considers the complexity of the bankruptcy schedules and the stress that debtors are under as they prepare such schedules, it is easy to understand why errors occur, even when debtors are represented by counsel. It is equally easy to understand, therefore, why bankruptcy courts and federal prosecutors regularly decline to jump to the conclusion pushed by the House – that all bankruptcy errors evidence fraud and ill intent – and seldom recommend or pursue criminal charges as a result of bankruptcy errors. Were this not the case, and if bankruptcy courts and federal prosecutors adopted the view urged by the House in this case, virtually every consumer bankruptcy filing could be followed shortly thereafter by a criminal prosecution. Bankruptcy is not an all-or-nothing system. (PF 807-810.)

C. Judge Porteous's Bankruptcy Should Not be Subject to Harsher Scrutiny Simply Because He Is a Federal District Court Judge

The House contends that Judge Porteous's bankruptcy filing should be subjected to harsher scrutiny because he is a federal district court judge. The uncontradicted evidence, however, is that Judge Porteous had no particular expertise in bankruptcy law or in the complexities of bankruptcy practice. As Professor Pardo testified at trial, most federal district court judges have little experience, knowledge, or expertise concerning bankruptcy issues. (PF 615.) This is true even though district court judges occasionally hear appeals of bankruptcy issues. (PF 615; Porteous Ex. 1067 (Pardo Vanderbilt Law Review article analyzing the disparate quality of appellate review of bankruptcy issues conducted by district court judges versus bankruptcy appellate panels composed of bankruptcy judges).) Indeed, Judge Porteous retained experienced bankruptcy counsel to represent him precisely because he did not have such expertise. It could not be clearer that Judge Porteous and his late wife entered bankruptcy as ordinary private citizens, seeking the same relief sought by millions of other Americans from all walks of life.

D. None of the Article III Allegations Warrants Removal

1. The Porteouses' Bankruptcy

Judge Porteous and his late wife Carmella, exercising their rights as private citizens,⁸⁵ sought bankruptcy protection in 2001 as a result of an untenable financial situation stemming from years of poor financial planning, record-keeping, and discipline. As happens with so many Americans, the couple's expenses, including those associated with raising and educating their four children, simply outstripped Judge Porteous's income. This situation was exacerbated by

⁸⁵ See Commentary to Canon 4(D) (previously 5(C)) of the Code of Conduct for United States Judges, explaining that "[a] judge has the rights of an ordinary citizen with respect to financial affairs"

Judge Porteous's (and his late wife's) penchant for gambling in Louisiana and other places in the country where gambling is legal. Ultimately, after obtaining legal counsel and trying unsuccessfully to reorganize their debt and finances informally, Judge and Mrs. Porteous sought shelter in the bankruptcy process. (PF 605, 607, 623-28, 658.) In so doing, Judge Porteous joined the nearly 1.5 million American debtors who in 2001 sought such protection, and an opportunity for a fresh start. (PF 659.)

The complete history of Judge Porteous's personal bankruptcy case is set forth in his Motion to Dismiss Article III, as well as his Proposed Findings of Fact (PF 597-811), both of which are incorporated herein by reference. That history will not be repeated here.

2. Very Brief Use of a Pseudonym

Judge Porteous and his wife did not intend to deceive, and in fact never deceived, their creditors by using the name "Ortous" on their original bankruptcy filing. The evidence is clear. Within twelve days of filing their original bankruptcy petition, the Porteouses filed an amended petition listing their full and correct names and residential address. Even though the brief use of a pseudonym was specifically disclosed to the Chapter 13 trustee, the trustee never sought to impose any bankruptcy sanction on the Porteouses. The Department of Justice, moreover, specifically concluded that criminal prosecution was not appropriate given the lack of evidence of either materiality or intent.

The law is clear that bankruptcy fraud requires fraudulent intent. (PF 647; 18 U.S.C. §§ 152, 157.) The evidence shows clearly that Judge Porteous and his wife never had any fraudulent or ill intent:

1. Judge Porteous and his wife relied extensively on his bankruptcy counsel (Claude Lightfoot) to advise them with regard to bankruptcy law and to prepare their bankruptcy petition and associated papers. (PF 609-12, 617, 632.)

2. Lightfoot, not Judge Porteous, suggested the use of a pseudonym on the original bankruptcy petition and advised Judge Porteous and his wife that this was permissible. (PF 634-40.)
3. Lightfoot timed the filing of other papers in the Chapter 13 case specifically so that no notices would be sent to creditors until after an amended petition with accurate information was filed. (PF 640, 673-75.)
4. Every witness with knowledge testified that the Porteouses' intent was to correct their original bankruptcy petition shortly after its filing. (PF 638-41, 673-75.)
5. Expert witness testimony established that an incorrect bankruptcy petition is not grounds for denial of discharge or referral for criminal prosecution. (PF 644-646.)
6. Judge Porteous and his wife, through their counsel, filed an amended bankruptcy petition correcting the pseudonym less than two weeks after the filing of the original petition, and the very next day after that pseudonym appeared in the Times-Picayune newspaper. (PF 663-64.)
7. Lightfoot informed the Chapter 13 Trustee of the name correction, thereby disproving any attempt to keep this fact a secret. (PF 641.)
8. No creditor ever received any official bankruptcy filing listing anything other than Judge Porteous's correct name. (PF 670-71.)

Prior to filing for bankruptcy protection, Judge Porteous opened – on Lightfoot's advice – a post office box for himself and his wife. (PF 649-652.) Lightfoot then used this new post office box address and the information previously provided to him to put together the Porteouses' bankruptcy petition, schedules, and statement of financial affairs. (PF 618-20, 632-33, 652, 657.) In preparing those documents, it is undisputed that Lightfoot proposed the use of the "Ortous" pseudonym on the petition. (PF 634-637; *see also* HF 230.) He did this solely out of compassion for the Porteouses, as an attempt to spare them the public embarrassment and notoriety that they, as public figures, would uniquely be subjected to as a result of filing for bankruptcy protection. (PF 630-31, 637.) Judge Porteous and his wife relied on their attorney's advice that such action was permissible and justifiable, so long as it was corrected before creditors received inaccurate information. (PF 609-10, 617, 640.) True to this intent, less than

two weeks after filing their original bankruptcy petition, the Porteouses filed an amended petition correcting their names and listing their residential address. (PF 664-667.) As a result, all notices provided to creditors accurately named the Porteouses as the debtors. (PF 668-671, 673-76.) The Porteouses' creditors were never provided with inaccurate information regarding Judge Porteous and his late wife's names. (PF 669-71, 673-76.)

Lightfoot advised Judge Porteous that there was nothing wrong with filing a petition under a fictitious name, so long as the error was corrected in time to ensure that creditors received proper notice of the bankruptcy filing. (PF 640.) Judge Porteous never intended to deceive his creditors.⁸⁶ (PF 638-40, 646, 654.) Instead, he simply, and in hindsight foolishly and ineffectually, sought to minimize the media attention and embarrassment to his family that would result from the bankruptcy filing. (PF 637.) The case authority in the Fifth Circuit is clear: a debtor is entitled to rely on the advice of his counsel, and a conviction for false oath cannot be founded on a debtor's following the advice of counsel. *Hibernia Nat'l Bank v. Perez*, 124 B.R. 704 (E.D. La. 1991), *aff'd*, 954 F.2d 1026 (5th Cir. 1992). (*See also* PF 648.)

Moreover, the Chapter 13 bankruptcy trustee overseeing the Porteouses' bankruptcy case (Mr. S.J. Beaulieu) was specifically informed of the Porteouses' use of incorrect names on their initial petition and elected not to take any action. (PF 641-42, 779-81, 783.) In January 2004, while the Porteouses' bankruptcy case was pending and prior to their receipt of a discharge, DOJ

⁸⁶ Indeed, in a signed memorandum to the Fifth Circuit Special Investigatory Committee, Judge Porteous specifically stated:

The incorrect names in the original [bankruptcy] filing were not done to defraud any creditor, but rather to avoid the embarrassment of news articles. The articles were printed anyway. No creditor was defrauded by the original petition, indeed no creditor even received the incorrect filing. ... Also the names were corrected within two weeks of the original filing.

(House Ex. 6(c) (Porteous Memorandum dated December 5, 2007, at 5; emphasis added).)

lawyers and FBI agents met with Beaulieu concerning the Porteouses' bankruptcy filing. (PF 780.) Despite meeting with the DOJ and FBI for several hours and being alerted to issues concerning the Porteouses' bankruptcy filing, Beaulieu testified that he did not take any action with regard to the Porteouses' temporary use of incorrect names. (PF 780-81, 783, 785; Porteous Ex. 1108 (Beaulieu Letter to FBI).)

Inaccuracies in debtors' names are not that common, but neither are they unprecedented. Henry Hildebrand, the standing Chapter 13 Trustee in Nashville, and an acknowledged expert concerning Chapter 13 bankruptcy cases, testified that he sees several petitions per year with inaccurate names, and his response is to request that the debtors' cases be dismissed unless the errors are corrected. (PF 802.) Beaulieu similarly testified that he has seen a small number of cases filed with incorrect names. (PF 642.) Indeed, even the House's expert witness on bankruptcy issues, Judge Duncan Keir, has experience with a debtor filing a bankruptcy petition under an incorrect name. In the case of *In re Connecticut Pizza, Inc.*, 193 B.R. 217 (Bankr. D. Md. 1996) (Judge Keir presiding), the debtor filed its bankruptcy petition with both an incorrect name and the wrong state of incorporation. *Id.* at 223 n.5 When that information was ultimately corrected, it was clear that venue was proper in the District of Columbia but not in Maryland. *Id.* Nevertheless, Judge Keir retained the case in the interest of judicial efficiency. *Id.* Neither the opinion nor the docket of the case reflects that Judge Keir ever sanctioned the debtor in any way for its errors.

3. Inadvertent Omissions of a Few, Small Assets

The Porteouses' bankruptcy petition and associated schedules disclosed assets totaling more than \$263,000, and included all of their significant assets, including their home, financial accounts, and personal property. (PF 667; Porteous Ex. 1100(d) (Chapter 13 Schedules).) The only assets that the House contends Judge Porteous failed to disclose are: (1) a tax refund of

\$4,143.72; (2) approximately \$2,100 in a Bank One checking account; and (3) a balance of \$283.42 in a Fidelity Homestead money market account. (PF 598.) The House presented no evidence to show that these omissions were anything but inadvertent, innocent, and immaterial. Given the ubiquitous errors found in Chapter 13 petitions – an uncontroverted fact in this case – the Senate must give special consideration to the concept of materiality (as the Justice Department did) in evaluating the Porteouses' omissions of certain, small assets.

In the particular context of a Chapter 13 case, materiality has two important components: first, the general magnitude of the asset involved, and second, the fact that a Chapter 13 debtor is specifically entitled to retain his or her assets and need devote only *future* income to the repayment of creditors. (PF 692-93, 704-06.) Thus, even if Judge Porteous and his wife had disclosed the assets discussed here in their schedules, there would have been absolutely no difference in the course of their Chapter 13 case or the recoveries of their creditors. (PF 704-06.)

Tax refund

Judge Porteous and his wife signed their tax return on March 23, 2001. (Stipulation 201.) They claimed a refund, but that refund had not been received on the date that he and his late wife filed their original bankruptcy petition. (Stipulation 204, 222.) Indeed, the Internal Revenue Service had not yet processed or approved the return at the time of their bankruptcy filing. Judge Porteous received his tax refund on April 13, 2001, several weeks after filing for bankruptcy and more than two months prior to confirmation of their proposed Chapter 13 plan on June 28, 2001. (Stipulation 204, 222, 278-79.) Judge Porteous and his wife relied – mistakenly – on their counsel in not disclosing the pending refund.⁸⁷ (PF 701.) There is no evidence to support a

⁸⁷ In his signed memorandum to the Fifth Circuit Special Investigatory Committee, Judge Porteous reiterated “[his] position that [he] told Mr. Lightfoot about [the year 2000 tax refund] and [Mr. Lightfoot] said to place it in [Judge Porteous’s] account, but if requested by the

finding of fraudulent intent for a failure to disclose this refund, which the Porteouses would have had the right to retain even if it had been disclosed. (PF 700, 704-06.) Since Judge Porteous and his wife would be entitled to keep their refund in any event,⁸⁸ its nondisclosure, while unfortunate, was immaterial.

Account balances

Judge Porteous advised his bankruptcy counsel that his Bank One checking account balance was approximately \$100, and that figure was used in his and his wife's schedule of assets. (PF 691; Porteous Ex. 1100(d) (Chapter 13 Schedules).) The record does not reflect when this conversation took place or whether their lawyer asked Judge Porteous or his wife for the net (checkbook) balance or advised them to ignore issued but uncleared checks. On the date of the bankruptcy filing, the collected balance of the Bank One account was approximately \$2,200, resulting in an under-disclosure of about \$2,100. Even assuming all other facts and circumstances favorable to the House's position, however, the understatement of this bank balance by \$2,100 simply is of no consequence, for it is undisputed that, as debtors in Chapter 13, Judge Porteous and his wife were permitted to retain the cash in their bank accounts. (PF 692-93.)

The Porteouses' bankruptcy schedules also inadvertently omitted their Fidelity Homestead money market account. That omission appears to have been the result of a miscommunication between Judge Porteous and his counsel. Judge Porteous denies,⁸⁹ and there

bankruptcy trustee, [Judge Porteous] would have to surrender it." (House Ex. 6(c) (Porteous Memorandum, at 6).)

⁸⁸ The tax refund represented the proceeds of Judge Porteous's labor during 2000, a pre-bankruptcy period, which, as an asset of his bankruptcy estate, he was entitled to keep (and which could not be recovered by creditors in Chapter 13).

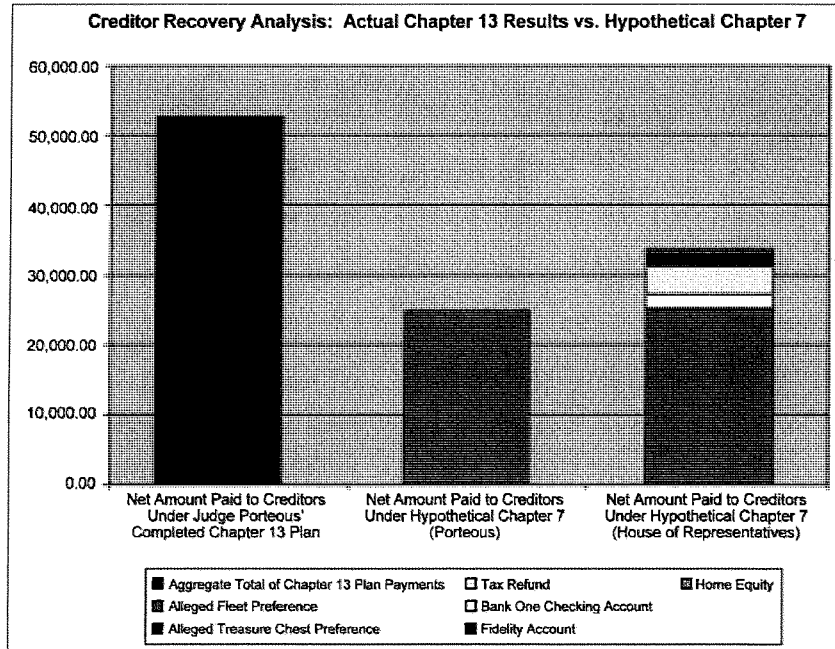
⁸⁹ In his signed memorandum to the Fifth Circuit Special Investigatory Committee, Judge Porteous stated that not disclosing the "Fidelity [account] was an oversight of an account

is no evidence to the contrary, that this account was intentionally omitted from the bankruptcy filing. (PF 696-97.) Moreover, while the account should have been included, its omission was plainly immaterial. In fact, on March 28, 2001, the day that the Porteouses filed their bankruptcy petition, the Fidelity Homestead money market account had a **total balance of \$283.42**, all of which Judge Porteous was permitted to retain in any event. (PF 692-93, 695; Stipulation 230.)⁹⁰

Indeed, the immateriality of each of these inadvertently omitted small assets is confirmed by the so-called “Best Interests of Creditors” Test. That test, a requirement for Chapter 13 repayment plans, requires that a debtor repay his creditors at least as much money through his Chapter 13 plan as those creditors would have received in a Chapter 7 liquidation. (PF 748-51.) It is undisputed that the Porteouses’ repayment plan satisfied this test – their creditors received far more through the Chapter 13 repayment plan than they would have in a Chapter 7 liquidation. It is also undisputed, moreover, that the Porteouses’ creditors received more through his Chapter 13 bankruptcy case than they would have in a liquidation even if the inadvertently omitted assets discussed above had been disclosed, as the following chart illustrates:

containing \$283.42. This was not intentionally omitted with the intent to defraud any creditor and did [not] alter the percentage payback.” (House Ex. 6(c) (Porteous Memorandum, at 6).)

⁹⁰ Through the testimony of Special Agent Horner and related demonstrative charts, the House has attempted to make Judge Porteous’s failure to disclose the Fidelity Homestead account into something meaningful by insinuating that the omission facilitated his continued gambling post-bankruptcy. (See HF 253.) Evidence introduced by Judge Porteous, however, unequivocally refuted this claim by the House. A debtor in bankruptcy may use whatever bank accounts he or she chooses, including new accounts opened post-bankruptcy that are never disclosed to anyone. (PF 698.) To the extent that the Senate believes that Judge Porteous is subject to criticism for failing to identify the Fidelity account in their schedules, that criticism must stand on its own merits; it has nothing to do, factually or legally, with Judge Porteous’s (now reformed) gambling habits.



Given their small size, and the absolute lack of any evidence of ill intent, the inadvertent omission of these few small assets cannot serve as a basis for removing from office a federal judge.

4. Unintentional Inaccuracies in Projected Income

Chapter 13 of the Bankruptcy Code focuses on a debtor's future income rather than his or her existing assets. (PF 692.) Inaccuracies in income, unlike inaccuracies in assets, thus have the *potential* to affect creditor recoveries. In this case, however, the Chapter 13 trustee – the party responsible for supervising Judge Porteous's Chapter 13 case, and a party with every incentive to maximize recoveries for creditors (since his fee is calculated as a percentage of the monies recovered) – reviewed the situation with full knowledge of the facts and declined to

pursue further action because of the minimal amount involved. (PF 681, 685-86, 780-83, 785; Porteous Ex. 1108 (Beaulieu Letter to FBI, at 1).)

Their bankruptcy counsel, Mr. Lightfoot, prepared the Porteouses' bankruptcy schedules. (PF 632-33.) In disclosing the Porteouses' income, Lightfoot inadvertently used a stale paystub for Judge Porteous.⁹¹ (PF 618, 633, 678.) That paystub was attached to the Porteouses' bankruptcy filing, and thus open and obvious to the bankruptcy judge, the Chapter 13 trustee, all creditors, and anyone else who cared to look. (PF 679-80; Porteous Ex. 1100(d) (Chapter 13 Schedules, at 19.) Using this stale paystub was an innocent mistake by counsel. (PF 678, 682-83, 688-89.) It does not evidence an intent by Judge Porteous to deceive or injure his creditors.⁹² In fact, the only likely repercussion from such an error would be for the Porteouses' Chapter 13 repayment plan to be amended to add additional payments, or, at worst, for their discharge to be denied. (PF 784, 811.) This was the uncontradicted testimony of experts Hildebrand and former Judge Barliant. (PF 804, 811.) As it happened, however, the DOJ and FBI brought this issue to the Chapter 13 trustee's attention in early 2004, before the Porteouses received a discharge in their bankruptcy case, and the trustee elected not to take any action with regard to the understated income. (PF 780-84; Porteous Ex. 1108 (Beaulieu Letter to FBI).)

The House also alleges that Judge Porteous should have adjusted his projected disposable income, and thus the amount of payments to his creditors, because his income exceeded the cap on payroll taxes for Social Security contributions (so-called FICA limits). In a perfectly-

⁹¹ Lightfoot testified that he elected to use this stale paystub (and not ask for an updated paystub) even though Judge Porteous had disclosed his net monthly take-home pay to Lightfoot as approximately \$7,900. (PF 622, 633, 678; House Ex. 138(b) (Porteous bankruptcy worksheets, at CL0032/SC00672).)

⁹² Judge Porteous has specifically denied that the underreporting of his income was intentional. (House Ex. 6(c) (Porteous Memorandum, at 6: "The understating of income was not intentional."))

executed Chapter 13 case, such an adjustment would have been made. But the undisputed evidence in this case establishes that the Porteouses' bankruptcy attorney was completely unfamiliar with this FICA phase-out issue. (PF 682.) As a result, the Porteouses did not receive any helpful legal advice regarding this issue. (PF 682.) It is manifestly unreasonable to expect a client – even one with training and experience in other areas of the law – to identify and apply such a fine point of bankruptcy law, especially when that issue is unfamiliar even to his counsel, a subject-matter expert. (PF 683.) Moreover, when this issue was brought to the attention of the trustee by the DOJ and FBI, he concluded that the amount involved would not justify his taking further efforts to collect it. (PF 685-86, 780-83; Porteous Ex. 1108 (Beaulieu Letter to FBI, at 1).)

Notwithstanding the alleged omissions, the Porteouses made each payment due under their Chapter 13 repayment plan, totaling more than \$57,000, and received a discharge. (PF 776-77, 788.) Moreover, their plan provided for a higher percentage recovery to creditors than typical Chapter 13 plans in the Eastern District of Louisiana in 2001. (PF 278.)

5. Omission of Two Minor Pre-Petition Payments

The House alleges that Judge Porteous made payments to creditors prior to his and his wife's bankruptcy case. (PF 598.) Every debtor makes pre-petition payments to creditors, and Judge Porteous is no exception. The simple fact, however, is that there is nothing inherently wrong, evil, or sinister about pre-petition payments. (PF 707; *In re Huber Contracting, Ltd.*, 347 B.R. 205, 215 (Bankr. W.D. Tex. 2006) (citations omitted) (noting that numerous courts have long recognized that there is nothing inherently wrong with “preferring” a particular creditor, so long as that preference is not made with fraudulent intent).)

The reason for disclosing pre-petition payments in bankruptcy case is that, in certain circumstances, the Chapter 13 trustee is given avoidance powers under Section 547 of the

Bankruptcy Code so that he can seek to retrieve such payments if they are substantial and would have an impact on the payments to other creditors. The two pre-petition payments that the House alleges Judge Porteous improperly failed to disclose are:⁹³

1. \$1,500.00 paid by Judge Porteous to the Treasure Chest Casino on March 27, 2001; and
2. \$1,088.42 paid by Judge Porteous's secretary to Fleet Credit Card Company on March 23, 2001.⁹⁴

Given the small size of these alleged preference payments,⁹⁵ however, it is highly unlikely that the trustee would have pursued those payments – given that the costs of collection would have greatly exceeded any payments returned to the bankruptcy estate. (PF 716.) Indeed, the Chapter 13 Trustee, Mr. Beaulieu, testified at trial that the two allegedly preferential payments omitted from the Porteouses' bankruptcy filings "were inconsequential as far as [he] was concerned," "were not to an insider," and, as a result, he "would not have probably done anything on those two items." (PF 715.)

Moreover, there is absolutely no evidence to suggest that Judge Porteous's failure to disclose these payments was caused by anything other than poor record-keeping. Indeed, given Lightfoot's testimony that he had the Porteouses sign but not date their bankruptcy filings (the

⁹³ See PF 713-14; House Report at 103, 106-07.

⁹⁴ At trial, Judge Porteous's judicial secretary, Rhonda Danos, testified that, over the course of their nearly 24-year long working relationship, she and Judge Porteous developed an informal custom whereby she would occasionally write checks on Judge Porteous's behalf (often because he did not have his checkbook with him), for which he would then promptly reimburse her. (PF 708-11.) This was something that Danos did not just for Judge Porteous, but also for other people, including her sons. (PF 712.) There is no evidence to support the allegation that Judge Porteous asked Danos to write a check to Fleet Credit Card Company in March 2001 in order to conceal that payment or with any other ill intent.

⁹⁵ While the House contends that these two undisclosed payments constitute preferences, this is a subject about which there is much dispute and as to which the House has failed to carry its burden of proof.

dates of which he then subsequently added prior to filing), the record does not demonstrate that the allegedly preferential payments had even occurred by the time that Judge Porteous signed his statement of financial affairs. (PF 656-57.) Such a scant record simply cannot support the House's claims of intentional nondisclosure, deceit, and/or fraudulent intent. (PF 721.) Moreover, it is by no means clear that either of these payments is, in fact, a recoverable preferential transfer, since the Treasure Chest transaction was a redemption of a marker (which, as discussed below, is not a debt under Louisiana law) and the Fleet transaction was a payment by a non-debtor.

6. Non-Disclosure of Gambling Losses and Debts

The House alleges that Judge Porteous failed to disclose gambling losses. (PF 598.) At trial, the FBI Agent who prepared the chart of gambling losses relied upon by House testified that the chart reflected only the information that he was able to obtain from the casinos that he contacted. (PF 737.) As a result, his chart does not include cash transactions or so called non-rated (or non-recorded) play. (PF 737.) Given this admittedly incomplete evidence, the House has failed to prove its initial premise: that the Porteouses had net gambling losses during the relevant time period. (PF 737-38.) Even if they did, however, the House failed to present any evidence that the Porteouses intentionally omitted gambling losses from their bankruptcy filings, or that they omitted such information with a fraudulent intent. (PF 739.) Finally, since much of Judge Porteous's pre-bankruptcy gambling was done using credit card advances, the creditors that might have reviewed his statement of financial affairs to see if he disclosed gambling losses already had evidence of gambling activity *in their own records*. The non-disclosure thus had no adverse impact on creditors. In the end, this allegation is based solely on speculation and incomplete records, neither of which is sufficient to warrant removal – particularly in the absence of any evidence of intentional nondisclosure.

7. Post-Confirmation Conduct

The House's specific allegation is that Judge Porteous committed bankruptcy misconduct by "incurring new debts while [his bankruptcy] case was pending, in violation of the bankruptcy court's order." (PF 598.) The House asserts that Judge Porteous incurred post-petition debt during three distinct time periods following his bankruptcy filing: (i) March 28, 2001, through May 8, 2001; (ii) May 9, 2001, through June 28, 2001; and (iii) June 29, 2001, through July 22, 2004. (See HF 269-96; House Report at 108-15.) The House implies that Judge Porteous violated federal bankruptcy law by incurring debt during the first two time periods, and that Judge Porteous knowingly violated the Bankruptcy Court order confirming his repayment plan by incurring debt during the third time period.

The House's allegations and analysis are overly formalistic and, when analyzed critically, unavailing. First, the Bankruptcy Code does not prohibit debtors from incurring post-petition debt without the permission of the bankruptcy trustee. (PF 757.) Quite to the contrary, the Code clearly contemplates that a debtor may do so, as it specifically states that if a debtor incurs such debts, they may be disallowed as an item to be paid by the trustee, and may be non-dischargeable. 11 U.S.C. §§ 1305(c), 1328(d). To the extent that the House claims that Judge Porteous's actions violated the Bankruptcy Code, or that the trustee's brochure instructing debtors not to incur debts has any legal significance, the House is simply mistaken. (PF 754, 757.)

Second, the Bankruptcy Court's order instructing Judge Porteous not to incur additional debt without trustee approval contemplated that that instruction would not always be followed; indeed, the very next line set out the consequences for ignoring the instruction. (House Ex. 133 (Confirmation Order, at 1).) Because of the court's familiarity with the law, it is not surprising that the consequences spelled out in the order are those set forth in the Bankruptcy Code --

namely, disallowance and non-dischargeability. 11 U.S.C. §§ 1305(c), 1328(d). (*See* PF 763.) Thus, all the order did was warn Judge Porteous that if he incurred debts without the trustee's permission, he would be required to pay those debts in full from sources other than the disposable income he was devoting to his Chapter 13 plan. (PF 765.) Any reasonable construction of the order must take into consideration what it actually says, in its entirety. The House's interpretation of the order – that incurrence of unauthorized debt could lead to contempt charges, or even removal from office, rather than the consequences set out in the order itself – places far more weight on the order than it can reasonably bear.⁹⁶

Finally, it is far from clear that Judge Porteous in fact incurred what would be considered "debt" without the trustee's permission.⁹⁷ The House presented evidence that Judge Porteous executed a number of casino markers following the entry of the confirmation order in his bankruptcy case.⁹⁸ Markers, however, do not constitute debt. (PF 734-35.) Rather, under Louisiana law, markers are treated as negotiable instruments or checks. *See TeleRecovery of Louisiana, Inc. v. Gaulon*, 738 So. 2d 662, 664-66 (La. Ct. App. 1999) (examining the features and attributes of casino markers and concluding that markers constitute checks under Louisiana law). Indeed, this is precisely the conclusion that four Fifth Circuit federal judges reached in

⁹⁶ Moreover, both former Bankruptcy Judge Barliant and Professor Pardo criticized the confirmation order as entirely unsupported by the Bankruptcy Code, as well as impossible to be complied with literally. (PF 755-61.) Judge Barliant further explained that if he had ever entered such an order, he would have "[k]ick[ed] [him]self for having entered the order" and either vacated it or construed it in a way to make it consistent with the Bankruptcy Code, which – as interpreted by the House – it is not. (PF 762.)

⁹⁷ During the Fifth Circuit Special Investigatory Committee hearings, Judge Porteous testified that (1) he disputed whether a marker constitutes credit and (2) he does not believe that purchasing gambling chips at a casino with a personal check would have violated any court order, including the confirmation order entered in his bankruptcy case. (PF 726.)

⁹⁸ The House also pointed to a credit card with a *de minimis* limit that was applied for and used post-confirmation. However, no evidence was presented that Judge Porteous, as opposed to his late wife, used the card.

their concurring and dissenting opinion in Judge Porteous's judicial disciplinary proceeding. (House Ex. 6(b) (Fifth Circuit Judicial Council Dissent at 39).)

This is consistent with the view taken by at least one of the casinos that accepted markers (as payment for gambling chips) from Judge Porteous. FBI Agent Horner confirmed at trial that, in 2003, he had a discussion with the Comptroller of the Treasure Chest Casino in Kenner, Louisiana, Mr. Vincent Schwartz, concerning casino markers. (PF 724.) During that conversation, Mr. Schwartz explained to FBI Agent Horner that "a marker is a temporary check," which the casino will negotiate if the marker is not redeemed first. (PF 724.) The House has failed to offer any explanation for why its view that a marker is a debt is more accurate than the view that a marker is a check held by the comptroller of one of the casinos that accepted the very markers at issue in this case.⁹⁹

While the House has attempted to establish that, contrary to Louisiana law, markers do constitute debt, this remains – at most – an open issue, about which reasonable minds can and do disagree. (PF 723.) Such an unsettled and complex legal issue certainly cannot serve as a basis for the removal of a federal judge. Moreover, even if the signing of a marker did involve or was related to the incurrence of some debt, there is no valid distinction between that debt and the debt involved in any check transaction outside of the gambling context. Put another way, there is no legal difference between buying gambling chips at a casino with a marker and buying potato chips at a grocery store with a check.¹⁰⁰ (PF 731.) Thus, if Judge Porteous violated the

⁹⁹ While the three-judge Fifth Circuit Special Investigatory Committee took the position that "[a] gambling 'marker' is a form of credit extended by a gambling establishment, such as a casino, that enables a customer to borrow money from the casino," the Committee cited absolutely no authority for that position, which, as noted, is directly contrary to Louisiana law. (House Ex. 5 at 19 n.10.)

¹⁰⁰ Those two transactions are also identical in another way – neither warrants the impeachment or removal from office of a federal judge.

Bankruptcy Court's order by executing markers, any other debtor who wrote a personal check at a retail establishment would violate that order as well. No one suggests that such a broad interpretation of the order is sensible or was intended by the bankruptcy judge.

E. Compared with Prior Impeachments, Article III's Allegations of Private, Minor Bankruptcy Misconduct Do Not Justify Removal from Office

In the history of the Republic, no federal judicial officer has been impeached and convicted for purely private conduct that does not constitute an actual abuse of constitutional power. Article III, however, seeks to deviate from this precedent and do just that. The allegations set out in Article III are novel (as well as grossly insufficient to warrant removal) in that they all relate to Judge Porteous's and his wife's purely private conduct in connection with this personal bankruptcy filing. There is no allegation in Article III, and there was no proof at trial, that Judge Porteous actually abused the power entrusted to him as a federal judge in connection with his family's bankruptcy. Moreover, the Justice Department specifically investigated Judge Porteous's conduct in connection with that bankruptcy and formally declined to bring any criminal charges. (PF 780-81, 792-96; House Ex. 4 (DOJ Declination Letter).) Accordingly, the Senate should vote to acquit on Article III.

Since the ratification of the Constitution, only fifteen federal judicial officers have been impeached by the House of Representatives. Of those, seven have been convicted by the Senate and removed from office. In every case resulting in conviction, the House has alleged, and the Senate has found, that the former judge actually abused the power entrusted to him as a federal judge.¹⁰¹

¹⁰¹ For an extensive discussion of those cases where the Senate has voted to convict and remove a federal judge, please see section II (pages 19-23) of Judge Porteous's Motion to Dismiss Article III (filed on July 21, 2010), which is incorporated herein by reference.

This precedent is clear, and it should guide the Senate here. Specifically, the Senate has previously voted to convict judges in impeachment trials only when their conduct is found to constitute an actual abuse of constitutionally entrusted judicial power. The House's Article III in this case, however, alleges no such actual abuse of official power by Judge Porteous. Instead, Article III seeks to convict and remove Judge Porteous solely on the basis of his and his wife's private conduct in connection with their personal bankruptcy filing.

Of the bases for past Senate impeachment convictions, tax evasion (charged by the House against Judges Ritter and Claiborne) is the most analogous to the bankruptcy misconduct alleged in Article III. Both federal tax and bankruptcy laws require full disclosures under oath. Likewise, both filing tax returns and seeking bankruptcy protection are private financial activities, which occur wholly apart from one's employment. Thus, the viability of the House's Article III, which is novel and not supported by prior precedent, can be evaluated by analogy to prior tax evasion impeachment allegations. Such allegations were raised in the Ritter and Claiborne impeachments, and the Senate's treatment of both should guide it here.

The House impeached Halsted Ritter in 1936 on the basis of seven articles. The first six such articles alleged various acts of misconduct in connection with Judge Ritter's actions on the bench, including kickbacks,¹⁰² practicing law while a judge, exhibiting favoritism in connection with cases before him, and tax evasion. With regard to tax evasion, the House alleged that Ritter filed two tax returns that improperly omitted income that he received in connection with his judicial misconduct (*i.e.*, bribes or other gratuities). The seventh article was a catch-all, alleging that Ritter's various acts of misconduct rendered him unfit to serve as a federal judge. Following

¹⁰² The House's second article alleged that Ritter "wrongfully and oppressively exercised the powers of his office to carry into execution" his plan to appoint a receiver and receive a portion of the fees paid to that receiver. *See* S. Doc. No. 185, at 4 (74th Cong. 2d sess., 1936), Articles of Impeachment Presented Against Halsted L. Ritter.

trial, the Senate acquitted Ritter on each of the first six articles -- including the two articles that sought his removal on the basis of tax evasion. The Senate then turned, however, to the seventh, catch-all article and voted to convict.

The Ritter impeachment precedent is instructive in how the Senate deals with articles of impeachment directed at private financial conduct. First, the Senate acquitted Ritter on both articles of impeachment that alleged solely personal conduct unrelated to his official position: tax evasion. Those articles omitted any reference to Ritter's abuse of his judicial authority and alleged instead simply that he received income that he failed to report. This result significantly undercuts the House's novel assertion in Article III that purely private, off-the-bench conduct in connection with a personal bankruptcy filing (or, by analogy, a personal tax return) can be the proper basis for an impeachment conviction. Indeed, in the first instance where the Senate considered removing a judicial officer for private conduct not specifically alleged to relate to an actual abuse of official power, the Senate rejected the theory and voted to acquit.

Second, the Ritter impeachment presented a significantly stronger case for removal on the basis of private conduct than that alleged in Article III, and yet it was rejected. In Ritter, the House alleged that there was a nexus between the alleged private misconduct (tax evasion) and the alleged abuse of judicial power (kickbacks). Indeed, the income that Ritter failed to report, which led to the tax evasion charge, consisted of bribes or other gratuities paid in connection with Ritter's actual abuse of his judicial authority. Ritter's private misconduct in connection with his tax returns was, thus, just an extension and continuation of his official misconduct. Nevertheless, the Senate voted to acquit. There is no such nexus in this case; indeed, the House does not allege and did not prove that Judge Porteous's private bankruptcy misconduct was in any way connected with the allegations of official misconduct contained in Articles I and II.

Lacking any such a link, the allegations against Judge Porteous in Article III, which are far weaker than those asserted – and rejected – against Ritter, should likewise be rejected.

The Claiborne impeachment is similarly instructive. In that case, both the House and Senate's impeachment proceedings followed Claiborne's federal conviction for tax fraud. Indeed, the Claiborne articles of impeachment specifically alleged that the "facts [relating to tax fraud] set forth in [Claiborne Articles I and II] were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada." S. Hrg. 99-819, pt. 1, at 7-8 (1986). In addition to the fact that his criminal conduct had already been conclusively determined by a federal jury (a clear distinction from the facts of this case), the Claiborne impeachment presented the unique circumstance that Claiborne had refused to resign his judgeship, was collecting his federal judicial salary while in prison, and intended to return to the federal bench after completing his two-year criminal sentence. These circumstances differ significantly from the Article III allegations against Judge Porteous, who has been neither criminally charged nor convicted of any misconduct in connection with his personal bankruptcy. Quite to the contrary, after conducting an extensive investigation, the Justice Department specifically declined to bring any criminal charges against Judge Porteous. (PF 780-81, 792-96; House Ex. 4 (DOJ Declination Letter).) Thus, the Senate's action in the Claiborne impeachment, which effectively ratified his prior criminal conviction and was necessary to prevent a convicted felon from retaking the bench, does not support the House's attempt in Article III to remove Judge Porteous from office on the basis of allegations of private bankruptcy misconduct that even the Justice Department concluded did not warrant criminal prosecution.

V. **Article IV**

Article IV alleges that Judge Porteous should have disclosed the allegedly corrupt relationships with Creely, Amato and the Marcottes which serve as the basis for the false allegations in Articles I and II in response to general questions asking him whether he could identify any matters that: (1) “could cause an embarrassment” to him or President Clinton if publicly known; (2) could be used to “influence, pressure, coerce,” “blackmail,” or “compromise” him; (3) would “impact negatively on his character, reputation, judgment, or discretion;” or (4) would unfavorably “affect his nomination” as a federal judge. (PF 812-25; 111 Cong. Rec. S1645 (Mar. 17, 2010).)

As already shown at length in the discussion of Articles I and II, there is little or no substance to any of these allegations of misconduct. Judge Porteous did go to lunch with his friends, but he never exchanged curatorships for cash. He did accept non-cash gifts from the Marcottes (as did essentially every judge in Gretna at the time), but he never wrongfully adjusted a bond or a conviction for them, and he was neither accused nor prosecuted in the Wrinkled Robe investigation. Most importantly, it is clear that in 1994 Judge Porteous had no reason to believe any of his past conduct was wrongful – it did not deviate from the norms of the Gretna bench and bar at the time – and therefore it would have made no sense for him to believe it would embarrass him or President Clinton or reflect poorly on him in any way.

Article IV suggests that Judge Porteous “concealed” facts about events that the House readily admits took place in the open – lunches at high-profile restaurants, trips with other judges and lawyers, and the assignment of curatorships through official court activities. It is self-evident that Judge Porteous did not believe that his public behavior was inherently corrupt, embarrassing, or likely to subject him to blackmail. There was thus no reason for him to think it required disclosure. There was no “concealment.” Moreover, much of the information that the

House complains Judge Porteous didn't disclose was, in fact, known to the FBI and made available to the Senate, in connection with Judge Porteous's confirmation. Thus, even Article IV's claim that the Senate was "deprived" of this information (whether or not Judge Porteous believed it relevant or significant) is incorrect.

Article IV is little more than an effort by the House to resurrect the pre-federal conduct alleged (but not proven) in Articles I and II. As discussed above, allegations of pre-federal misconduct have never been, and should not become, grounds for conviction in this or any other case. Even more pernicious is the risk that, if the Senate convicts Judge Porteous under Article IV, all federal judges will have reason to fear impeachment by some future Congress based on a subjective determination that the accused should have anticipated that some aspect of his or her past might someday be perceived as embarrassing. An impeachment standard designed by James Madison to impose a clear and high standard would be replaced by a standard of what future Senators in hindsight think was "an embarrassment." It would treat failure to anticipate the subjective judgment of future Senators as the constitutional equivalent of treason.

A. The Allegations Against Judge Porteous in Article IV

Article IV alleges that "[i]n 1994, in connection with his nomination to be a judge of the United States District Court for the Eastern District of Louisiana," Judge Porteous "knowingly made material false statements about his past to both the United States Senate and to the FBI in order to obtain the office of United States District Court Judge." (PF 812.) The House then defines the alleged false statements:

(1) On his Supplemental SF-86, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known. Judge Porteous answered 'no' to this question and signed the form under the warning that a false statement was punishable by law.

(2) During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.

(3) On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees," Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did "not know of any unfavorable information that may affect [his] nomination."

(PF 813-15.) Article IV alleges that these statements were, in fact, false, because Judge Porteous should have responded to the questions above in the affirmative in light of the following information:

- His relationship with Jacob Amato and Robert Creely;
- That he had appointed Robert Creely as a curator in "hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm";
- His relationship with Louis and Lori Marcotte;
- That he had solicited and accepted numerous things of value from the Marcottes while at the same time taking official actions that benefitted the Marcottes;
- That Louis Marcotte made false statements to the FBI in an effort to assist Judge Porteous in being appointed to the federal bench.

(PF 816-19.) As such, Article IV necessarily depends on the Senate finding both that Judge Porteous committed the wrongful pre-federal acts described in Articles I and II, and that Judge Porteous, at the time of his confirmation in 1994, believed those actions to be improper or embarrassing. The House argues that Judge Porteous's failure to disclose these facts "deprived the United States Senate and the public of information that would have had a material impact on his confirmation." (PF 820.)

Article IV also alleges that Judge Porteous “well knew and understood” that Louis Marcotte “made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the federal bench.” (PF 823.) This claim is identical – word for word – to the claim made in Article II. Marcotte’s conversations with the FBI, however, in which he made these allegedly false statements, took place on August 1, 1994, and August 17, 1994, *after* Judge Porteous had filled out his SF-86 and his Supplemental SF-86, and *after* Judge Porteous was initially interviewed by the FBI. (PF 903.) Marcotte’s conversation with the FBI cannot have been the basis of allegedly false statements Judge Porteous made in forms he completed and an interview he gave prior to that time. This critical fact was never revealed to the House before the vote on impeachment. As demonstrated below, the House’s allegations and evidentiary arguments related to Article IV are riddled with such illogical and implausible flaws.¹⁰³

B. Judge Porteous Did Not Submit False Answers or Withhold Information from the FBI or the Senate

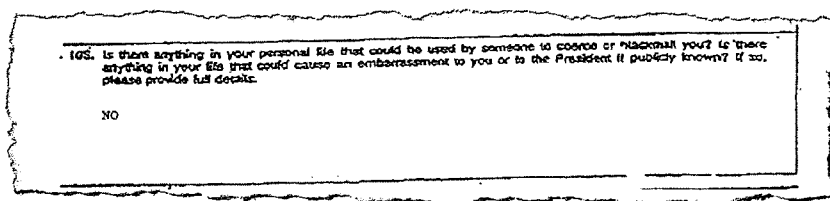
1. SF-86 and Supplemental SF-86

On April 27, 1994, in connection with a possible nomination to the United States District Court for the Eastern District of Louisiana, Judge Porteous signed a completed Standard Form (“SF”) 86. (PF 834.) The SF-86 asked a series of detailed questions including “Have you ever been charged with or convicted of a felony offense?” (PF 836.)

Prior to July 6, 1994, Judge Porteous completed and signed a Supplemental SF-86. (PF 837, House Ex. 69(b) PORT 297-98.) The Supplemental SF-86 also asked detailed questions,

¹⁰³ Article IV does not contain a claim that Judge Porteous knew and understood that Robert Creely made false statements to the FBI in an effort to assist Judge Porteous in being appointed to the federal bench. (PF 824.) Nor does Article IV allege that Judge Porteous lied when he stated during his background check that he had not abused alcohol as an adult. (PF 825.) Article IV also does not allege that Judge Porteous suborned false statements. (PF 821.)

such as “Please list all of your interests in real property” and “Have you . . . ever been convicted of a violation of any Federal, state, county, or municipal law, regulation, or ordinance?” The last question on the Supplemental SF-86, No. 10S, asks “Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details.” (PF 839, PORT 298.) Judge Porteous responded “No.”



The House offered no evidence that Judge Porteous understood his response to be false. Judge Porteous was not aware of anything that could have been used to blackmail him or cause embarrassment to him or the President. As discussed, *supra*, Marcotte unequivocally testified that he could not have coerced or blackmailed Judge Porteous. Similarly, Amato did not think that he could influence Judge Porteous. (PF 84, 85.) He testified that he “always felt he [Judge Porteous] was always going to do the right thing”; a view Amato still holds today, and he always thought Judge Porteous did the right thing on the bench. (PF 86, 87.)

The House has argued that a candidate must necessarily be exhaustive and over-inclusive when answering these types of questions. While the House’s position may be aspirational, based on the testimony adduced during the evidentiary hearings it is not the practice of most (or, perhaps, of any) nominees. Bobby Hamil, a 25 year veteran of the FBI, and the only fact witness to testify before the Senate regarding Article IV, stated that although he had reviewed various

SF-86's and Supplemental SF-86's in his career, he could not recall a single instance where a candidate responded with an affirmative answer to this question. (PF 841-43.) Professor G. Calvin Mackenzie, an expert in the area of presidential appointments and the appointments process, testified that there are no guidelines as to what constitutes embarrassing information in relation to this question. Mackenzie described this question as "ambiguous" and "very difficult to apply" and reported that he is not aware of any individual who has ever responded affirmatively to this question. (PF 845, 847.) Further, Mackenzie testified that "history is replete with examples of people who have answered no to this question, gone into the confirmation process, or sometimes even gone through successfully the confirmation process, only to have information come out later which was embarrassing to them, sometimes, even embarrassing to the president." (PF 845.) Nonetheless, Mackenzie noted, that in his study of the field, he was unaware of any individual who has ever been prosecuted or removed from office for allegedly falsely answering this question. (PF 846.)

Further, courts have rejected answers to the type of vague, untethered question that appears in the Supplemental SF-86 as the basis for perjury or false statement crimes. In *United States v. Kerik*, Bernard Kerik, the former New York City Police Commissioner and nominee for Secretary of the Department of Homeland Security, was charged with lying to the White House when he sought membership in the Academe & Policy Research Senior Advisory Committee to the White House Office of Homeland Security, among other positions.¹⁰⁴ See 615 F. Supp. 2d

¹⁰⁴ On December 3, 2004, Kerik was nominated by President Bush to succeed Tom Ridge as United States Secretary of Homeland Security. On December 10, 2004, after a week of press scrutiny, Kerik withdrew acceptance of the nomination. Kerik stated that he had unknowingly hired an undocumented worker as a nanny and housekeeper who had used someone else's social security number. See Mike Allen and Jim VandeHei, *Homeland Security Nominee Kerik Pulls Out*, WASH. POST (Dec. 11, 2004).

256 (S.D.N.Y. 2009). The questions to which Kerik allegedly provided false answers to included:

- [W]hen asked whether there was anything embarrassing that he [Kerik] wouldn't want the public to know about, Kerik told a White House official, "Nope! It's all in my book."
- Similarly, when asked whether there was any other information, including information about other members of his family, that could be considered a possible source of embarrassment to him, his family, or the President, Kerik stated, "Not to my knowledge."

Id. at 272 n.19. The U.S. District Court for the Southern District of New York, in framing its analysis, noted "[w]here a question is so vague as to be fundamentally ambiguous, [] it cannot be the predicate of a false statement, regardless of the answer given." *Id.* at 271 (citing *United States v. Watts*, 72 F. Supp. 2d 106, 109 (E.D.N.Y. 1999) (noting an answer to a fundamentally ambiguous question "may not, as a matter of law, form the basis of a prosecution for perjury or false statement").) The court further noted that "[t]his proscription holds even where the answer is unquestionably false or fraudulent." *Kerik*, 615 F. Supp. 23 at 271.

Because the word "embarrassing" was used in several of the questions, the court in *Kerik* analyzed the meaning and application of the term in the context of background checks and applications for federal employment:

Plainly the meaning of the term "embarrassing," . . . is open to interpretation. What is embarrassing to one person may not be embarrassing to the next. If an individual withheld some innocuous but potentially embarrassing secret -- such as one's contentious divorce or one's prescription medication -- it is hard to believe that a federal prosecution [let alone an impeachment] would follow.

Id. at 273. The court then delved into a more specific analysis, stating:

[T]his Court agrees that the term "embarrassing" is not fundamentally ambiguous *per se*. For example, a question about "embarrassing educational history" or "embarrassing business dealings" would not be fundamentally ambiguous because it

provides the answerer with clarity about the specific information sought by his examiner.

Id. The court then stated that the more general questions posed to Kerik, such as “whether there was anything embarrassing that he would not want the public to know about,” were more troubling. *Id.* at 273-74. “In contrast” to the more specific questions listed above, the court stated that “this level of abstraction renders the term ‘embarrassing’ fundamentally ambiguous.” *Id.* at 274. The court pointed out:

The question does not explicitly limit the context to “associations” or specific affiliations. Rather, the question is more like a fishing expedition, seeking *anything* that might embarrass an applicant. Despite the laundry list of answers the Government wishes Kerik would have supplied, it does not follow that Kerik necessarily understood the question in precisely this way.

Id. The court concluded that the two questions posed to Kerik provided “no greater clarity.” *Id.* Thus, the court found that these two questions were “fundamentally ambiguous.” *Id.*

The questions posed by the Supplemental SF-86 (as well as the FBI questioning and the Senate Questionnaire, as will be shown below) are largely identical to the “fundamentally ambiguous” questions posed to Kerik, which the court in that case found so troubling.

2. FBI Background Check Commences

In the summer of 1994, the FBI began its background investigation of Judge Porteous, interviewing approximately 120 different individuals, including Senators Bennett Johnston and John Breaux. (PF 849-852, 888.) Senator Johnston stated that he had known Porteous “for five to ten years . . . thinks highly of the candidate and believes him to be well-qualified.” (PF 851.) Senator Breaux stated that he had known Judge Porteous for approximately nine years . . . thinks highly of the candidate, both on a personal and professional basis, and considered him to be a friend.” (PF 852.) Despite Senator Breaux’s apparent knowledge of the relationship between Judge Porteous and the Marcottes, he did not raise that issue with the FBI and made no mention

of his own lunches with the Marcottes and Judge Porteous. (House Ex. 69(b) PORT 279; *see also* footnote 61, *supra*, for further discussion for Senator Breaux's previous contacts with the Marcottes.)

3. First FBI Interview of Judge Porteous

On July 6, 1994, well before the FBI had interviewed Louis Marcotte, the FBI, through FBI Special Agent Bobby Hamil and another agent, conducted a lengthy interview of Judge Porteous. (PF 853, 856.) The interview summary prepared by the FBI states that "Porteous said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgment, or discretion." (PF 863, House Ex. 69(i).)

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Continuation of FD-302 of GABRIEL THOMAS PORTEOUS, JR. On 7/6 & 7/8/94 Page 3

PORTEOUS said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgement, or discretion.

Hamil conceded that the FBI asks the question in the compound manner in which it appears to have been answered. (PF 864.) During the course of his testimony, Hamil conservatively estimated that he had performed one hundred interviews relating to FBI background checks. (PF 855.) Hamil stated that the question above was a standard question routinely asked of interviewees. (PF 858.)

Based upon the defense's review of the complete FBI file related to Judge Porteous's background check, some form of this question was asked in over 60 of the interviews of

individuals contacted by the FBI. (PF 865, *see* House Ex. 69(b).) Not a single individual answered affirmatively or raised any concerns, issues or questions related to this question. (PF 865, *see* House Ex. 69(b).) Hamil testified that this finding would not have surprised him. (PF 866.) In Hamil's experience, in all of the interviews he has conducted where he has asked that question, he cannot recall a single individual answering in the affirmative. (PF 867.)¹⁰⁵

As a specific example, Bob Creely was interviewed by the FBI on August 1, 1994. Creely told the FBI that "he was not aware of anything in the candidate's background that might be the basis of attempted influence, pressure, coercion, or compromise or that would impact negatively on the candidate's character reputation, or judgment." (PF 887.) The House claims that Porteous responded falsely to the exact same question by not disclosing his relationship with Creely. If the House's allegation's regarding the relationship and the ability of Creely to coerce Porteous are true (which the defense does not concede) Creely would have similarly been aware of these facts. The House has not alleged that Creely made a false statement and Creely has not been charged with perjury or making a false statement to a federal law enforcement officer.

Professor Mackenzie testified that the question posed to Judge Porteous during his FBI interview question is asked "routinely" and of "virtually everybody who is interviewed." (PF 870.) Professor Mackenzie stated that he is not aware of any individual that has ever responded affirmatively to this question. (PF 871.)

4. First FBI Interview of Louis Marcotte

During its background check, presumably though Judge Porteous, the FBI was made aware that Judge Porteous and Louis Marcotte had a relationship. (PF 875.) On August 1, 1994,

¹⁰⁵ Hamil noted that the fact that interviewees do not reveal adverse information in response to this question does not mean that they never reveal adverse information – instead they reveal such information in response to specific questions, as opposed to the question for which Judge Porteous is alleged to have falsely responded. (PF 869.)

Louis Marcotte was interviewed by the FBI for the first time in connection with the FBI's background check of Judge Porteous. (PF 877.) Louis Marcotte testified that Judge Porteous did not tell him to be untruthful with the FBI. (PF 884.) Marcotte conceded that he and Porteous never discussed what answers Marcotte would give. (PF 575.)

During the interview, according to the FBI 302 Report that was generated, Marcotte stated that he "knows the candidate professionally and socially" and that "he sometimes goes out to lunch with the candidate and attorneys in the area." (PF 877, House Ex. 69(b) PORT 471.) He told the FBI that in relation to the setting of bonds, "many times the family [of the accused] cannot come up with the 10% so Marcotte goes to the judges to try and lower the bonds." (PF 879, PORT 471.)

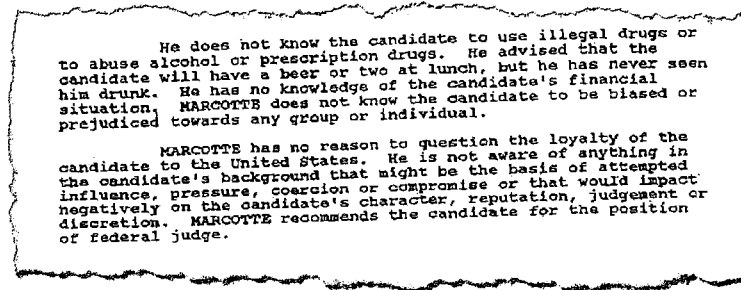
LOUIS M. MARCOTTE III, Bail Bondsman, 221 Derbigny Street, advised that he has known the candidate for approximately ten years, since the candidate has been a judge. He knows the candidate professionally and socially. MARCOTTE said he sometimes goes to lunch with the candidate and attorneys in the area, since MARCOTTE's office is across the street from the courthouse.

MARCOTTE believes the candidate has a good professional reputation and has heard the candidate is very bright and makes decisions quickly in the courtroom. MARCOTTE said he is really helpful and available for everybody. He stated that the candidate is open-minded and fair, but is not a "push-over." MARCOTTE advised that the candidate is tough on sentencing.

He said the candidate is a very hard worker and many times is the only judge still working in the evenings when MARCOTTE goes to the Gretna courthouse to negotiate bonds with the judges. MARCOTTE advised that family members of individuals in jail will come to MARCOTTE to get bonds. The family members are supposed to give the bondsman 10% of the set bond. If a bond is set for \$10,000 the family has to come up with \$1,000 to give to the bondsman. Many times the family cannot come up with the 10%, so MARCOTTE goes to the judges to try to lower the bond. He stated that 2% of money received by the bondsman goes to the judges. He advised that the judges are willing to lower set bonds, because if they don't the families will not be able to pay the bonds at all. This way at least some funds will go back into the court system.

MARCOTTE said the candidate is of good character and has a good reputation in general. He said the candidate is well-respected and associates with attorneys who are upstanding individuals. He does not know the candidate to associate with anyone of questionable character.

The interview summary states that Marcotte said he “he does not know the candidate to abuse alcohol or prescription drugs. He advised that the candidate will have a beer or two at lunch.” (PF 880, House Ex. 69(b), PORT 472.) Marcotte also reportedly stated that he “has no knowledge of the candidate’s financial situation.” (PF 882, House Ex. 69(b), PORT 472.)



He does not know the candidate to use illegal drugs or to abuse alcohol or prescription drugs. He advised that the candidate will have a beer or two at lunch, but he has never seen him drunk. He has no knowledge of the candidate's financial situation. MARCOTTE does not know the candidate to be biased or prejudiced towards any group or individual.

MARCOTTE has no reason to question the loyalty of the candidate to the United States. He is not aware of anything in the candidate's background that might be the basis of attempted influence, pressure, coercion or compromise or that would impact negatively on the candidate's character, reputation, judgement or discretion. MARCOTTE recommends the candidate for the position of federal judge.

The House alleges that Marcotte’s answers were false because he saw Judge Porteous drink heavily on occasion in Louisiana, because he had knowledge of Judge Porteous’s financial situation, and he was aware of things in Judge Porteous’s background that might be the basis of attempted influence, pressure, coercion, compromise, or that would impact negatively on Judge Porteous’ character, reputation, judgment and discretion. (HF 128-131.) The House argues that Judge Porteous “well knew and understood” that Marcotte made these “false statements to the [FBI] in an effort to assist Judge Porteous in being appointed to the Federal bench.” (Article IV.)

As an initial matter, it is important to note the timing of events. Marcotte’s interview with the FBI came after Judge Porteous had signed and submitted the SF-86, the Supplemental SF-86, and been interviewed himself by the FBI for the first time. Judge Porteous could not have provided information about questions Marcotte had not yet been asked and answers he had not yet given. Nevertheless, Judge Porteous’s failure to disclose events that had not yet occurred is proffered as a basis for his impeachment.

The evidence shows that Judge Porteous never learned about Marcotte's allegedly false statements to the FBI. Marcotte did not take notes during his interview with the FBI, waited several days after the interview to call Judge Porteous to tell him about the interview, and when they finally met and discussed the interview, Marcotte provided only a summary of the interview, as opposed to giving a run-down of questions and answers. (PF 578.) Marcotte testified that he simply told Judge Porteous he had given the FBI a "thumbs up" regarding the questions he had been asked. (PF 575.) As such, there is no evidence that Judge Porteous was ever aware of any of Marcotte's alleged false statements.

Further, it is unclear that anything Marcotte stated to the FBI is demonstrably false. Marcotte testified that Judge Porteous had a high threshold for alcohol and that after several drinks, "you wouldn't even know he had a buzz." (PF 881.) The House cites no testimony or evidence of Judge Porteous having appeared inebriated. Moreover, Marcotte's statement regarding Judge Porteous having one or two drinks at lunch is factually correct, as evidenced by the House's own production of receipts from lunches at which Judge Porteous allegedly attended. (See House Ex. 372(a)-(d), 373(d), each of which shows only two drinks having been ordered; 373(a) which show two glasses of wine being ordered.) According to the FBI interview write-up, Marcotte merely said that "the candidate will have a [drink] or two at lunch," which appears to be consistent with the receipts. (PF 880.) Marcotte's statement does not indicate that he had ever seen Judge Porteous take more than one or two drinks. Reading any more into it is disingenuous.

Marcotte did not have knowledge of Judge Porteous's financial situation. The House asserts that because Marcotte observed the state of Judge Porteous's automobile on occasion and knew that Judge Porteous enjoyed gambling, he must have believed that Judge Porteous's

financial affairs were a problem. In reality, Marcotte had no direct knowledge of Judge Porteous's financial affairs. (PF 574.) Marcotte testified that he had no knowledge of Judge Porteous's bank accounts or finances. (Sen. Vol. II at 584:13-18.)

As to the third alleged false statement – that Marcotte falsely stated that he was not aware of anything in Judge Porteous's background that might be the basis of attempted influence, pressure, coercion, compromise, or that would impact negatively on Judge Porteous' character, reputation, judgment and discretion – the House asserts that Marcotte was aware of his own relationship with Judge Porteous, and knew it was improper. (HF 131.) Despite the House's strenuous insistence to the contrary, Marcotte testified that he did not think, at the time of the August 1994 FBI interview, that he could have used any information that he was in possession of to coerce Judge Porteous into taking any action. (PF 579.) Marcotte further stated that he "would never, you know, extort" Judge Porteous "in any kind of way." (PF 902.) When pressed by House counsel on this point and asked "You wouldn't extort him but you did have information that could potentially embarrass him or to use leverage on him?" (PF 902.) Marcotte responded "But I would never have leaned on him in that kind of way." (PF 902.) House counsel then asked "Did you feel that because of what you said in the FBI interview, you might be able to coerce the judge at a later date?" (PF 902.) Marcotte responded "and ask him to do stuff for me? No I don't think that at the time." (PF 902.) Even the felon Louis Marcotte, the House's star witness, disagrees with the House's theory on this point.

5. Anonymous Sources Discussed the Marcotte Relationship, Bond-Setting, and Lunches

Article IV argues that "Judge Porteous's failure to disclose these corrupt relationships deprived the United States Senate . . . of information that would have had a material impact on his confirmation." The evidence, however, shows that they had the relevant information, and

upon FBI investigation it obviously was not material enough to derail Judge Porteous's Senate confirmation.

On August 8, 1994, months before Judge Porteous was confirmed by the United States Senate, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who is referred to as T-6 by the FBI. (PF 889.) This individual stated that "Judge Porteous works with certain individuals in writing bonds, specifically . . . Louis and Lori Marcotte." (PF 889, House Ex. 69(b), PORT 526.) T-6 further reported that:

- The Marcottes "frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks." (PF 890.)
- "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (PF 891.)
- Judge Porteous "frequently sign[ed] bonds ahead of time for bondsmen." (PF 892.) T-6 also reported that Louis Marcotte told the girlfriend of an individual who had been arrested that it would take \$12,500.00 to get [the boyfriend] out of jail" and that "\$10,000.00 of this would go to Judge Porteous for the bond reduction." (PF 893.)
- Judge Porteous was "paid to reduce a bond" in a different case and "had been given \$1,500 to reduce a bond" in that matter. (PF 894.)
- Judge "Porteous had transferred a case from another division to his [Porteous] to help [redaction follows]." (PF 895.)

As the following chart illustrates, these allegations largely track the allegations in Article II:

Claim in Article II	Information in FBI Background Investigation of Judge Porteous Provided to Senate Prior to Confirmation
Judge Porteous knew and was associated with the Marcottes.	Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI that "he has known the candidate for approximately ten years" and that he "knows the candidate professionally and socially." Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Judge Porteous works with certain individuals in writing bonds, specifically . . . Louis and Lori Marcotte."
Judge Porteous dined with the Marcottes	Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI "that he sometimes goes to lunch with the candidate and attorneys in the area."
Judge Porteous accepted things of value from the Marcottes, including meals, trips, home repairs, and car repairs	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that the Marcottes "frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks"
Judge Porteous set, reduced, and split bonds as requested by the Marcottes	Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed.
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge Porteous "frequently sign[ed] bonds ahead of time for bondsmen." (The Justice Department has refused to reveal the identity of this source to the defense.)
	Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that the candidate "indirectly received \$10,000 from an individual in exchange for the candidate reducing his bond"; the FBI interviewed an individual, whose identity has been redacted from discovery documents, who reported that Louis Marcotte told the girlfriend of an individual who had been arrested that it would take \$12,500.00 to get [the boyfriend] out of jail" and that "\$10,000.00 of this would go to Judge Porteous for the bond reduction." This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed.
	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Porteous was "paid to reduce a bond" in a different case and "had been given \$1,500 to reduce a bond" in that matter. This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed.
Judge Porteous improperly set aside or expunged felony convictions	Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge "Porteous had transferred a case from another division to his [Porteous] to help [redaction follows]."

6. The Senate was aware of these allegations or facts at the time of Judge Porteous's confirmation vote

In response to these allegations, the FBI conducted a number of follow-up interviews. (PF 896.) In particular, on August 17, 1994, the FBI asked Marcotte whether he was "aware of an exchange of money with Judge Porteous and others to get a bond reduction" for a specific individual. (PF 896-97.) According to the summary of that interview with Marcotte prepared by

Bobby Hamil, the agent conducting the interview for the FBI, Marcotte was “confronted with questions and information about his knowledge and relationship of specific bond matters” and Marcotte concluded the interview “by totally denying...arranging for a portion of the bond reduction fee to go directly to Judge Porteous as a ‘kickback.’” (PF 897-901.)

During this second interview, Marcotte was not asked about Judge Porteous’s drinking or financial status. (*See generally* House Ex. 69(b), PORT 513-14.)

On August 18, 1994, Judge Porteous was interviewed by the FBI for a second time. (PF 904.) FBI Agent Hamil again conducted the interview. (PF 905.) Judge Porteous denied the allegations asserted by T-6. (PF 906.) Based on the interview summaries, Judge Porteous was never specifically asked, in either of his FBI interviews, about his relationship with Amato and Creely, gifts Judge Porteous may have received from the Marcottes, or his frequent lunches with Amato, Creely, and the Marcottes, despite the fact that the FBI was aware of all of these issues. (PF 909-911, House Ex. 69(i), 69(k).) Moreover, Hamil testified that had he been aware that Judge Porteous and Marcotte went to lunch together (as was referenced in the first FBI interview of Marcotte), he would not have necessarily raised that issue or asked questions related to that topic in his second interview of Judge Porteous. (PF 908.)

On August 19, 1994, the FBI sent a communication to the Department of Justice, noting that the investigation was complete and specifically highlighting the allegations asserted by T-6. (PF 913.) Six days later, President Clinton formally nominated Judge Porteous to serve as the United States District Court Judge for the Eastern District of Louisiana. (PF 914.)

7. Senate Judiciary Questionnaire, Review, and Investigation

Once nominated, Judge Porteous completed a United States Senate Committee on the Judiciary Questionnaire for Judicial nominees. (PF 915.) The completed questionnaire was signed by Judge Porteous on September 6, 1994. (PF 916.) The questionnaire posed very

specific questions, including, "Were all of your taxes current as of the date of your nomination?" (PF 917, House Ex. 9(f).) The final question, Number 11 on page 34 of the document, asked Judge Porteous to "Please advise the Committee of any unfavorable information that may affect your nomination." (PF 918, House Ex. 9(f).) Judge Porteous responded by stating that "[t]o the best of my knowledge, I do not know of any unfavorable information that may affect my nomination." (PF 918, House Ex. 9(f).)

11. Please advise the Committee of any unfavorable information that may affect your nomination.

To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.

Professor Mackenzie testified that he is not aware of any individual who has ever responded affirmatively to this or similarly worded questions on the Senate's questionnaire, in part because nominees feel that by this point in the process, they have already been asked this or similar questions on several occasions. (PF 919; *see also* Sen. Vol. V at 2026:9-2027:13.) Moreover, Professor Mackenzie stated that he was not aware of any individual ever having been prosecuted or removed from office for falsely answering such a question. (PF 920.) The House did not contest this testimony or present its own witness on these issues.

At the most basic level, Article IV charges Judge Porteous with making false statements and concealing information in relation to questions such as the one on the Senate Questionnaire. These are allegations which, by their very nature, require some showing of intent. It would challenge any notion of due process to impeach a federal official for accidentally or unknowingly making a false statement. Even the House's own expert witness, Professor Charles Geyh, agreed with a federal judicial misconduct opinion which stated that "even if the alleged inconsistencies

in testimony and submission to the Senate Judiciary Committee were a proper subject for a complaint, dismissal would be required...there's no evidence that respondent intentionally misled or knowingly made false statements to the Senate[.]” (PF 928.) That particular judicial misconduct opinion, authored in 2005 by the Chief Judge of the Third Circuit Court of Appeals on behalf of the Judicial Council of the Third Circuit, addressed allegations that a District Court Judge lied about his prior legal experience on the “questionnaire he submitted to the **Senate’s Committee on the Judiciary.**” (HP Ex. 1111d at DEF02333.) The Judicial Council opinion noted the importance of intent as an element of such “allegations of criminal conduct” and held that since there was no evidence of such intent, the claim could not survive. (HP Ex. 1111d at DEF02338.) In agreeing with the reliance on intent in that opinion, Professor Geyh testified that, “the knowing nature of the wrong is a relevant consideration...I think that intent is one of the things one would look at, yeah.” (PF 929.) Despite this recognition from the House’s own expert witness, the House never offered any evidence of Judge Porteous’s state of mind.

Following his nomination, but prior to his confirmation, the staff of the Judiciary Committee of the United States Senate reviewed the FBI’s background investigation of Judge Porteous and were made aware of the allegations that Judge Porteous took kick-backs, gambled, had a drinking problem, and was living beyond his means.” (PF 921-25.) Judge Porteous was confirmed to the federal bench on October 7, 1994.

C. Proven Misrepresentations Far More Sensational Than the Unsubstantiated Article IV Allegations Have Never Led to Impeachment

Congress has applied the meaning of “high crimes and misdemeanors” by voting to impeach judges only when their alleged conduct has included abuses of constitutionally entrusted powers. *No one has ever been convicted by the United States Senate in an impeachment for failing to disclose even egregious facts during the nomination process.* There have been

numerous occasions where previously undisclosed information, obviously embarrassing to a federal civil officer (including Supreme Court Justices, federal judges, and cabinet secretaries), has been discovered after confirmation, but no impeachment proceedings were ever instituted.

For example, in 1997, District Court Judge James Ware, then a nominee for the Ninth Circuit, filled out “the ‘Questionnaire for Sensitive Positions,’ known as OPM Form 86, which must be completed by all presidential nominees. Judge Ware was asked to list all relatives. He listed ‘Virgil Lamar Ware’ as his only half brother.” (HP Ex. 1111k at DEF02385.) Judge Ware had made repeated public speeches proclaiming that his brother, Virgil, was shot and killed in a racially motivated incident in Birmingham, Alabama in 1963 while the two were riding a bicycle. (HP Ex. 1111k at DEF02382-02384.) Parts of this story were true. Virgil Ware was indeed murdered under these general circumstances. However, Judge Ware had no family relationship to Virgil Ware. (HP Ex. 1111k at DEF02385.) Judge Ware did not ride on the bicycle with Virgil Ware that night. (HP Ex. 1111k at DEF02385.) When he finally admitted that he had fabricated his relationship to Virgil Ware and repeated the lie throughout decades of his career, Judge Ware explained that he included Virgil’s name on the questionnaire “in an effort to be consistent with the way he had presented himself publicly.” (HP Ex. 1111k at DEF 02385-86.) Confronted with having intentionally lied about Virgil Ware being his half-brother on his OPM Form 86, Judge Ware withdrew himself from consideration for the Ninth Circuit but remains a U.S. District Court judge to this day. (HP Ex. 1111k at DEF02388.) He was eventually reprimanded by the Judicial Council of the Ninth Circuit, but never impeached.¹⁰⁶

Other examples abound:

¹⁰⁶ At the evidentiary hearing, the House’s expert on legal ethics, Professor Charles Geyh, was unaware of the facts of Judge Ware’s reprimand or his career long deceit. (Sen. Vol. III at 848:23.)

- In 1937, President Roosevelt nominated Hugo Black for an opening on the United States Supreme Court. See Howard Ball, *Hugo L. Black: Cold Steel Warrior*, Oxford Oxfordshire: Oxford University Press 5 (1996). During the confirmation hearings, rumors swirled regarding Black's prior membership in the Ku Klux Klan. *Id.* at 94-95. Senator William E. Borah, Republican of Idaho, made the only statement in Black's behalf on the Klan question. "There has never been at any time one iota of evidence that Senator Black was a member of the Klan," Borah told his colleagues. He said that Black, in private discussion before the nomination, had stated that he was not a member of the Klan. No one, Borah said, had suggested any source from which evidence might be obtained. For himself, the Idaho senator said he would vote against any man whom he knew to be a member of a secret organization of the nature of the Klan. After six hours of debate, the Senate voted 63-16 to confirm Black. See Ball at 94. The next month, the Pittsburgh Post-Gazette investigated Black's KKK past and definitively revealed Black's involvement in the Klan. *Id.* at 96. Vacationing senators were tracked down and asked whether they would have voted for Black if they had known of his former membership. Some said they had been "misled"; others passed it off as a "tempest in a teapot." Weeks later, Black addressed the nation by radio, admitting that "I did join the Klan." The Congress never instituted impeachment proceedings against Justice Black, who continued to serve on the Court for the next thirty-four years.
- Prior to his appointment to the Supreme Court, Chief Justice William H. Rehnquist purchased properties in Arizona and Vermont which contained discriminatory deed restrictions. See Alan S. Oser, *Unenforceable Covenants are in Many Deeds*, N.Y. TIMES, Aug. 1, 1986. The restriction on the Vermont property prohibited the sale or lease of the property to "members of the Hebrew race." *Id.* The Arizona property contained a restrictive covenant barring sale to "any person not of the White or Caucasian race." *Id.* This was not discovered until he was already a member of the Supreme Court. *Id.* The Chief Justice was called to testify before the Senate Judiciary Committee and stated that he would get rid of the covenants. *Id.* Chief Justice Rehnquist was never impeached. See Chief Justice Rehnquist has Died, <http://www.cnn.com/2005/LAW/09/03/rehnquist.obit/index.html> (last visited July 18, 2010).
- Gerald Carmen was the head of the General Services Administration under President Reagan. See Gregory Gordon, *GSA Head Says He Forgot to Mention Loan*, UNITED PRESS INTERNATIONAL, Jul. 16, 1982. Carmen did not include a \$425,000 federal loan in stating his finances to a Senate committee before he was confirmed. *Id.* William Roth, Chairman of the Senate Governmental Affairs Committee, demanded an explanation from Carmen, who claimed it was an oversight. *Id.* Carmen was never impeached, and served as Administrator until 1984, when President Reagan appointed him U.S. Permanent Representative to the United Nations in Geneva. See Gerald P. Carmen, <http://people.forbes.com/profile/gerald-p-carmen/31618> (last visited July 18, 2010).
- Jay Bybee was confirmed to the Ninth Circuit by the Senate on March 13, 2003. See Sen. Leahy Issues Statement on Nomination of David Nahmias, U.S. FED NEWS, Sept.

30, 2004. After his confirmation, it was discovered that Judge Bybee had signed a controversial memo advising President Bush to ignore laws forbidding torture. *Id.* Senator Patrick Leahy indicated that had Judge Bybee's role in sanctioning cruel, inhumane, and degrading treatment and abandoning the rule of law been known before his confirmation, the Senate would not have accepted his promise to follow the law. *Id.* Judge Bybee has not been impeached.

- William F. Baxter was the Assistant Attorney General in charge of the Antitrust Division in 1982. *See* Andrew Pollack, *Baxter Role Upheld in I.B.M. Case*, N.Y. TIMES, June 18, 1982, at D1. Baxter dismissed a thirteen-year old antitrust case against I.B.M. *Id.* Baxter did not disclose his past dealings with I.B.M. during his Senate confirmation hearings, which included aiding the evaluation of expert witnesses in a different case, research funded with an I.B.M. grant, and arguing on I.B.M.'s behalf before officials of the European Economic Community, which also had an antitrust suit pending against the company. *Id.* Baxter was never impeached. *See* Michael M. Weinstein, *W.F. Baxter, 69, Ex-Antitrust Chief, is Dead*, N.Y. TIMES, Dec. 2, 1998.
- William J. Casey, Director of the Central Intelligence Agency, did not disclose his stock holdings in three corporations in the financial disclosure report he filed with the Senate Select Committee on Ethics during his confirmation proceedings in 1981. *See* Edward T. Pound, *Casey Tells Federal Ethics Agency He Omitted Three Stock Holdings*, N.Y. TIMES, July 31, 1981, at A11. His interest in the companies were valued at approximately \$75,000, and he claimed his failure to report was "just an oversight." *Id.* Casey was never impeached, and he later resigned as director of the CIA because of his failing health. *See* Shultz Among Mourners at Casey's Wake, L.A. TIMES, May 8, 1987.
- Federico Pena had already been confirmed as Transportation Secretary when he acknowledged that he had failed to pay Social Security taxes for a baby-sitter who looked after his children in 1991. *See* Michael J. Sniffen, *Nominees Sunk by Tax and Nanny Problems for Years*, ASSOCIATED PRESS, Jan. 14, 2009. He promised to pay back taxes, was never impeached, and kept his position for President Clinton's first term. *Id.* Pena was then tapped as Energy Secretary, and resigned after one year to return to private life. *See* Matthew L. Wald, *Pena Resigns as Energy Secretary, Citing Concerns for Family*, N.Y. TIMES, Apr. 7, 1998.

There are also numerous other instances where a federal nominee failed to disclose certain information at the initial stages of his or her nomination, only then to have the information discovered by a third-party and disclosed by that party or whereby sufficient pressure was apparently placed on the nominee so that nominee disclosed the information at a

later date. In each of the examples listed below, the Senate confirmed the individual despite the lack of full and timely disclosure of relevant material:

- Justice Stephen G. Breyer was a candidate to succeed Justice Byron White in 1993. See Aaron Epstein & Angie Cannon, *Consensus-Building Skills Gave Nominee the Edge*, THE MIAMI HERALD, May 14, 1994 at A13. Prior to his nomination, it was revealed that he had failed to pay Social Security taxes for a household helper. *Id.* Justice Breyer later paid the tax, but President Clinton nominated Justice Ruth Bader Ginsburg instead. *Id.* Justice Breyer was subsequently nominated and confirmed the next year as Justice Harry A. Blackmun's replacement. *Id.*
- Justice Sonia Sotomayor failed to disclose to the Senate Judiciary Committee a document she had authored arguing that the death penalty was "racist" and a violation of the present "humanist" thinking of society. See Pete Winn, *Sotomayor Failed to Disclose to Senate Memo in which She Argued Death Penalty is "Racist"*, June 5, 2009, <http://www.cnsnews.com/news/print/49218> (last visited July 18, 2010). The Judicial Confirmation Network stated that the memo should have been disclosed as required under Question 12(b) of the Senate questionnaire. *Id.* Justice Sotomayor also did not reveal that she was a member of an allegedly gender-exclusive club – from which she subsequently resigned. See *Sotomayor Resigns from Women's Club*, <http://www.cnn.com/2009/POLITICS/06/19/sotomayor.womens.club/index.html> (last visited July 18, 2010). Republican senators had called for more information about her participation in the club. *Id.* Justice Sotomayor was subsequently confirmed by the Senate. See Amy Goldstein and Paul Kane, *Sotomayor Wins Confirmation*, WASH. POST, Aug. 7, 2009.
- Justice Ruth Bader Ginsburg initially failed to list as a gift on her financial disclosure forms a \$25,000 initiation fee for a country club near Washington. See Neil A. Lewis, *Ginsburg Hearings End in a Secluded Meeting*, N.Y. TIMES, July 24, 1993. The Woodmont Country Club routinely waived fees as a courtesy to members of the federal bench. *Id.* Justice Ginsburg said that she regretted not listing the waived fee as a gift on the form. *Id.* Justice Ginsburg was subsequently confirmed. See #48 *Ruth Bader Ginsburg, The 100 Most Powerful Women*, Aug. 19, 2009, http://www.forbes.com/lists/2009/11/power-women-09_Ruth-Bader-Ginsburg_D8D7.html (last visited July 19, 2010).
- Judge Alex Kozinski was a nominee in 1985 to the Ninth Circuit Court of Appeals. See Chris Chrystal, *Levin: Kozinski Lacks Judicial Temperament*, United Press International, Nov. 2, 1985. Senate confirmation stalled because of allegations by former employees that he was harsh, cruel and demeaning. *Id.* Senator Carl Levin stated Judge Kozinski misled the Judiciary Committee by claiming an excellent working relationship with his former staff when six people had filed affidavits that he treated employees unfairly. *Id.* Another allegation stemmed from his lack of disclosure about the circumstances surrounding his firing of Mary Eastwood, his predecessor at the Office of Special Counsel. *Id.* Eastwood testified that Judge

Kozinski was “less than honest” with the panel by implying she had dropped her appeal of the firing when she had not, and by failing to disclose that she eventually won with back pay. *Id.* The Senate still confirmed Judge Kozinski. See Robert L. Jackson & Philip Hager, *Senate Narrowly Confirms Kozinski as Appeals Judge*, L.A. Times, Nov. 8, 1985.

As these examples demonstrate, the Senate has routinely confronted nominees who failed fully to disclose information that the Senate as a whole, or individual Senators, believed to be relevant and material. Moreover, the Senate has previously confirmed the appointments of nominees who initially concealed significant information. If nondisclosure ranging from the failure to fully list stock holdings to the failure to admit prior membership in the Ku Klux Klan does not prevent confirmation, it cannot be grounds for impeachment.

There is no excuse for such knowing failures to disclose, but even in cases far more egregious than the tenuous and unsubstantiated nondisclosure allegations against Judge Porteous they have never resulted in impeachment or, usually, even derailed a confirmation. This is as it should be. The constitutional basis for impeachment would become a political bagatelle if judges who took unpopular positions could be impeached simply by dredging up some colorably embarrassing episode from their past that they failed to disclose in their background check. Senators could hold questionnaires as pocket impeachments to be used against an unpopular judge or even for the purpose of creating judicial vacancies to be filled by nominees of the party currently in power. For their part, judges would serve at the whim of Congress. In effect, Article IV invokes the very standard James Madison worked so hard to avoid in the Constitution.

The Senate should reject Article IV, both because it is unsupported by evidence and because it falls far short of alleging impeachable misconduct.

VI. Epilogue

The defense appreciates and thanks the Committee and its staff for their professionalism and assistance during this process. The defense would be remiss, however, for purposes of the historical record, not to point out various procedural issues and pre-trial rulings that the defense believes prevented Judge Porteous from receiving a full and fair trial. These include (but are not limited to):

- Despite the efforts of the Committee staff, the Department of Justice refused to provide requested relevant and material discovery on a timely basis. The defense received literally hundreds of pages of material documents (including FBI 302 Reports) on the eve of – and even during – trial. Indeed, some documents relevant to particular witnesses were not provided until *after* those witnesses had already testified. In one case, dozens of pages of documents relevant to Judge Bodenheimer were produced literally hours after he was excused from further testimony.
- The Committee severely limited the number of defense-requested depositions to four. The House faced no such limitation during its discovery and, indeed, conducted depositions of more than 25 witnesses in connection with its investigation and trial preparation, as well as conducted some 70 interviews during the House's investigation. This deprivation was only aggravated by the fact that this case did not follow either a criminal or civil trial, thereby leaving the defense with no alternative compulsory process to investigate and prepare for trial. The result was that many witnesses refused to speak to the defense after speaking with the House, with the result that the defense had virtually no idea what witnesses would contribute to the trial.
- The Committee declined the defense motion to subpoena a witness from the Department of Justice to testify concerning the Department's decision not to prosecute Judge Porteous. Similarly, the Committee declined to require the Justice Department to produce internal memorandum on the same subject, although there is past precedent for the Justice Department providing similar documents in prior impeachment trials.
- The House refused to provide for open file discovery or even to provide an index or general listing of relevant materials in its possession, despite the fact that the House had done so in prior impeachment proceedings.
- Through various actions – including declining to consider in good faith and accept or propose alternatives to defense proposed stipulations, and refusing to support or supervise its negotiator once discussions of stipulations began – the House repeatedly and blatantly refused to negotiate stipulations in good faith, resulting in a substantial commitment by the defense to duplicative and wasted negotiations, all on the eve of trial.

- The Committee declined to take any actions to sanction the House for its refusal to participate in good faith in the stipulation process, contrary to the Committee's commitment that there would be serious sanctions for such misconduct.
- The Committee limited the evidentiary hearings to 20 hours per side – less than the average time afforded in prior impeachments even though this case lacked any prior trial record. The Committee's decision necessarily limited the number of witnesses that the defense believed it could call in the time allotted, and required the defense to truncate its trial presentation. As a result, while the parties had a small amount of time left over from their allotted 20 hours, the defense clearly indicated that it had wanted to present more witnesses but had to reduce the number of those witnesses in light of the abbreviated schedule.
- The Committee declined the defense's request for defense funding, including (1) funds for litigation costs (such as copying and courier expenses), (2) funds for logistical costs (such as for travel to allow defense counsel to meet with potential witnesses), and (3) funds for expert witness travel to Washington, D.C. to testify at trial. By all accounts, the House was able to fund its discovery and trial preparation expenses through the budget of the House Impeachment Committee, which provided funds for numerous trips to Louisiana to interview personally and interrogate relevant witnesses. This left the defense at a severe disadvantage, particularly since defense counsel – who handled this matter on a *pro bono* basis – began representing Judge Porteous only four months before trial.
- At this time, the defense has not been told whether the Senate will allow it to present argument concerning central constitutional issues raised in this case, about which the defense previously filed dispositive motions. In a judicial proceeding, such issues would be given a separate hearing prior to trial, and certainly would not be relegated to passing references during abbreviated closing statements. Nevertheless, at this point, the defense has been assured only a relatively brief time to present the facts and testimony to the Senate. More time should be allotted, as a separate presentation of these important constitutional issues would serve to fully inform the Senate's consideration of and deliberations on the Article of Impeachment.

The defense does not expect that these considerations should or will affect the deliberations of the Senate with regard to the Articles of Impeachment, and does not seek to cast blame on any individual. Nonetheless, because Senate impeachment trials are rare and historical events, where all parties look to past precedent for guidance, the defense is obliged to make a record of these issues, with the hope that they will not be similarly inflicted upon the accused in future impeachment trials.

CONCLUSION

For all these reasons, the Senate should acquit Judge Porteous on all four Articles of Impeachment.

Respectfully submitted,

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Dated: October 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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In The Senate of the United States
Sitting as a Court of Impeachment

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)

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Dated: October 29, 2010

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I. INTRODUCTION

On March 11, 2010, by unanimous votes,¹ the House of Representatives (the “House”) charged G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana, with four Articles of Impeachment, setting forth a range of misconduct demonstrating that Judge Porteous is not fit to be a federal judge. The evidence establishes that Judge Porteous exploited his judicial office to implement a kickback scheme involving his assignment of cases to attorneys, exploited his judicial office to solicit and accept cash and other things of value from attorneys and bail bondsmen, lied to the FBI and the Senate to obtain his judicial appointment and engaged in repeated dishonest acts in a federal bankruptcy proceeding, including filing under a false name – all actions in separate spheres of conduct that compel the conclusion that Judge Porteous should be removed from office.

In the brief that follows, the House summarizes the evidence that was adduced before the Senate Impeachment Trial Committee (SITC) on each Article of Impeachment. The facts are not complex, and indeed, much of the evidence is not in dispute. Rather, the true dispute is simply that Judge Porteous believes his conduct amounts to nothing more than an appearance problem, notwithstanding clear and indisputable evidence of his blatant corruption and dishonesty under oath.

For all the reasons set forth below, the House submits that the Senate should convict Judge Porteous on each of the four Articles of Impeachment now pending before it.

¹ The votes were as follows: Article I: 412–0; Article II: 410–0; Article III: 416–0; and Article IV: 413–0.

II. EXECUTIVE SUMMARY

A. Procedural History

Prior to the unanimous votes in the House, Judge Porteous's conduct had been the subject of inquiry by both the Executive Branch and the Judicial Branch. In late 1999, the Department of Justice (the "DOJ") and the Federal Bureau of Investigation (the "FBI") commenced a criminal investigation of Judge Porteous. The criminal investigation continued for several years, and ultimately ended in early 2007, without an indictment. In a letter dated May 18, 2007, the DOJ submitted a formal complaint of judicial misconduct to the Honorable Edith H. Jones, Chief Judge, United States Court of Appeals for the Fifth Circuit. The DOJ Complaint Letter described numerous instances of alleged misconduct by Judge Porteous that demonstrated his unfitness as a judge.

Upon receipt of the DOJ Complaint Letter, the Fifth Circuit appointed a Special Investigatory Committee to investigate the Department's allegations. The Special Committee conducted a hearing and issued a Report dated November 20, 2007, which concluded that Judge Porteous engaged in misconduct which "might constitute one or more grounds for impeachment." On December 20, 2007, by a majority vote, the Judicial Council of the Fifth Circuit accepted and approved the Special Committee's Report and likewise concluded that Judge Porteous "had engaged in conduct which might constitute one or more grounds for impeachment under Article I of the Constitution." The Fifth Circuit Judicial Council thereafter certified these findings and the supporting records to the Judicial Conference of the United States. On June 17, 2008, the Judicial Conference of the United States determined unanimously, upon recommendation of its Committee on Judicial Conduct and Disability, to transmit to the Speaker of the House a Certificate "that consideration of impeachment of United States District Judge G. Thomas Porteous (E.D. La.) may be warranted."

B. Facts

Article I alleges and the evidence establishes that Judge Porteous, while a state judge, initiated and implemented a corrupt “kickback” scheme with Robert Creely and the law firm of Amato and Creely whereby Judge Porteous assigned “curatorship” cases to Creely and the Amato and Creely law firm gave Porteous approximately half of the legal fees amounting to about \$20,000 in cash. Thereafter, when Porteous became a federal judge, he presided over a non-jury case (Liljeberg) in which Amato entered his appearance six weeks before the scheduled trial date. When opposing counsel filed a motion to recuse Judge Porteous based on his close friendship with Amato, Judge Porteous deliberately misled the parties and did not disclose the corrupt financial relationship that had existed between the Judge and Amato and Creely.

Moreover, while the Liljeberg case was pending and had not yet been decided, Judge Porteous solicited and received a secret cash payment of at least \$2,000 from Amato. Judge Porteous thereafter decided the Liljeberg case very favorably towards Amato’s client. This decision was later reversed in large part in a scathing opinion by the appellate court which characterized the ruling by Judge Porteous as “inexplicable,” “apparently constructed out of whole cloth,” and “close to being nonsensical.”

It is noteworthy that Judge Porteous, in response to questioning by the Special Investigatory Committee of the Fifth Circuit admitted the essential aspects of the corrupt relationship set forth in Article I. He acknowledged that he solicited and received money from Creely; that Creely ultimately balked at giving him money; that he sent curatorship cases to Creely; that “occasionally” he received money after the curatorship cases were sent; and that he solicited and received cash from Amato while the Liljeberg case was pending before him.

Article II alleges and the evidence establishes that Judge Porteous, while a state judge and extending into his tenure as a federal judge, had a corrupt relationship with Louis and Lori

Marcotte, local bondsmen who operated in Louisiana. The evidence established that while Porteous was a state judge, Porteous would set bail bonds as directed by the Marcottes which were designed to maximize the premium the Marcottes could get from the person arrested. In return, the Marcottes took Judge Porteous to expensive restaurants and paid for numerous meals, paid for servicing and repairing his automobiles; replaced a damaged fence at his home, paid for one or more trips to Las Vegas for the Judge and his secretary, and provided other benefits to the Judge.

Of particular note in the relationship is the fact that Judge Porteous was pressured by Louis Marcotte to expunge the conviction of two Marcotte employees so they could be licensed as bail bondsmen. Judge Porteous obliged, but, significantly, told Marcotte that he would not expunge one of the convictions until after Senate confirmation of his position as a United States District Judge, because he did not want to jeopardize his "lifetime appointment." Shortly after Senate confirmation, but before he was sworn in as a federal judge, Judge Porteous did in fact set aside the conviction of Marcotte's employee, an act that was denounced when discovered as unlawful and unwarranted.

The evidence further established that after Judge Porteous became a federal judge he continued to be wined and dined by the Marcottes who wanted his help in recruiting state judges to assume Porteous's former role in setting bonds as requested by them. Judge Porteous obliged them by meeting with state judges and vouching for the Marcottes, thereby using the prestige of his federal office to foster these new corrupt relationships. It is noteworthy that two of those state court judges, Bodenheimer and Green, were ultimately convicted and incarcerated in part because of their corrupt relationships with the Marcottes which closely paralleled

Porteous's prior relationship. Both of the Marcottes ultimately entered pleas of guilty to federal corruption offenses premised on the factual pattern described above.

Article III alleges and the evidence established that Judge Porteous filed for personal bankruptcy in March, 2001. The evidence shows that Judge Porteous filed in a false name ("Ortous") and obtained and listed a post office box as his residence, all filed under penalty of perjury. The evidence further established that Judge Porteous engaged in a pattern of concealing assets so that he could continue to gamble, such as \$4,100 tax refund, lying under oath about preferential payments to certain creditors, particularly casinos where he gambled, concealing gambling losses, and violating a court order which prohibited Judge Porteous from incurring new debt without permission. Judge Porteous blatantly and repeatedly violated the court order by incurring debt at several casinos and by obtaining and using a new credit card.

Article IV alleges and the evidence establishes that Judge Porteous repeatedly lied to the Federal Bureau of Investigation and to the United States Senate in responding to questions posed to him as part of the confirmation process. Judge Porteous was asked on two occasions by the FBI whether he had engaged in conduct whereby someone could influence, pressure, coerce or compromise him in any way, or that would impact negatively on his character, reputation, judgment or discretion. Both times Porteous said he had not engaged in any such conduct. That was clearly false given his corrupt relationship with attorneys Amato and Creely and his corrupt relations with the Marcottes and their bail bond business.

On the Supplement to the SF-86 Form, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him or if there was anything that could embarrass Judge Porteous or the President if publicly known. Judge

Porteous responded “no” to this question and signed the Form under a warning that a false statement was punishable by law.

Judge Porteous’s response was a clear lie given his corrupt relationship with attorneys Amato and Creely and his corrupt relationship with the Marcottes and their bail bond business.

The Senate Judiciary Committee’s Questionnaire for Judicial Nominees posed the question to Judge Porteous whether any unfavorable information existed that could affect his nomination. Judge Porteous answered under oath that to the best of his knowledge there was no such information.

Judge Porteous’s response was also plainly false given his corrupt relationship with attorneys Amato and Creely and his corrupt relationship with the Marcottes and their bail bond business. It is noteworthy that Porteous refused to set aside the conviction of a Marcotte employee until after his confirmation in order not to jeopardize his “lifetime appointment.” There can be no doubt that Judge Porteous knew that he had to hide these corrupt relationships if he had any hope of being confirmed as a United States District Judge. Experts for the House and defense agreed that a truthful answer to those questions would have required Judge Porteous to disclose these corrupt relationships.

C. General Principles of Law Governing Impeachments and Removal²

By means of the impeachment and removal process, the Framers of the Constitution “sought to protect the institutions of government by providing for the removal of persons who

² The application of these principles, as well as other specific legal concerns that may be raised by the Articles, will be further discussed as applied to the respective articles. For example, the particular considerations associated with “pre-federal bench” conduct are discussed in connection with Articles II and IV, and the allegedly “personal” aspects of Judge Porteous’s conduct in his bankruptcy proceeding are discussed in connection with Article III.

are unfit to hold positions of trust.”³ Justice Story similarly observed in the early nineteenth century that “an impeachment is a proceeding of a purely political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property; but simply divests him of his political power.”⁴ Indeed, the fact that the individual who is impeached and removed from office “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law,” makes it clear that impeachment is a remedial provision, not a punitive one.⁵ In this way, the Founders intentionally broke from the British impeachment practice which, upon conviction imposed criminal penalties, up to and including death.⁶ Indeed, any doubt as to whether impeachment proceedings were limited to criminal conduct was settled in the early impeachment inquiries, such as the impeachment and removal from office of Judge John Pickering in 1803 for performing his judicial functions while drunk and for acts of indecency.⁷

Congress has consistently interpreted the Constitution’s definition of impeachable conduct – “treason, bribery or other high Crimes and Misdemeanors” – in light of the “fitness for office” determination that is at the core of the impeachment inquiry. The Report accompanying

³ H.R. Rep. No. 101-36, Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87 (hereinafter “Nixon Impeachment Report”), 101st Cong., 1st Sess. at 3–4 (1989). *See also id.* at 5 (“The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct.”).

⁴ Joseph Story, Commentaries on the Constitution § 801 (1833).

⁵ U.S. CONST. art. I, § III, cl. 7.

⁶ *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS, A CONSTITUTIONAL AND HISTORICAL ANALYSIS (Princeton University Press) (1996).

⁷ *See* Articles of Impeachment of Judge John Pickering, *reprinted in* IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess. at 131 (1973), *as reprinted in*, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess. at 1267 (1998).

the 1989 Resolution to Impeach United States District Court Judge Walter L. Nixon summarized the British precedents for impeachment, the events at the Constitutional convention leading to the adoption of the “high Crimes and Misdemeanors” formulation for impeachable conduct, and the interpretation of that term in the 12 judicial impeachments that had occurred prior to 1989.

In its summary of the historical meaning of the term, the Report noted:

The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined “other high Crimes and misdemeanors” to be serious violations of the public trust, not necessarily indictable offenses under criminal laws.⁸

That portion of the Report concluded:

Thus, from an historical perspective the question of what conduct by a federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge’s conduct calls into question his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.⁹

⁸ Nixon Impeachment Report, *supra* note 3, at 5. To illustrate the “non-criminal” nature of the “high Crimes and Misdemeanors” standard, the Nixon Impeachment Report further stressed that the term “Misdemeanor” as used in the Constitution was not intended to denote a minor criminal offense, but rather focused on the behavior of the judge, that is, whether the judge “misdemean[ed]” and thus should be removed.

Indeed, when the phrase “high crimes and misdemeanors” first appeared during the impeachment of the Earl of Suffolk in 1386, the term “misdemeanor” did not denote a violation of criminal law. In the context of impeachment, the word focuses on the behavior of a public official, i.e., his demeanor. Gouverneur Morris, a member of the Committee on Style and Revision of the Constitutional Convention and one of the founding fathers responsible for the final revisions to the Constitution, explained the use of the term “Misdemeanor”: “[T]he judges shall hold their offices so long as they demean themselves well, but if they shall misdemean, if they shall, on impeachment, be convicted of misdemeanor, they shall be removed.”

Id.

⁹ Nixon Impeachment Report, *supra* note 3, at 12.

To the same end, the Report that accompanied the Alcee Hastings impeachment resolution stated that the phrase “high Crimes and Misdemeanors” “refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal misconduct.”¹⁰ That Report stressed that impeachment is “non-criminal,” designed not to impose criminal penalties, but instead simply to remove the offender from office,¹¹ and that it is “the ultimate means of preserving our constitutional form of government from the depredations of those in high office who abuse or violate the public trust.”¹²

Thus, “high Crimes and Misdemeanors” include “serious violations of the public trust” as well as “conduct that calls into question [the judge’s] integrity or impartiality” such that “impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.”¹³ This understanding of the meaning of “high Crimes and Misdemeanors” in the context of the impeachment of a federal judge is not subject to any legitimate dispute.¹⁴

¹⁰ H.R. Rep. No. 100-810, “Impeachment of Alcee L. Hastings, Report of the Committee on the Judiciary to Accompany H. Res. 499 (hereinafter “Hastings Impeachment Report”), 100th Cong., 2d Sess., at 6 (1988).

¹¹ *Id.* at 7.

¹² *Id.*

¹³ Nixon Impeachment Report, *supra* note 3, at 5 (“The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct.”).

¹⁴ Indeed, counsel for Judge Porteous has adopted this view on more than one occasion. He has stated that “[t]he judicial impeachment cases . . . reflect controversies that raise fundamental questions of legitimacy and conduct that is viewed as incompatible or demeaning to judicial office.” See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L. J. 1, 73–74 (1999). Counsel also recognized that impeachment proceedings have involved not only conduct that “relate[d] to the use of judicial power but . . . conduct that brought disrepute upon the office through personal or (non-judicial) criminal misconduct.” *Id.* at 67–68. On another occasion, counsel has written that “acts which

Some of Judge Porteous's conduct occurred when he was a state judge, some during the confirmation process itself, and the rest while a federal judge. The issue of whether conduct prior to assuming federal office can be a basis for removal was addressed by several pre-eminent constitutional scholars in the proceedings before the House. They unanimously concluded that conduct which occurs prior to assuming federal office, particularly when the officeholder concealed such conduct during the confirmation process, is an appropriate basis for impeachment and removal from office. To conclude otherwise is to make the position of federal judge a lifetime safe harbor for someone who is able to hide his misdeeds and defraud the Senate into confirming him.

Professor Michael Gerhardt testified on the issue as follows:

The third kind of misconduct is different than either of the first two kinds. This third kind is egregious and not known at the time of confirmation. Such misconduct is, in other words, likely to be of sufficient gravity that it is an impeachable offense. It does not matter whether the conduct has any formal relationship to a judge's specific duties; it is bad behavior that by itself demonstrates a level of moral depravity and bad judgment that it is completely incompatible with the responsibilities of a judge. If we add to the facts that the nominee lied to the Senate about this bad misconduct, then the nominee has not only done something morally reprehensible but he has also engaged in misconduct that directly undermines the integrity of the confirmation process itself.

Say, for instance, that the offense was murder – it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process. The

undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law. . . . [T]he essential nexus . . . may be found in acts which, without directly affecting the governmental processes, undermine that degree of public confidence in the probity of executive and judicial officers that is essential to the effectiveness of government." *See Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 28 (1998) (testimony of J. Turley, George Washington University Law School).

fact that a nominee would suppress or not bring this misconduct to light to either the President who is considering his nomination or the Senate which is considering his confirmation makes the misconduct all the more reprehensible. It clearly reflects such poor judgment and complete lack of regard for the Senate that it is an offence against the State and a breach of the public trust.¹⁵

Professor Akhil Amar testified as follows:

Third, it is a gross mistake to believe that Federal officers may be impeached only for misconduct committed while in office or, even more strictly, for misconduct that they committed in their capacity as Federal officers. This was the standard that was put forth by Judge Dennis in some of the materials you have before you, and it is a completely mistaken standard that really fatally compromises the analysis that Judge Dennis provided. The text of the Constitution has no such requirement, and structure and common sense demonstrate the absurdity of this position.

Let's take bribery. Imagine now a person who bribes his way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can't immunize the briber from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.¹⁶

Professor Charles Geyh testified as follows:

We are really talking here about a political crime in which the focal point is whether this judge has violated the public trust. And, to me, a quid pro quo arrangement with bail bondsmen, accepting kickbacks for curatorships, is the kind

¹⁵ *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., Part IV: Hearing Before the Task Force on Judicial Impeachment of the House Comm. on the Judiciary* ("Task Force Hearing, Part IV"), Ser. No. 111-46, 111th Cong., 1st Sess., at 30 (Written Statement of Professor Gerhardt at 4) (Dec. 15, 2009).

Professor Michael Gerhardt is an expert on constitutional law and teaches at the University of North Carolina School of Law. He graduated from Yale University, received his master's from the London School of Economics and his law degree from the University of Chicago. Professor Gerhardt has testified before Congress on several occasions, including as the only joint witness in the House Judiciary Committee's special hearing on the history of the federal impeachment process for its consideration of the impeachment of President Clinton.

¹⁶ Task Force Hearing, Part IV, *supra* note 15, at 17.

Professor Akhil Amar is an expert on constitutional law and is the Sterling Professor of Law and Political Science at Yale University. He received both his undergraduate and law degrees at Yale University.

of corruption that fairly may be characterized as a violation of the public trust. Who cares if it occurred before?¹⁷

Professor John Harrison submitted an opinion letter as follows:

The question you asked me to address is whether the conduct for which a civil officer may be impeached, convicted, and removed from office includes only actions that took place while the officer held the office that is the subject of impeachment. Judge Porteous argues, in motions to dismiss two of the articles of impeachment, that conduct that took place prior to his appointment as United States District Judge cannot support impeachment.

In my view the Constitution imposes no such limitation. As I will explain, the important question concerning the relationship between the officer's alleged high crimes and misdemeanors and the officer's current office is not temporal. Rather, the question is whether the conduct, whenever it occurred, is such as to disqualify the officer from any longer holding the public trust.

* * *

Because impeachment is about the interests of the public, and not primarily about punishing wrongdoing, it is appropriate that a judgment of unfitness may be based on conduct that took place before an officer-holder's appointment. Wrongdoing before one enters office can demonstrate serious untrustworthiness just as can wrongdoing while in office, and the ultimate touchstone in impeachment is whether the people can trust the office holder.¹⁸

¹⁷ Task Force Hearing, Part IV, *supra* note 15, at 36.

Professor Charles Geyh is an expert in judicial ethics and teaches at the Maurer School of Law, Indiana University. He received his law degree from the University of Wisconsin. He is the current director of the ABA Judicial Disqualification Project and is also the co-author of JUDICIAL CONDUCT AND ETHICS.

¹⁸ Letter from Professor John C. Harrison to Alan Baron, Special Impeachment Counsel (July 27, 2010) (Attachment 12 to the House of Representatives' Consolidated Opposition to Judge G. Thomas Porteous, Jr.'s Five Motions to Dismiss the Articles of Impeachment ("House Consolidated Opposition") (July 28, 2010)).

Professor John Harrison is a Distinguished Professor of Law at the University of Virginia Law School. He received his undergraduate degree from the University of Virginia and his law degree from Yale Law School. Professor Harrison's teaching subjects include constitutional history.

Judge Porteous's misconduct while a state judge, during the confirmation process, and while on the federal bench is so egregious and inimical to public confidence in the integrity and impartiality of the judiciary that he must be removed from office.

III. ARTICLE I

A. Introduction

In the early 1970s, Judge G. Thomas Porteous, Jr. practiced law as a partner with Jacob Amato in the law firm Edwards, Porteous & Amato. Robert Creely was an associate who worked for the firm. Amato and Creely ultimately split off and formed an equal partnership. They each remained friends with Judge Porteous.

In 1984, Judge Porteous was elected judge of the 24th Judicial District Court in Jefferson Parish, Louisiana. He took the bench on August 24, 1984, and remained in that position until October 28, 1994 when he was sworn in as a United States District Judge for the Eastern District of Louisiana.

Judge Porteous's ten years as a state court judge were characterized by his dependence on others to provide for and subsidize his meals, entertainment, and lifestyle (including drinking and gambling), as well as essential expenses associated with maintaining his household. This dependence led him into corrupt relationships with attorneys Creely and Amato, described below, and with bail bondsman Louis Marcotte, described in Section IV of this brief.¹⁹

¹⁹ The record is also clear that Judge Porteous took money from other attorneys as well. See Donald Gardner Senate Impeachment Trial Committee Hearing Testimony ("Gardner SITC") at 1585:14 – 1589:4. Those events are not charged as part of the Articles, but nonetheless corroborate and support the evidence related to Judge Porteous's financial relationship with attorneys Creely and Amato, and his relationship with bail bondsman Louis Marcotte.

B. Judge Porteous's "Curatorship" Kickback Scheme with Creely and Amato

While he was a state court judge, there came a time when Judge Porteous began to ask Creely for money. At first, he asked for small amounts – \$50 or \$100, money that Creely had in his pocket. Judge Porteous would request the money “for various personal issues.” “[I]t would be things like tuition, different things that he needed in his – in his personal life.”²⁰

At some point in the mid to late 1980s, Judge Porteous requested more significant sums from Creely – amounts in the range of \$500 or \$1,000. Creely resisted giving Judge Porteous the money that was being requested. As Creely testified: “I did tell him I was tired of giving him cash . . . I felt put upon that he continued to ask – I thought it was an imposition on our friendship. . . . I told him a couple of times [‘]I’m tired of giving you money, I’m tired of you asking for money. This isn’t what friends are supposed to do to one another.[’]”²¹

In response to Creely’s resistance to giving Judge Porteous the money he sought, Judge Porteous conceived what was, in all material aspects, a kickback scheme, whereby Judge Porteous used the power of his judicial office to assign Creely “curatorships” and then requested and received from Creely (and Amato) a portion of the fees received by their law firm for handling those judicial appointments.²² This corrupt scheme went on for years.

²⁰ See Robert Creely Senate Impeachment Trial Committee Hearing Testimony (“Creely SITC”) at 257:16-18, 298:6-9. See also Robert Creely 5th Circuit Special Committee Hearing Testimony (“Creely 5th Cir.”) at 199; Robert Creely House Impeachment Task Force Hearing Testimony (“Creely Task Force”) at 20 (Judge Porteous would ask for money for “tuition” and “living expenses”).

²¹ See Creely SITC at 258:4 – 259:16.

²² These were legal matters in which Creely was assigned to represent the interests of a missing party. The duties were largely ministerial, such as publishing notices in the newspaper and similar acts. Creely and his firm received a fixed fee of approximately \$200, plus expenses, for each such appointment. Judge Porteous then asked Creely for money from those curatorship fees, and Creely in turn gave Judge Porteous cash as requested.

The proof of this series of events is evidenced by the interwoven and consistent testimony of Creely, Amato and Judge Porteous himself, who testified before a Special Committee of the Fifth Circuit.²³ It is also corroborated by the court records evidencing the curatorships assigned by Judge Porteous to Creely. Finally, it is corroborated by evidence of Judge Porteous's similar conduct with bail bondsman Louis Marcotte, where Judge Porteous also used the power of his judicial office for personal financial gain.

Creely testified that after Judge Porteous started assigning the curatorships, "he then started calling and saying, [']Look, I've been sending you curators, you know, can you give me the money for the curators?['']" Although Creely sought to avoid linking the requests for cash with the assignment of curatorships, Creely understood that Judge Porteous "made [that] correlation."²⁴ Moreover, Creely all but expressly acknowledged the "kickback" essence of the scheme when he testified that Judge Porteous's assignment of the curatorships made it easier for Creely to give Judge Porteous cash since it "wasn't costing anything"²⁵ – i.e., the money he was giving to Judge Porteous came from the curatorship fees. Creely confirmed that he told Amato

²³ In anticipation that he would assert his Fifth Amendment privilege, Judge Porteous was provided formal immunity, which provided that his testimony could not be used against him in any criminal proceeding. See HP Ex. 13 (Order, In re Matters Involving U.S. District Judge G. Thomas Porteous, Docket No. 07-05-351-0085 (5th Cir., Aug. 3, 2007)). The Senate Impeachment Trial Committee ruled in advance of the SITC evidentiary hearing in this case that Judge Porteous's Fifth Circuit testimony was admissible in this impeachment proceeding, which is not a criminal prosecution. See SITC Disposition of Pre-Trial Motions at 4–5 (Aug. 25, 2010).

²⁴ Creely SITC at 268:2-4, 17 (adopting grand jury testimony). See also Creely Task Force at 22 ("Mr. DUBESTER. I am asking, in your mind, did you understand that Judge Porteous was assigning you curatorships so that you would have cash to give him back? Mr. CREELY. Eventually, that is what I thought he was doing, yes."); *id.* at 23 (agreeing that Judge Porteous was taking official actions in appointing curatorships to enrich himself).

²⁵ Creely SITC at 271:3-8. See also Creely Task Force at 23 (curatorships were a "justification to help him out so that I didn't have to go and spend my own money on him"); Creely 5th Cir. at 209–10) (curatorships were "basically a way for me to supply him funds as before instead of coming out of my pocket. It was being provided through the curatorships.").

of Judge Porteous's requests for the curatorship money, and that in response, Amato told Creely to "[k]eep paying him, it doesn't cost us anything, it's not costing us any money, just if he [Judge Porteous] asks for money from time to time, let's continue giving it to him."²⁶

Amato – who split the payments to Judge Porteous with Creely 50-50 – corroborated Creely's account as to what occurred. Amato testified that Creely informed him "that the judge was sending curator cases to him and that he would, in turn, give money to the judge."²⁷ Amato testified that in his conversation with Creely they agreed they would split the net difference between themselves and the judge, and that "I told him I thought it was going to turn out bad."²⁸ Amato did not feel comfortable giving Judge Porteous cash from the curators, however, he was not "strong enough" to say no to what he understood to be a classic kickback arrangement.²⁹

²⁶ Creely SITC at 264:12-15.

²⁷ Jacob Amato, Jr. Senate Impeachment Trial Committee Hearing Testimony ("Amato SITC") at 124:25 – 125:2.

²⁸ Amato SITC at 125:19-24. Amato has testified consistently about his knowledge of the curatorships arrangement on three prior occasions, at each of which he was subject to cross-examination. *See, e.g.*, Jacob Amato, Jr. Senate Deposition ("Amato Sen. Dep.") at 32:5-8 ("Bob Creely came in my office one day, told me that Porteous was sending curatorships, and he wanted us to, you know, give him some money back, and I told him this is going to wind up bad."); Jacob Amato, Jr. House Impeachment Task Force Hearing Testimony ("Amato Task Force") at 99-100 ("Mr. Creely came to me one day and said that Tom - or Judge Porteous asked him for some money based upon sending curatorships. . . . Bob [Creely] would tell me Judge Porteous needs, you know, \$500, \$1,000, whatever it is for the curatorships, and we would each draw a check for whatever half the amount that he requested. . . . [J]udge Porteous sent curator cases to Bob Creely and at some point asked that he . . . receive some of that money."); Jacob Amato, Jr. 5th Circuit Special Committee Hearing Testimony ("Amato 5th Cir.") at 238 ("I know . . . from talking to Bob, that he had asked Bob to split curator fees with him some sort of way.").

²⁹ Amato SITC 125:23 – 126:4. *See also* Amato Task Force at 101 ("Mr. DUBESTER: Okay. Now, did you feel you had a choice but to give Judge Porteous this money? Mr. AMATO: Yes, I think we had a choice, but I just wasn't strong enough to put an end to it. To put an end to it, I would have to break up my law partnership and break up a friendship that I have had over a number of years with Judge Porteous, and I wasn't strong enough."); *id.* at 127

Amato had “no doubt” that the money that he and Creely gave Judge Porteous came from the proceeds of the curatorships assigned to Creely by Judge Porteous.³⁰

When Judge Porteous requested money, the two attorneys would take equal draws from the firm’s operating account. They would put the cash in an envelope and give it to Judge Porteous. The money they received from the curatorships was treated by Creely and Amato as income and taxes were paid on those amounts – even though some portion was being provided to Judge Porteous.³¹ They provided Judge Porteous cash every few months.³² They gave him cash, as opposed to a check drawn on the firm’s accounts, both “to avoid any kind of paper trail,” and because “that’s what Judge Porteous wanted,”³³ and because it was “part of the deceit.”³⁴ In most instances, Creely gave the cash to Judge Porteous, however both Amato and Creely believed that on occasion Amato personally gave Judge Porteous cash as well.³⁵ In any event, Amato had “no doubt” that Judge Porteous knew that the monies he was soliciting and receiving through the curatorship scheme were coming from Amato as well as Creely.³⁶

(agreeing that this was a “classic kickback arrangement”); Amato Sen. Dep. at 73:21 – 74:2 (same).

³⁰ Amato SITC at 127:1-4.

³¹ See Amato SITC at 129:7-10; Creely SITC at 268:8-10, 376:11.

³² See Creely SITC at 341:17 (“several months between requests”); Amato SITC at 241:15-16 (“two or three times a year”).

³³ Amato SITC at 128:13; Creely SITC at 363:17.

³⁴ Amato Task Force at 120.

³⁵ See Amato SITC at 216:25 – 217:1 (as to whether Amato gave the curator money on occasion to Judge Porteous: “I think so. I just don’t recall. But I think so.”). See also Creely SITC at 342:20-21, 342:24 – 343:2 (“either me or Jake” would give Judge Porteous the curator cash, and Amato “probably” did so).

³⁶ Amato SITC at 217:2-5. Judge Porteous knew both men well and had previously been in a law partnership with Amato. In addition, as Amato explained, “We owned our own office

In his testimony at the Fifth Circuit Hearing, Judge Porteous confirmed the essential aspects of his receiving cash from Amato and Creely in connection with the curatorships he assigned to Creely. Judge Porteous admitted that: (1) he received cash from Creely; (2) at some point in time Creely expressed his displeasure with giving Judge Porteous cash; (3) thereafter Judge Porteous started assigning Creely curatorships; and (4) that Judge Porteous's receipt of cash from Creely and Amato followed his assigning Creely curatorships.

First, Judge Porteous testified that he received cash from Creely and Amato:

Q. When did you first start getting cash from Messrs. Amato, Creely, or their law firm?

A. Probably when I was on state bench.

Q. And that practice continued into 1994, when you became a federal judge, did it not?

A. I believe that's correct.³⁷

Judge Porteous confirmed that there came a time when Creely expressed resistance to giving Judge Porteous money before the curatorships started:

Q. Do you recall Mr. Creely refusing to pay you money before the curatorships started?

A. He may have said I needed to get my finances under control, yeah.³⁸

Judge Porteous also admitted that his receipt of cash from Amato and Creely "occasionally" followed his assignment of curatorships to Creely.

building. We had checks. We had business cards. We filed pleadings and, you know, Amato and Creely, a professional law corporation." *See* Amato Task Force at 100–01. Creely and Amato also owned real estate together and had the firm's name – Amato & Creely – on the building they owned. *Id.*

³⁷ Judge G. Thomas Porteous, Jr. 5th Circuit Special Committee Hearing Testimony ("Porteous 5th Cir.") at 119.

³⁸ *Id.* at 134.

Q. And after receiving curatorships, Mr. -- Messrs. Creely and/or Amato and/or their law firm would give you money; correct?

A. Occasionally.

Q. During the time you were giving Creely and Amato and the law firm curatorships and you were getting cash back, was that cash you received a kickback for the curatorship, in your mind?

A. No, sir.³⁹

Though Judge Porteous took issue with the label “kickback” to describe the arrangement, he did not dispute – indeed he accepted – the description of the arrangement that he had with Creely and Amato as one where he gave “Creely and Amato and the law firm curatorships and [was] getting cash back.”⁴⁰ Similarly, at a different part of his testimony, Judge Porteous was asked a series of questions by Judge Benavides as to whether he received all the fees from the curatorships he assigned the firm, or just a portion of them. Judge Porteous responded: “I don’t know if it matched each time. That’s all I can tell you Judge. I just don’t know.”⁴¹ Significantly, Judge Porteous again accepted the fundamental premise of the question – that he received fees from the curatorships – but professed simply not to know whether the monies he received from the two attorneys matched the curatorship fees “each time.”

In addition to the testimony of Creely, Amato, and Judge Porteous, the House located close to 200 judicial orders signed by Judge Porteous assigning Creely “curatorships.” As described in the following chart, these curatorships would have generated fees of nearly \$40,000 to the firm.

³⁹ *Id.* at 132–33.

⁴⁰ *Id.* at 133.

⁴¹ *Id.* at 130–33.

Year	Number of Curatorships Assigned by Judge Porteous to Creely/Fee Amount per Curatorship	Total Dollar Amount
1988	18 x \$150, or 18 x \$200	\$2,700 – \$3,600
1989	21 x \$200	\$4,200
1990	33 x \$200	\$6,600
1991	28 x \$200	\$5,600
1992	44 x \$200	\$8,800
1993	28 x \$200	\$5,600
1994	20 x \$200	\$4,000
TOTAL	192	\$37,500 – \$38,400

Thus, Judge Porteous assigned curatorships to Creely resulting in the firm of Amato & Creely receiving fees amounting to at least \$37,500 from 1988 through 1994.⁴²

Both Creely and Amato have testified consistently that they gave Judge Porteous approximately \$10,000 each, or approximately \$20,000.⁴³ For his part, Judge Porteous testified that he had “no earthly idea” how much Creely and Amato gave him, though he did not deny the total could have been more than \$10,000. Judge Porteous testified as follows:

Q. Judge Porteous, over the years, how much cash have you received from Jake Amato and Bob Creely or their law firm?

A. I have no earthly idea.

⁴² See House Chart 40 (previously marked as HP Ex. 190); HP Ex. 188 (Letter from Jefferson Parish Court Clerk re: curator fee amounts), HP Exs. 189(1)–(226) (Curatorships).

⁴³ See Amato SITC at 131:19-22 (“Over time my best, not estimate but guesstimate would be something under 20,000 or around \$20,000 over a period of 10, 12 years, 15 years, I don’t know.”); Creely SITC at 272:2-4 (“[M]y best estimate of what I gave Judge Porteous was \$10,000, while he was on the state bench.”); Amato Task Force at 101, 108) (agreeing that the total amount was “in the neighborhood of 10 [thousand] to 20 thousand [dollars]”); Amato 5th Cir. at 242, 247).

* * *

Q. It could have been \$10,000 or more. Isn't that right?

A. Again, you're asking me to speculate. I have no idea is all I can tell you.⁴⁴

On October 28, 1994, Judge Porteous was sworn in as a federal district judge. Judge Porteous was no longer in a position to refer curatorships to Creely and Amato, and he stopped (for the time being) asking them for cash.⁴⁵ The fact that Judge Porteous's requests for cash from Creely and Amato came to an end at the same time he could no longer assign curatorships to them constitutes additional powerful evidence that those two actions were inextricably connected.

C. Lunches, Trips, Expenses and Parties

While Judge Porteous was a state judge, both Amato and Creely each frequently took Judge Porteous to lunch. Amato testified that he took Judge Porteous to lunch "on a regular basis . . . a couple of times a month," amounting to "potentially hundreds of lunches."⁴⁶ The restaurants to which Amato took Judge Porteous included the Beef Connection, the Red Maple, Bertucci's, Ruth's Chris Steak House, Antoine's, Smith & Wolensky's and Galatoire's.⁴⁷ As Amato testified: "We liked to eat well."⁴⁸ Amato paid for food and drink – typically "at least two" vodka drinks for Judge Porteous and sometimes more.⁴⁹ Amato, or other attorneys who

⁴⁴ Porteous 5th Cir. at 118–19.

⁴⁵ See Amato SITC at 130:17-23; Creely SITC at 275:9-12.

⁴⁶ Amato SITC at 119:6-12, 122:7-9.

⁴⁷ *Id.* at 119:18-25.

⁴⁸ Amato SITC at 119:13-14. See also Amato Task Force at 104 (describing his lunches with Judge Porteous spanning the entirety of their relationship: "[W]e had a good time.").

⁴⁹ Amato SITC at 121:9-15.

may have been in attendance, paid for all but a handful of these lunches, with Judge Porteous paying “rarely,” that is, a “couple of times, two, three times out of a hundred.”⁵⁰

While Judge Porteous was a state court judge, Creely also took Judge Porteous to lunch approximately twice a month. Creely believed that Amato took Judge Porteous out to lunch more frequently than he (Creely) did. When Creely and Judge Porteous went to lunch together, either Creely paid, or someone else paid, but “[n]ot Judge Porteous.”⁵¹

In addition, the two men hosted Judge Porteous on a variety of hunting and fishing trips, and arranged those trips, some of which involved air travel to Mexico, so that Judge Porteous never paid.⁵² In the summer of 1994, when Judge Porteous’s son Timothy was in Washington D.C. for an “externship,” Judge Porteous, through his secretary Rhonda Danos, solicited and received money from Creely and Amato to help pay for Timothy’s expenses.⁵³

Amato and Creely also paid several hundred dollars toward a party for Judge Porteous to celebrate his becoming a federal judge in 1994.⁵⁴

⁵⁰ Amato SITC at 122:16, 210:12-13. *See also id.* at 119:9-12, 122:7-9, 121:9-11, 122:16; Amato 5th Cir. at 255; Amato Task Force at 104 (recalling that that he had taken Judge Porteous to restaurants “hundreds of times” and that Judge Porteous bought lunch “at least on one occasion.”).

⁵¹ Creely SITC at 254:9. *See also id.* at 252:5-15, 254:5-9.

⁵² *See* Creely SITC at 254:17 – 257:5; Amato SITC at 122:19 – 124:5.

⁵³ *See* Timothy Porteous Senate Impeachment Trial Committee Hearing Testimony (“T. Porteous SITC”) at 1243:25 – 1244:9 (“I remember the conversation [Judge Porteous] had had, that he came home and said Bob [Creely] and Uncle Jake [Amato] gave you some money, and they said to have a great time and enjoy the experience.”); Rhonda Danos Senate Impeachment Trial Committee Hearing Testimony (“Danos SITC”) at 872:19 – 874:5 (describing her phone calls to attorneys, including Amato and Creely, and others seeking money for Timothy Porteous’s externship); Amato Task Force at 104 (confirming that he contributed money for Judge Porteous’s son).

⁵⁴ *See* Danos SITC at 872:2-15 (estimating the attorneys put in about “\$500 each” toward the party).

D. Judge Porteous's Handling of the Liljeberg Case

1. Introduction

On January 16, 1996, as a federal judge, Judge Porteous was assigned a complicated civil action, Lifemark Hospitals of La., Inc. ["Lifemark"] v. Liljeberg Enterprises, Inc. ["Liljeberg"] or "the Liljebergs". The case was scheduled for a non-jury trial in November of 1996. Amato entered his appearance on behalf of the Liljebergs in September of 1996 – approximately six weeks prior to the trial date. Thereafter, Judge Porteous presided over the Liljeberg case without disclosing his corrupt relationship with Amato. Indeed, in 1999, while Amato was awaiting Judge Porteous's decision – a verdict that was worth hundreds of thousands of dollars to Amato and his firm – Judge Porteous solicited two thousand dollars in cash from Amato. Amato acknowledged that he complied with Judge Porteous's request in part because of the financial leverage that Judge Porteous then enjoyed over him. Ultimately, Judge Porteous issued an opinion benefiting Amato in the Liljeberg case that was so bereft of legal support that the Fifth Circuit Court of Appeals, in reversing Judge Porteous, described it as "inexplicable," "a chimera," "constructed entirely out of whole cloth," "nonsensical," and "absurd."⁵⁵

2. The Recusal Hearing in the Liljeberg Case

The Liljeberg case involved a dispute between a hospital (Lifemark) and a pharmacy (Liljeberg), and involved antitrust law, bankruptcy law, real estate law, and contract law. The case was filed in 1993, and had been assigned to other judges before being transferred to Judge

⁵⁵ HP Ex. 63 (*In the Matter of Liljeberg Enterprises Inc.*, 304 F.3d 410, 428–29, 431–32 (5th Cir. 2002) ("5th Cir. *Liljeberg* Opinion")).

Porteous in January 1996. The matter was particularly contentious, with millions of dollars at stake.⁵⁶

The case was set for a non-jury trial before Judge Porteous, to commence November 4, 1996. On September 19, 1996, approximately six weeks prior to the scheduled trial date, the Liljebergs filed a motion to enter the appearances of Amato and Leonard Levenson (another of Judge Porteous's friends) as their attorneys. Judge Porteous granted the motion on September 26, 1996.⁵⁷

Amato was hired on a contingent fee basis, which provided that his law firm would receive 8% of any award. Amato estimated that if the Liljebergs prevailed in the case, he would have received between \$500,000 and \$1,000,000, but would receive nothing if the Liljebergs lost.⁵⁸ The motion to enter Amato's appearance clearly identified him with the firm "Amato and Creely."⁵⁹ Amato knew that one of the reasons he was retained was because of his friendship with Judge Porteous – "I'm sure my relationship with Judge Porteous had something to do with it."⁶⁰

⁵⁶ See Joseph Mole Senate Impeachment Trial Committee Hearing Testimony ("Mole SITC") at 379:13-15; Amato SITC at 189:14-19. See also HP Ex. 50 (Pacer Docket Report Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP, at p. 5 (Docket No. 1), p. 20 (Docket No. 190) ("Pacer Docket Report")).

⁵⁷ See HP Ex. 51(a) (Liljebergs' Motion to Substitute Counsel, Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP (E.D. La. Sept. 19, 1996) ("Motion to Substitute")); HP Ex. 51(b) (Order Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP (E.D. La. Sept. 23, 1996)).

⁵⁸ See Amato SITC at 132:33 – 133:11, 134:8-15. Mole SITC at 382:19-22 (describing the contingency arrangement).

⁵⁹ See HP Ex. 51(a) (Motion to Substitute), *supra* note 57 (listing Amato as being with the law firm Amato & Creely, P.C.).

⁶⁰ Amato SITC at 220:4-16.

After Amato and Levenson entered their appearances on behalf of the Liljebergs, Lifemark's lead counsel, Joseph Mole, inquired of others as to their relationship with Judge Porteous. After speaking to several individuals, Mole "developed some serious concerns that Mr. Amato and Mr. Levenson's presence in the case would be a problem that would keep the case from having a fair result."⁶¹

On October 1, 1996, Mole, on behalf of his client Lifemark, filed a motion to recuse Judge Porteous. Mole drafted the motion carefully based on his limited understanding of the facts, alleging in substance "that there was a close relationship between Judge Porteous and Mr. Amato and Mr. Levenson, that they were known to socialize together, that Amato and the judge had been law partners and that the timing created suspicion that it was the best thing for the judge to do, to avoid the appearance of impropriety, to step aside."⁶²

⁶¹ Mole SITC at 383:11-14. The Liljebergs' motives for hiring Amato, and the reasons for Mole's concerns, were corroborated by former state judge Bodenheimer, who informed the FBI, and confirmed in his trial testimony, that Judge Porteous had a reputation for awarding verdicts to his friends. See, e.g., Ronald Bodenheimer Senate Impeachment Trial Committee Hearing Testimony ("Bodenheimer SITC") at 1306:19 – 1309:1 (testifying that he previously made a statement to the FBI that was recorded as follows:

Bodenheimer would describe Porteous as corrupt because any time certain lawyers were in Porteous's court, a verdict in that lawyer's favor was assured, which constituted corruption in Bodenheimer's mind. Bodenheimer had heard that type of corruption had continued in Porteous's federal courtroom with Gardner and Levenson and with Amato & Creely to a lesser extent.

Bodenheimer affirmed that he, in fact, "had heard that." *Id.*

⁶² Mole SITC at 385:16-23. See also *id.* at 384:18-23, 385:3-7, 432:22-23 (stating that "[t]his is the only motion to recuse I've ever been involved with"). See also HP Ex. 52 (Lifemark's Memorandum in Support of Motion to Recuse, Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 1, 1996)); Joseph Mole House Impeachment Task Force Hearing Testimony ("Mole Task Force") at 141-42 (describing his motion as arguing "that the judge shouldn't be handling a case where two of his closest friends, if not his very closest friends, had just signed up 6 weeks before trial, whose facts had been in litigation since 1987 in one court or another, and that I didn't believe they had anything to add,

Mole had no idea that Amato, along with his partner Creely, had actually given Judge Porteous cash pursuant to the curatorship kickback arrangement, nor did he know about the other things of value that Amato or his partner Creely had provided Judge Porteous. If Mole had known those facts, he would have raised them in his motion to recuse.⁶³

On October 16, 1996, after the parties filed their respective written pleadings, Judge Porteous held a hearing on the recusal motion.⁶⁴ Both Amato and Levenson were present. During that hearing, Judge Porteous did not disclose the kickback arrangement that he had previously enjoyed with Amato and his partner. Instead, he made a series of misleading statements that characterized his relationship with Amato in benign terms, essentially as being no different than his relationship with countless other friends and members of the Bar:

The Court: Let me make also one other statement for the record if anyone wants to decide whether I am a friend with Mr. Amato and Mr. Levenson, I will put that to rest for the answer is affirmative, yes. Mr. Amato and I practiced the law together probably 20-plus years ago. Is that sufficient? . . . So if that is an issue at all, it is a non-issue.

other than their relationship with the judge, and that if the result came out in a certain way, it would create an appearance that things had not been right”).

⁶³ See Mole SITC at 385:24 – 386:10; Joseph Mole 5th Circuit Special Committee Hearing Testimony (“Mole 5th Cir.”) at 169-70.

⁶⁴ The Liljebergs filed their Opposition, dated October 9, 1996, which was signed by Mr. Levenson; Lifemark filed its Reply to the Opposition, dated October 11, 1996; and the Liljebergs filed a Memorandum in Opposition to Lifemark’s Reply, dated October 15, 1996, again signed by Mr. Levenson. See HP Ex. 53 (Liljebergs’ Opposition to Lifemark’s Motion to Recuse, Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 9, 1996)); HP Ex. 54 (Lifemark’s Reply to Liljebergs’ Opposition, Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 11, 1996)); HP Ex. 55 (Liljebergs’ Opposition to Lifemark’s Reply, Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 15, 1996)). That final pleading attacked Lifemark’s factual allegations, not because they were untrue, but because they were unproven, lacked specificity, and, in essence, alleged nothing more than the existence of “a friendly relationship.” HP Ex. 55 (Liljebergs’ Opposition to Lifemark’s Reply at 2).

* * *

Mr. Mole: I am happy to tell the Judge what the public perception is of the relationship.

* * *

Mr. Mole: I don't know what the Court wants to do with that issue, whether or not the Court wants to make a statement or accept the statement.

The Court: No, I have made the statement. Yes, Mr. Amato and Mr. Levenson are friends of mine. Have I ever been to either one of them's house? The answer is a definitive no. Have I gone along to lunch with them? The answer is a definitive yes.

* * *

Mr. Mole: The public perception is that they do dine with you, travel with you, that they have contributed to your campaigns.

The Court: Well, luckily I didn't have any campaigns. So I'm interested to find out how you know that. I never had any campaigns...

* * *

The Court: The first time I ran, 1984, I think is the only time when they gave me money.

* * *

The Court: [T]his is the first time a motion for my recusal has ever been filed. . . . I guess it got my attention. But does that mean that any time a person I perceive to be friends who I have dinner with or whatever that I must disqualify myself? I don't think that's what the rule suggests. . . . Courts have held that a judge need not disqualify himself just because a friend, even a close friend, appears as a lawyer.

* * *

The Court: Well you know the issue becomes one of, I guess the confidence of the parties, not the attorneys. . . . My concern is not with whether or not lawyers are friends. . . . My concern is that the parties are given a day in court which they can through you present their case, and they can be adjudicated thoroughly without bias, favor, prejudice, public opinion, sympathy, anything else, just on law and facts. . . .

I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off. . . .

[In the Bernard case] the court said Section 450 requires not only that a Judge be subjectively confident of his ability to be even handed but [that an] informed, rational objective observer would not doubt his impartiality. . . . I don't have any difficulty trying this case. . . .

[I]n my mind I am satisfied because if I had any question as to my ability, I would have called and said, "Look, you're right."⁶⁵

At one point in the hearing, Judge Porteous discussed the issue of whether the attorneys had given him campaign contributions and chastised Mole on that issue:

[D]on't misstate, don't come up with a document that clearly shows well in excess of \$6,700 with some innuendo that that means that they gave that money to me. If you would have checked your homework, you would have found that that was a Justice for all Program for all judges in Jefferson Parish. But go ahead. I don't dispute that I received funding from lawyers.⁶⁶

Amato never uttered a word at the recusal hearing about the kickbacks he paid to the Judge, nor did Judge Porteous. Amato described the consequences, were he to have made such a disclosure, as follows: "I would be disbarred, my law partner would be disbarred and that the judge would be sanctioned or defrocked, derobed by the judicial commission. At the time they

⁶⁵ HP Ex. 56 (Recusal Hearing Transcript, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP at 4, 6–7, 8, 10–11, 17–19 (E.D. La. Oct. 16, 1996) ("Recusal Hearing Transcript")) (emphasis added). Among the many devious ploys Judge Porteous utilized at this hearing, one in particular involved his dancing around the issue of disclosure. Mole, for his part, sought for Judge Porteous to make a full disclosure, diplomatically suggesting: "I don't know what the Court wants to do with that issue, whether or not the Court wants to make a statement or accept the statement." *Id.* at 6. In response, Judge Porteous went on the attack, essentially attacking Mole for mischaracterizing the nature of certain campaign contributions that were given. *Id.* at 9–10. Judge Porteous thus side-tracked the hearing into an irrelevant inquiry where he could be on the offense so as to discredit Mole.

⁶⁶ See HP Ex. 56 (Recusal Hearing Transcript at 10), *supra* note 65.

were two of my best friends.” Amato thus left the decision as to what would be disclosed to Judge Porteous, because “[t]he judge knew as much as I knew.”⁶⁷

With Amato (and Levenson) remaining silent in the courtroom, the few factual disclosures about the relationship between Judge Porteous and Amato (and Levenson) were made by Judge Porteous, and, as noted above, these were limited to the statements that he was “a friend with Mr. Amato and Mr. Levenson,” had been a former law partner with Amato, had “gone along to lunch with them,” but had not “been to either one of them’s house,” and that the first time he ran for judge in 1984 was “the only time when they gave me money.” Judge Porteous did not admit that Amato, through his firm Amato & Creely, had given him approximately \$20,000 in cash, including monies funded by Judge Porteous’s assignment of curatorships to Creely. Judge Porteous did not address Mole’s specific statement that he [Mole] had heard that Judge Porteous had traveled with the attorneys, and thus did not disclose, for example, that he had been hunting and fishing with Amato and Creely as their guest on several occasions. Judge Porteous also did not disclose that Amato and Creely had helped pay for his party to celebrate his appointment to the federal bench or had given money to help support Judge Porteous’s son’s 1994 summer externship.

The dishonesty in Judge Porteous’s handling of the recusal hearing is manifest. Even Amato has testified that Judge Porteous was at that time “obligated” to have disclosed their prior financial relationship, that Judge Porteous’s failure to disclose that financial relationship at the recusal hearing was “dishonest,” and that Judge Porteous’s statements concerning the fact that the only time he received cash from Amato and Levenson involved modest campaign

⁶⁷ Amato SITC at 139:4-8, 138:17-18. *See also* Amato Task Force at 103; Amato 5th Cir. at 248-49.

contributions, were “misleading” in that Judge Porteous did not disclose the cash he had received directly from Creely and Amato.⁶⁸

Judge Porteous’s statements minimizing his relationship with Amato – by denying he had ever been to his house, or asserting that they had “gone along to lunch” – depicted a relationship that was totally at odds with the truth. Judge Porteous trivialized Mole’s motion by comparing it to the following: “But does that mean that any time a person I perceive to be friends who I have dinner with or whatever that I must disqualify myself? I don’t think that’s what the rule suggests”⁶⁹ By suggesting merely that he had “dinner with” or “gone along to lunch with” Amato, with no elaboration, he affirmatively concealed the truth: that Amato (and his partner Creely) had paid for hundreds of Judge Porteous’s lunches and dinners at expensive restaurants for a decade or longer, for which Judge Porteous virtually never reciprocated. But more fundamentally, these were attorneys who, for years, paid him thousands in kickbacks. Judge Porteous affirmatively diverted the hearing from the true issues raised in the recusal motion by focusing on whether the attorneys had given him campaign contributions – denying that fact – and criticizing Lifemark’s attorney for raising the issue.⁷⁰

Finally, Judge Porteous made several “lulling” statements – stressing his awareness of and sensitivity to his ethical concerns associated with recusal issues, and suggesting his comfort

⁶⁸ Amato SITC at 230:3-6, 138:1-2, 144:10-13. *See also* Mole SITC at 385:24 – 387:1 (at the time he filed the recusal motion, Mole was unaware that Amato and Creely had given Judge Porteous cash from curatorship cases); Amato Task Force at 103 (agreeing that monies given from Amato and Creely to Judge Porteous was a “material fact that would have been relevant to Joseph Mole and Lifemark”).

⁶⁹ *See* HP Ex. 56 (Recusal Hearing Transcript at 11), *supra* note 65.

⁷⁰ *See* HP Ex. 56 (Recusal Hearing Transcript at 8–10), *supra* note 65.

with the issue having been raised. The most significant example of this tactic was Judge

Porteous's statement:

I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off.⁷¹

This self-serving statement purported to demonstrate the Judge's sensitivity to his ethical responsibilities and thus bolstered the factual and legal record for appellate review.

Judge Porteous denied the recusal motion after the argument in open court on October 16, 1996 and issued a one paragraph written order that he signed the following day.⁷² Lifemark sought a writ of mandamus from the Fifth Circuit. That petition was also denied.⁷³

Lifemark, having lost the recusal motion, felt that it was necessary to "level the playing field," and thus hired Don Gardner, another close friend of Judge Porteous, to be part of its trial team. Lifemark's pleading to the court entering the appearance of Gardner was date-stamped March 11, 1997. Mr. Gardner, who had little to no federal court / complex litigation experience, was brought in solely because he was a friend of the judge.⁷⁴

⁷¹ See HP Ex. 56 (Recusal Hearing Transcript at 18), *supra* note 65.

⁷² HP Ex. 57 (Judgment, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP at 1 (E.D. La. Oct. 17, 1996)). The written Order merely stated: "On Wednesday, October 16, 1996, the court heard oral argument on Lifemark Hospitals, Inc.'s Motion to Recuse. The Court, having reviewed the motion to recuse, the opposition, the reply, and the response to the reply and having heard oral argument, for reasons stated in open court denies the Motion to Recuse."

⁷³ See HP Ex. 58 (Lifemark's Petition for Writ of Mandamus, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 24, 1996)); HP Ex. 59 (Order, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 28, 1996)).

⁷⁴ See Mole SITC at 390:5-7, 390:9 – 392:8; Mole 5th Cir. at 174, 177-80; HP Ex. 60(a) (Motion of Lifemark to Enroll Additional Counsel of Record, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. March 11, 1997)).

**E. Judge Porteous's Relationship with Amato and the firm Amato & Creely
While the Liljeberg case was Pending**

Judge Porteous conducted a bench trial in the Liljeberg case in June and July 1997.⁷⁵ At the conclusion of the trial in July of 1997, Judge Porteous took the case under advisement. He did not issue his opinion until April 26, 2000, nearly three years after trial.⁷⁶

1. Meals

Amato and Creely continued to take Judge Porteous to lunches after the Liljeberg trial ended and prior to Judge Porteous issuing his written decision in that case. The restaurants where Amato took Judge Porteous included Ruth's Chris Steak House, the Beef Connection, Andrea's, and Emeril's.⁷⁷ From May 1999 to April 2000 (during which time the Liljeberg case was pending), the following chart reflects some of the meals attended by Judge Porteous and paid for by Amato, as reflected on Amato's credit card statements and his calendars for that period, which were produced to the Department of Justice pursuant to a grand jury subpoena.⁷⁸

Date	Restaurant	Amount	Calendar Notes
05/05/99	Sal and Sam's Metairie	\$56.45	"Tom Porteous"
05/26/99	Cannon's Restaurant	\$28.40	"GTP Parking \$5"
06/16/99	Ruth's Chris #2 Steak House	\$154.57	"G.T.P. Parking \$7" [PAID BY CREELY]
06/22/99	Ruth's Chris #1 Steak House	\$98.06	"Tom Porteous Parking \$3"
06/29/99	Red Maple Restaurant	\$52.48	"GTP" [PAID BY CREELY]

⁷⁵ See HP Ex. 50 (Pacer Docket Report at pp. 39-41), *supra* note 56.

⁷⁶ See HP Ex. 50 (Pacer Docket Report at p. 44 (Docket Nos. 471-72)), *supra* note 56.

⁷⁷ Amato Task Force at 103-04.

⁷⁸ See HP Ex. 21(b) (Jacob Amato calendars, 1999-2001); HP Ex. 21(c) (Jacob Amato credit card records).

Date	Restaurant	Amount	Calendar Notes
07/29/99	Sal and Sam's Metairie	\$37.50	"GTP"
08/02/99	Omni Hotels	\$45.82	"G.T.P. - \$4 Parking"
08/12/99	Crescent City Brewhouse (3 separate charges)	\$242.03, \$29.64, \$30.46	"G.T.P Parking \$8"
09/13/99	Metro Bistro	\$44.00	"GTP - Parking \$5"
10/04/99	Andrea's Restaurant	\$244.78	"GTP - Parking \$15"
12/06/99	Ruth's Chris #1 Steak House	\$299.41	"GTP Parking \$10"
12/28- 29/99	Canon's Restaurant	\$80.24	"G.T.P" [Calendar entry unclear as to which date]
01/12/00	Beef Connection	\$206.68	"G.T.P."
01/25/00	Dickie Brennan Steak	\$233.50	"G.T.P.- Parking \$4"
02/09/00	Bruning's Restaurant	\$60.61	"Porteous"
03/01/00	Dickie Brennan Steak	\$124.29	"G.T.P. \$5"
03/29/00	Red Maple	\$160.83	GTP
04/05/00	[no corresponding restaurant charge in New Orleans]		"GTP & Crew \$145"
04/17/00	Beef Connection	\$101.37	"G.T.P" [PAID BY CREELY]

2. May 1999 - Creely's Payments for Judge Porteous in Las Vegas

In May 1999, while the Liljeberg case was pending his decision, Judge Porteous went on a trip to Las Vegas, Nevada with several friends, including Creely and Gardner, for his son's bachelor party. Creely paid for Judge Porteous's hotel room and some incidental room charges. He also paid for a portion of Timothy Porteous's bachelor party dinner at the Golden Steer. These payments amounted to more than \$1,100. During that trip, Creely accompanied Judge

Porteous and others to a strip club, where Creely gave a club employee \$200 to pay for a lap dance for Judge Porteous and a courthouse employee.⁷⁹

Judge Porteous admitted in his Fifth Circuit testimony that Creely paid for his hotel room and a portion of the dinner on the May 1999 Las Vegas trip.⁸⁰

3. June 1999 – Judge Porteous Solicits and Receives
Approximately \$2000 from Amato

On June 29, 1999 – prior to Judge Porteous issuing his decision in Liljeberg – Judge Porteous solicited approximately \$2,000 to \$2,500 from Amato while the two men were on a fishing trip. Amato described the incident as follows:

We were standing on the front of Mitch Martin's boat, his rather large boat, and we were both drinking, the judge was not hysterical, but he was very upset that his son's wedding was coming up soon and that he didn't have enough money to put the kind of wedding on that he thought he should. I don't know if he was – for the – half the rehearsal party or whatever. But he had some – some wedding-related reason why he needed some cash to go farther with the wedding plans.⁸¹

⁷⁹ See Creely SITC at 289:23 – 290:2, 289:17-22, 354:1-10, 291:7-18. See also HP Ex. 377 (Caesars Palace Record reflecting that Creely signed for Judge Porteous's room charges); HP Ex. 378 (consisting of: (1) Caesars Palace records including Judge Porteous's room charges of \$86.11, \$86.11 and \$378.70, and (2) the Amato & Creely corporate American Express statement for May 1999 showing charges for \$86.11, \$86.11, and \$378.70 – from Judge Porteous's hotel room at Caesars Palace – and for \$560.58 – from Creely's payment at the Golden Steer bachelor party dinner – for a total in excess of \$1,100). At the SITC trial, Creely expressed confusion at separating out Judge Porteous's charges on his credit card statement from other charges he incurred on that trip, but those charges are readily identifiable by reference to Judge Porteous's room statement, which is part of HP Ex. 378, and the charges clearly total more than \$1,100.

⁸⁰ Porteous 5th Cir. at 140 (“It appears Mr. Creely paid for [my room].”).

⁸¹ Amato SITC at 141:5-14. See also Amato Task Force at 104–05 (“It was a weekday, and a friend of mine has a fairly large boat . . . So we went fishing that night. Judge Porteous was drinking. We were standing on the front of the boat, the two of us, and he was—I don't know how to put it. He was really upset. He was—had a few drinks. He said, ‘My son's wedding was more than I anticipated. The girl's family can't afford it. I invited too many guests.’ Would I lend him, give him, provide him, however you want to call it, something, like \$2,500, to pay for part of the wedding or the after-rehearsal party of something?”); Amato 5th Cir. at 240; HP Ex. 283 (Amato's June 1999 calendar showing the name “Mitch Martin” written in the box for June 29, 1999).

Amato subsequently obtained approximately half that amount (\$1,000) from Creely, and gave Judge Porteous \$2,000 in cash in an envelope.⁸²

Creely recalled the incident in similar terms as Amato. Creely testified:

- A. There was a fishing trip that I wouldn't go on, didn't want to go on. And Judge Porteous and Amato went on this fishing trip. In general - I don't remember word for word how it went. It was 11 years ago. But the judge and he ended up in some sort of a conversation, either on the front or the back of the boat where the judge became - loss of words, became emotional about not being able to satisfy or pay for the obligation that he needed money for and asked Jake Amato to help him out. And that was what was related to me. . . .
- Q And both of you decided that if you were going to give money to the judge, it was going to come from you both equally?
- A. Yeah. That's what Mr. Amato decided, that we would give half the money to the judge, and I eventually did it.⁸³

Judge Porteous, testifying in the Fifth Circuit hearing, confirmed the essence of Amato's recollections of events surrounding the request for money on the fishing trip. Judge Porteous admitted that he received cash from Amato for the purposes Amato described, and that cash was received in an envelope.

- Q. Do you recall in 1999, in the summer, May, June, receiving \$2,000 for [sic: should be "from"] them?
- A. I've read Amato's grand jury testimony. It says we were fishing and I made some representation that I was having difficulties and that he loaned me some money or gave me some money.
- Q. You don't - you're not denying it; you just don't remember it?
- A. I just don't have any recollection of it, but that would have fallen in the category of a loan from a friend. That's all.

* * *

⁸² See Amato SITC at 141:23-24.

⁸³ Creely SITC at 294:4-22.

- Q. [W]hether or not you recall asking Amato for money during this fishing trip, do you recall getting an envelope with \$2,000 shortly thereafter?
- A. Yeah. Something seems to suggest that there may have been an envelope. I don't remember the size of an envelope, how I got the envelope, or anything about it.
- * * *
- Q. Wait a second. Is it the nature of the envelope you're disputing?
- A. No. Money was received in [an] envelope.
- Q. And had cash in it?
- A. Yes, sir.
- Q. And it was from Creely and/or -
- A. Amato.
- Q. Amato?
- A. Yes.
- Q. And it was used to pay for your son's wedding.
- A. To help defray the cost, yeah.
- Q. And was used -
- A. They loaned - my impression was it was a loan.
- Q. And would you dispute that the amount was \$2,000?
- A. I don't have any basis to dispute it.
- Q. Your impression was that it was a loan was what you just said, correct?
- A. Yes.
- Q. Did you ever pay back the loan?
- A. No, I didn't. I declared bankruptcy in 2001; and, of course, I didn't list it.⁸⁴

⁸⁴ Porteous 5th Cir. at 121, 136-38. Judge Porteous's Fifth Circuit testimony, that he considered the \$2,000 a "loan," is obviously not true. In the entire history of the relationship

At the time of Judge Porteous's request of Amato for money, Judge Porteous had the Liljeberg case under advisement, with his decision in that case still to be rendered. Depending on how Judge Porteous chose to rule, Amato and his firm could receive up to a million dollars – or get nothing.⁸⁵ The case was exceptionally important to Amato, who had put his practice on hold for almost two years to handle this demanding contingency case. The leverage that Judge Porteous had over Amato at the time of this request – where Judge Porteous had the power to enrich Amato many times over the amount that he was requesting of Amato – was apparent. Amato was blunt that Judge Porteous's role as a judge, with the Liljeberg case pending before him, was a factor that influenced Amato's willingness to give Judge Porteous cash.

Q. Let me ask you now, Amato, did the fact that you stood to make a lot of money enter your head when he asked you for the cash?

A. It did, yes, it did.⁸⁶

between Judge Porteous and attorneys Amato and Creely, there is no evidence whatsoever that any of the cash they gave Judge Porteous was ever considered or treated as a loan, or that Judge Porteous ever repaid anything to them.

Notwithstanding that Judge Porteous swore under oath before the Fifth Circuit that this transaction was "a loan," Judge Porteous, through his attorneys, came up with an entirely different explanation for this transaction at the SITC trial, during which the payment was described as a "wedding gift": "It was a gift, a wedding gift from long-standing friends." Jonathan Turley SITC Opening Statement at 76. This description of the transaction is equally far-fetched and disingenuous. The payment of \$2,000 from Amato and Creely to Judge Porteous bore no semblance whatsoever to a common understanding of the term "wedding gift." For one, the cash was provided to the father of the groom – not the groom; for another, it was provided not as a result of any charitable impulse but in response to a specific request for cash. If those reasons were not enough to render the "wedding gift" explanation fictive, both Amato and Creely specifically denied that the cash was intended to constitute such a gift. *See* Amato SITC at 231:3-22 (Amato gave the groom a different wedding present); Creely SITC at 359:25 – 360:8 ("It wasn't a wedding present."). It is inferable that Judge Porteous and his attorneys have resorted to "false exculpatory" explanations for the conduct because the truth is so truly damning and reveals what was, in substance, Judge Porteous's shakedown of Amato for cash.

⁸⁵ *See* Amato SITC at 132:22 – 133:11.

⁸⁶ Amato SITC at 142:23 – 143:1.

* * *

Q. So you understood that this was something of critical importance to him?

A. Yes.

Q. Now, you testified on cross that you gave him the money, but influencing the judgment was not the primary reason; is that right?

A. Yes, that's correct, it wasn't the primary reason, a moving reason. It was because of my friendship, and I really felt sad for him. Now, I did consider that, you know, I had a case in front of him.

Q. In the House I think I asked you to break down –

A. Yes.

Q. -- how you weighted this, how much of your motivation to give him the money was based on your friendship and how much was based on the fact that this was a federal judge sitting on a case worth a potential half million to a million to you. How did you break that down?

A. 20 percent because he was a federal judge, the rest because of friendship and because I really felt sorry for him. I know what it's like to raise a bunch of kids, you know?

Q. But 20 percent was because he had a case worth a fortune to you, wasn't it?

A. Yes, and I – biggest mistake I ever made.

Q. You didn't believe it would influence the judge's decision necessarily, but you weren't willing to take the risk that it might?

A. That's correct.⁸⁷

The shakedown quality to Judge Porteous's request is obvious and was perceived as such by Amato. It was inconceivable that with the case pending, Amato would "take the risk" of turning down Judge Porteous's request for cash where the matter was of "critical importance" to the judge.⁸⁸ Thus, the evidence established beyond a doubt that in the midst of presiding over a

⁸⁷ Amato SITC at 232:20 – 233:25 (emphasis added).

⁸⁸ *Id.* at 232:20-22.

case, at a critical stage where he had the case under advisement, Judge Porteous solicited and received cash from one of the attorneys for one of the parties. Judge Porteous's solicitation of cash from Amato demonstrates Judge Porteous's egregious misuse of his judicial power to enrich himself. A judge who engages in such conduct is unfit to continue to hold the office of United States District Judge.

4. Other – Amato's and Creely's Payment for Five Year Anniversary Party

In late 1999, still while Judge Porteous had the Liljeberg case under advisement, Amato and Creely paid for a party for Judge Porteous to celebrate his fifth year on the federal bench, at the French Quarter Restaurant and Bar, to which his present and former clerks and other attorneys were invited. Amato estimated they paid between \$1,000 and \$1,500.⁸⁹

F. Procedural History of the Liljeberg Case – 1997 to 2002

Notwithstanding Judge Porteous's statement at the October 16, 1996 recusal hearing that: "I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off," he did not notify Mole of any of his post-recusal hearing and post-trial contacts with Amato or Creely which would have provided Mole the opportunity to renew his motion to recuse.⁹⁰ Specifically, Judge Porteous did not inform attorney Mole of the meals, the payments of expenses in Las Vegas, the \$2,000 cash payment, or Amato and Creely's payment towards Judge Porteous's fifth year anniversary party.

⁸⁹ See *id.* at 145:12-21; Danos SITC at 871:17-24; Amato Task Force at 105 (estimating \$1,700).

⁹⁰ See Mole SITC at 399:2-19; Mole 5th Cir. at 193 (testifying that he would have been "very alarmed to find out that Jake was giving money to the judge during the case as being under submission for decision by Judge Porteous"); Mole Task Force at 145 ("All of those things were the things I—sort of things I feared were happening or would happen, but had-I had no knowledge of.").

On April 26, 2000, Judge Porteous issued a written opinion in the Liljeberg case. By that time, Judge Porteous's financial situation was desperate. He had nearly depleted his IRA account, had over \$100,000 in credit card debt, and was just weeks away from meeting with a bankruptcy attorney. He knew that he had turned to Amato and Creely as sources of financial support in the past, and there is every reason to conclude that he would have expected such a relationship to continue in the future. Judge Porteous – who had taken judicial actions in the past so as to enrich himself – had powerful financial motives not to burn his bridges with Amato and Creely and, instead, to curry their favor and stoke their generosity.

Thus, Judge Porteous ruled in all major aspects for Amato's and Levenson's clients, the Liljebergs. According to Lifemark's counsel, this was a "resounding loss" for Lifemark,⁹¹ and Lifemark appealed Judge Porteous's decision to the Fifth Circuit Court of Appeals.⁹²

In August of 2002, the Fifth Circuit Court of Appeals reversed Judge Porteous's decision in most significant aspects. In doing so, the Fifth Circuit characterized various aspects of Judge Porteous's ruling as "inexplicable," "a chimera," "constructed entirely out of whole cloth," "absurd," "close to being nonsensical," and "not supported by law."⁹³

After the case was reversed by the Fifth Circuit and remanded back to Judge Porteous, the parties settled because Mole's client did not want to go back before Judge Porteous.⁹⁴

⁹¹ Mole SITC at 400:17-18. Such a verdict was consistent with Judge Porteous's reputation of awarding verdicts to his friends. See Bodenheimer SITC at 1308:16 – 1309:1.

⁹² See Mole SITC at 401:5-7.

⁹³ HP Ex. 63 (Fifth Cir. *Liljeberg* Opinion at 428–29, 431–32), *supra* note 55.

⁹⁴ See Mole SITC at 404:6-11.

**G. Judge Porteous Should Be Convicted and Removed from Office for
Engaging in the Conduct Set Forth in Article I**

The House has clearly proved the allegations set forth in Article I. That conduct constitutes a “high Crime and Misdemeanor” warranting Judge Porteous’s conviction and removal from the office of United States District Judge.

The conduct at issue warrants conviction and removal for several independent reasons. First, at its core, the conduct demonstrates Judge Porteous’s breach of the public trust by his abuse of his judicial office for personal gain. He did so while a state judge by assigning Creely curatorships in order to enrich himself; he did so as a federal judge by dishonestly conducting a recusal hearing for personal purposes, the effect of which was that he would control a case vital to his close friend and financial benefactor; he did so by soliciting cash of Amato at a time when he had enormous economic leverage and power over Amato; and ultimately, he did so by issuing an unsupported, result-oriented decision that would have greatly enriched Amato and Creely.

Second, the conduct at issue demonstrates Judge Porteous’s utter lack of integrity and lack of fitness to hold the office. This is apparent from the blatant corruption at the heart of the curatorship kickback scheme. It is also manifested by the dishonest way Judge Porteous handled the recusal hearing. He denied a fair hearing to Lifemark; he denied Lifemark a fair record on which they could base their appeal; and he prevented the Court of Appeals from having a fair record on which it could consider the appeal. Judge Porteous’s conduct was a total and knowing corruption of the judicial process.

Third, the conduct at issue brings disrepute to the federal judiciary and undermines public confidence in it. No one could possibly conclude that the verdict in the Liljeberg case was fair and impartial given the undisclosed relationship between Judge Porteous and the lawyers for the Liljebergs, including Judge Porteous’s solicitation of cash during the pendency of the case.

Further, the damage to public confidence in the judiciary going forward is immense: Judge Porteous's handling of the Liljeberg case sends the clear message that to prevail in his courtroom, it is necessary to give him things, or to hire attorneys who have given him things, and that the actual merits of the case are not determinative to a just outcome.⁹⁵ Judge Porteous so warped and corrupted the judicial process that both parties in the Liljeberg case felt it necessary (and who, unknown to the parties, had provided Judge Porteous with cash) to hire attorneys who were his friends, and, after the case was reversed and remanded on appeal, Lifemark decided to settle rather than go back to such a biased judge.

Thus, applying all the recognized and established grounds for conviction and removal – “abuse of position of trust,” “lack of integrity,” and “bringing disrepute to the judiciary and undermining public confidence in it” – Judge Porteous's conduct requires conviction and removal.

IV. ARTICLE II

A. Introduction

Starting in the early 1990s (while he was a state court judge), and continuing while on the federal bench, Judge Porteous maintained a corrupt relationship with bail bondsman Louis Marcotte. While on the state court, Judge Porteous solicited and accepted things of value from Marcotte (and from Louis Marcotte's sister, Lori Marcotte), and took a series of judicial actions – both in the nature of setting bonds as they requested (at amounts they recommended) and in setting aside and expunging felony convictions of two of their employees – that benefited the

⁹⁵ Creely and Amato each turned in their law licenses rather than face disciplinary proceedings for their conduct in connection with Judge Porteous. See Amato SITC at 150:7-13; Creely SITC at 294:23 – 295:6.

Marcottes. Judge Porteous's conduct was willfully corrupt, and was the same sort of conduct for which other state judges were ultimately convicted and imprisoned.

Even after he became a federal judge and could no longer set bonds for the Marcottes, Judge Porteous continued to maintain a corrupt relationship with them. He continued to accept expensive lunches from them, and, in particular, would go out to lunch with them when the Marcottes sought to impress and recruit others to their corrupt scheme. He willingly vouched for the bond practices of the Marcottes to state judges, knowing full well that the Marcottes were corrupt. By virtue of his influential position as a federal judge, Judge Porteous was particularly instrumental in the case of former state judge Ronald Bodenheimer, who kept his distance from Louis Marcotte until Judge Porteous spoke to him on Marcotte's behalf. Bodenheimer thereafter entered into a corrupt relationship with the Marcottes that was comparable to that of Judge Porteous when he was a state judge, and which ultimately resulted in Bodenheimer's guilty plea and incarceration.

Judge Porteous's conduct *vis-à-vis* the Marcottes constituted an abuse of his position of public trust and demonstrates Judge Porteous's lack of integrity. Further, Judge Porteous disgraces the federal judiciary as he continues to wear the robe of a federal judge after he has been exposed for having engaged in the same conduct which resulted in other state judges being sent to jail.

B. Overview - The Role of Louisiana State Judges in the Bail Bonds Business

In the 24th Judicial District Court (the "24th JDC"), where Judge Porteous presided as a state judge until October 1994, the bond-setting practices of the state judges had enormous financial impact on Louis Marcotte's bail bond business. If a judge were to set a bond so high that the prisoner could not afford to pay the premium to the bondsman (typically 10% of the bond), Marcotte would make nothing and the prisoner would remain in jail. If the bond was set

too low or if the prisoner was released on his personal promise to reappear, Marcotte would also make little or no money.⁹⁶ Thus, Marcotte wanted bonds to be set at the highest amount for which the individual who was arrested could afford to pay the premium – even if a lower bond was sufficient to secure their appearance in court. If, for example, the most money a prisoner could come up with to pay a premium was \$10,000, then Louis Marcotte wanted bond set at \$100,000.

When a person was arrested, the Marcottes (or their employees or agents) would interview him or her in jail, find out identifying information, the nature of the crime, and the prisoner's record. The Marcottes would also locate relatives or persons capable of posting the bond, run credit reports, and ultimately determine the maximum premium the prisoner could pay. The Marcottes would use that information in making a recommendation to one of the judges in the 24th JDC as to the amount of bond that the judge should set.⁹⁷ However, a judge's purpose in setting a bond amount should be to secure the defendant's presence in court, not necessarily to exhaust a defendant's (or his family's) resources – and certainly not to maximize a bail bondsman's profits.

Although the procedures in the 24th JDC during the early 1990s called for bond to be initially set by a sitting magistrate assigned to that duty, any judge in the courthouse could set bond. Accordingly, if the Marcottes thought that the sitting magistrate would set the bond "too high" or "too low" – something other than the "profit-maximizing" level – they would seek out a judge to set the bond at their recommended level. As Louis Marcotte explained: "[I]f the

⁹⁶ See Louis Marcotte Senate Impeachment Trial Committee Hearing Testimony ("Louis Marcotte SITC") at 506:22 – 507:3.

⁹⁷ *Id.* at 504:20 – 505:3, 523:9-14. See also Louis Marcotte House Impeachment Task Force Hearing Testimony ("Louis Marcotte Task Force") at 42.

magistrate wasn't favorable, we would start calling the judges at home, you know, real early before the magistrate got there. And then, if we couldn't get in touch with them, we would go shopping in the courthouse before the magistrate set the bond."⁹⁸ Every time a judge set bond at the Marcottes' request, the Marcottes maximized their profits.⁹⁹

C. The Relationship Between Judge Porteous and the Marcottes

In order to maximize his profits, Louis Marcotte needed judges who would be receptive to his bond requests. Judge Porteous, with expensive habits (alcohol and gambling), needed financial support. Each of these men quickly understood what the other could do for him, and they formed a mutually beneficial, corrupt relationship.

1. Meals

The Marcottes started to develop a relationship with Judge Porteous in the early 1990s. They met him through Adam Barnett, another bondsman who on occasion worked with the Marcottes. Barnett was close to Judge Porteous, and the Marcottes initially used Barnett to approach Judge Porteous to set bonds.¹⁰⁰ After the Marcottes got to know Judge Porteous, they dealt with him directly, and began to take Judge Porteous to lunch, along with his secretary, Rhonda Danos. The meals were expensive and involved "lots of drinking" by Judge Porteous.¹⁰¹

⁹⁸ Louis Marcotte Task Force at 43. *See also* Lori Marcotte Senate Deposition ("Lori Marcotte Sen. Dep.") at 49:2-4 ("[Sometimes] we didn't even call the magistrate if we knew it was someone that wouldn't help us."); Louis Marcotte Senate Deposition ("Louis Marcotte Sen. Dep.") at 139:22 – 140:11 (Louis went to Judge Porteous if he thought he could do better with Judge Porteous than the Magistrate, not just if the Magistrate were unavailable).

⁹⁹ *See* Louis Marcotte SITC at 523:2-5, 524:11-16, 508:25 – 509:3.

¹⁰⁰ *Id.* at 509:7-20, 560:12 – 561:10. *See also* Lori Marcotte Sen. Dep. at 10:14-18; Louis Marcotte Sen. Dep. at 18:12-18, 23:2-4.

¹⁰¹ *See* Louis Marcotte SITC at 509:21-25, 510:16-25, 511:1-7, 512:1-7 ("lots of drinking"); Jeffery Duhon Senate Impeachment Trial Committee Hearing Testimony ("Duhon SITC") at

The best evidence suggests that the Marcotte lunches with Judge Porteous started in or around 1992.¹⁰²

Louis Marcotte estimated that the lunches with Judge Porteous occurred “around once a week and sometimes twice a week” and identified the restaurants as including the Beef Connection, Ruth’s Chris Steak House, and other “high-end restaurants.”¹⁰³ To arrange these lunches, Louis Marcotte would sometimes call Judge Porteous, and Judge Porteous would sometimes call Louis Marcotte. On some occasions, the Marcottes would call Judge Porteous’s secretary Danos and she would set up the lunch.¹⁰⁴

661:12-16, 663:18-25; Danos SITC at 892:12-20 (“a few times a month”); Lori Marcotte Sen. Dep. at 22:1-3.

¹⁰² See Lori Marcotte Sen. Dep. at 15:23 – 16:25, 60:16-25. It should be noted that former state judge Alan Green was elected as a 24th JDC judge in October of 1992, and Lori Marcotte specifically recalled a lunch with Green soon after he was elected. See PORT Ex. 1007 (list of judges who served on the 24th JDC). In questioning Lori Marcotte during the SITC trial, Judge Porteous’s attorney represented that Green was elected in November 1993. In response, Lori Marcotte testified: “I thought it was sooner.” See Lori Marcotte SITC at 646:15-19. That colloquy confirms not only the specificity and certainty of Lori Marcotte’s recollection as to dates that the Marcottes’ relationship with Judge Porteous and the lunches began, but the accuracy of her recollection that they started in 1992, especially in the face of a mistaken representation of fact by counsel for Judge Porteous. Judge Porteous has sought through questioning to suggest that his relationship with the Marcottes did not begin until after a derogatory newspaper article appeared in fall 1993.

¹⁰³ Louis Marcotte SITC at 512:8-17. See also Louis Marcotte Task Force at 44; Lori Marcotte Sen. Dep. at 66:13 – 67:6 (Ruth’s Chris Steak House, the Beef Connection, and the Red Maple).

¹⁰⁴ See Louis Marcotte SITC at 510:11-15; Louis Marcotte Task Force at 44 (“It started out with me calling him for lunch. And then, as we got closer and developed a relationship, he would call and then I would call.”)

Louis Marcotte paid for the lunches with Judge Porteous through his company, Bail Bonds Unlimited (“BBU”). Judge Porteous never paid for a lunch that he attended with the Marcottes.¹⁰⁵

The Marcottes wanted there to be a lot of people at the lunches they hosted for several reasons. First, Judge Porteous liked to have people around him, and the Marcottes wanted him to have a good time. They allowed Judge Porteous to bring whomever he wanted to the lunches. In addition, it helped the Marcottes for other judges who were guests at their lunches to see them with Judge Porteous, because it made Louis Marcotte “look like a businessman instead of a bondsman.”¹⁰⁶ However, no matter how many people were in attendance at the lunches, the Marcottes viewed the monies they spent on the lunches as money spent on and for the benefit of Judge Porteous, and, of course, to benefit their business.¹⁰⁷ For Marcotte, these lunches were business, not pleasure. He often preferred to be working at his office rather than sitting around drinking in the middle of the day, but these lunches were his investment to make money.¹⁰⁸

Lori Marcotte, in her Task Force testimony, specifically described one of the Judge Porteous lunches at which then newly elected state judge Alan Green was in attendance, as follows:

¹⁰⁵ See Louis Marcotte SITC at 514:7-16 (“none,” “never”); Louis Marcotte Task Force at 45 (Of a hundred lunches that Judge Porteous may have attended with Louis Marcotte, Judge Porteous “didn’t pay for any”).

¹⁰⁶ Louis Marcotte SITC at 511:8-18. See also Lori Marcotte Sen. Dep. at 61:4-11, 61:22 – 62:2, 62:15-20 (describing how a lunch would come about: “As soon as a judge gets elected, let’s try to get him at the table. Let’s try to train him. And that was an opportunity for Judge Porteous to have an entourage with him too. Let’s invite two or three judges and their staff and the table would be big like this.”).

¹⁰⁷ See Louis Marcotte SITC at 514:17-20; Lori Marcotte Sen. Dep. at 122:13 – 123:1.

¹⁰⁸ See Louis Marcotte Sen. Dep. at 38:5 – 39:1, 137:14-21 (Louis became tired of drinking in the middle of the day when he needed to work at his business).

I remember setting up a lunch with some other judges and some attorneys and Judge Porteous and Rhonda, and we had - they had invited or we had invited Judge Green who was newly elected. And, I mean, it is pretty clear because that was really the first lunch where Judge Porteous had explained the concept of splitting bonds. That was kind of like the stage for everything else that would happen.¹⁰⁹

Green was ultimately convicted of a federal corruption offense and incarcerated as a result of his relationship with the Marcottes.

2. Car Repairs

When Louis Marcotte was first dealing with Judge Porteous through Adam Barnett and did not have direct contact with the judge, Barnett would ask Louis Marcotte to share the expenses associated with taking care of Judge Porteous's cars. On occasion, there was a kickback quality to these requests, as a portion of the bond premium for a bond set by Judge Porteous for Barnett and the Marcottes would be used to pay for car repairs.¹¹⁰ Louis Marcotte ultimately "edge[d] Adam [Barnett] out" of the relationship with Judge Porteous, and began to deal with Judge Porteous directly,¹¹¹ so he could be sure that he was getting credit with Judge Porteous for the repairs. Louis Marcotte described his involvement in taking care of Judge Porteous's cars as follows:

- Q. Okay. And let me turn now to the subject of automobiles. Did you have anything to do with Judge Porteous's cars in the time period prior to 1994?
- A. You know, it's hard to say, the time frame, was it '92, '92, yes. What I can say is I fixed cars for he and his family.
- Q. And what do you mean by that, fixing cars?

¹⁰⁹ Lori Marcotte Task Force at 57. *See also* Lori Marcotte Sen. Dep. at 58:15-21.

¹¹⁰ *See* Louis Marcotte SITC at 515:12-20; Louis Marcotte Sen. Dep. at 23:23 – 24:4, 95:4-12, 34:3-20, 45:4-12, 134:12-20 ("Adam and I would share the costs of the car but Porteous didn't know it was coming from me. He just thought Adam was doing it.").

¹¹¹ Louis Marcotte SITC at 515:12-20.

- A. Tires, radios, transmissions, body work. Every time I took one of his cars, I filled it up with gas and washed it as well.
- Q. All right.
- A. I mean, I really wanted to make a statement, you know, when I did something for him.¹¹²

Louis Marcotte would make repairs to Judge Porteous's cars – which he described as “old and kind of beat up” – “once a month or once every three months.”¹¹³ Marcotte would have his employees, Jeff Duhon and Aubry Wallace, pick up the cars for repairs and servicing. On occasion, Duhon would go to Judge Porteous's chambers to pick up the keys so he could take care of the cars.¹¹⁴ Judge Porteous gave Aubry Wallace the security code to the courthouse parking lot, and Wallace would get the keys to Judge Porteous's car from under the floor mat.¹¹⁵ In addition to the more significant repairs, Louis Marcotte (mainly through Wallace) would regularly pick up Judge Porteous's car to have it washed, detailed and filled up with gas.¹¹⁶ Louis Marcotte, through BBU, paid for all Judge Porteous's car repairs. Judge Porteous never reimbursed him.¹¹⁷ On several occasions when Wallace returned the car to Judge Porteous, the

¹¹² *Id.* at 514:23 – 515-10.

¹¹³ *Id.* at 516:13-15. *See also* Duhon SITC at 658:10-16; Lori Marcotte Sen. Dep. at 60:20-24) (“His car was broken a lot.”).

¹¹⁴ *See* Duhon SITC at 657:19-20; Darcy Griffin Senate Impeachment Trial Committee Hearing Testimony (“Griffin SITC”) at 1842:7-19 (“I know [the Marcottes] were coming to get the keys” to do something with Judge Porteous's cars).

¹¹⁵ *See* Aubry Wallace Senate Impeachment Trial Committee Hearing Testimony (“Wallace SITC”) at 682:14-19.

¹¹⁶ *See* Louis Marcotte SITC at 515:4-7, 516:4-11; Duhon SITC at 657:10-17 (“brakes, air conditioning, transmission and things like that”); Louis Marcotte Task Force at 45-46; Lori Marcotte Sen. Dep. at 85:11-16.

¹¹⁷ *See* Louis Marcotte SITC at 517:25 – 18:3.

Marcottes would leave presents in the car for Judge Porteous, such as liquor and coolers of shrimp.¹¹⁸

3. Trip to Las Vegas with Judge Giacobbe and Other Attorneys

In or about 1992, Lori Marcotte took Rhonda Danos to Las Vegas. Judge Porteous did not attend this trip.¹¹⁹ Thereafter, in approximately 1993 or 1994, Louis Marcotte took Judge Porteous on a trip to Las Vegas. Also in attendance was another state judge, George Giacobbe. Louis Marcotte also included some attorneys on the trip because he knew that bail bondsmen do not enjoy a great reputation and it would not look good for Judge Porteous to be going to Las Vegas only with him.¹²⁰

Louis Marcotte and Lori Marcotte split the costs of Judge Porteous's trip with the attorneys and gave Rhonda Danos cash in Judge Porteous's chambers to reimburse her for the cost of the trip.¹²¹ Lori Marcotte recalled "standing in [Danos's] office, with another attorney, handing her the money."¹²² The Marcottes paid for the trip in cash "to hide it from the world."¹²³

4. Home Repairs

In or about 1994 – while Judge Porteous was still a state judge – Judge Porteous told Louis Marcotte that a storm blew down an 85 foot section of his wooden fence. Marcotte sent

¹¹⁸ See Wallace SITC at 685:23 – 686:11.

¹¹⁹ See Lori Marcotte SITC at 610:7-17.

¹²⁰ See Louis Marcotte SITC at 518:21 – 520:5; Lori Marcotte SITC at 610:16 – 611:2; Louis Marcotte Task Force at 46.

¹²¹ See Lori Marcotte SITC at 611:5-14.

¹²² Lori Marcotte Task Force at 56. See also Danos SITC at 876:20-21 (recalling being reimbursed by Marcottes for a trip, but not recalling if it was Louis or Lori who reimbursed her, or whether the reimbursement was by check or cash).

¹²³ Louis Marcotte SITC at 520:6-17.

Duhon and Wallace to do repairs on the fence at Judge Porteous's house. Duhon purchased the necessary materials, consisting of poles, concrete, two by fours, and boards. Louis Marcotte paid for the materials, and Duhon estimated that the project took about three days.¹²⁴

5. Other – Taking Rhonda Danos to Las Vegas

The Marcottes also invited and paid for Rhonda Danos to go on trips with them to Las Vegas, and paid for her entertainment on those trips, both when Judge Porteous was a state judge and when he was a federal judge. They did so because she was the “gatekeeper” to Judge Porteous and because she herself handled matters associated with the bond setting process. The Marcottes would never have paid for those trips but for Ms. Danos's status as Judge Porteous's secretary. Judge Porteous knew that the Marcottes were paying for Ms. Danos's trips.¹²⁵

D. Judge Porteous's Bond Setting For the Marcottes

The Marcottes gave Judge Porteous things of value so that they would have access to him to set bonds as they requested.¹²⁶ The Marcottes would go to Judge Porteous to reduce bonds in cases where the bonds were set too high, or when the bonds had not been set at all and they needed him to set bond as an initial matter.¹²⁷ They would produce a “worksheet” that would

¹²⁴ See Louis Marcotte SITC at 18:4-8; Duhon SITC at 660:17-20, 660:24-25, 659:19 – 660:6; Wallace SITC at 686:12 – 687:3; Louis Marcotte Task Force at 46.

¹²⁵ See Danos SITC 895:19 – 896:18; Lori Marcotte Sen. Dep. at 22:4-22, 26:17-21 (“[W]e wanted to spend money to make her happy.”), 110:4-24 (1992 Las Vegas trip with Danos during which they flew over the Grand Canyon), 111:21 – 112:15 (provided Danos things of value because she controlled access to Judge Porteous, was the “gatekeeper,” and because she helped them with bond matters). See also HP Ex. 371 (containing, among other records, Lori Marcotte's credit card statement containing charges for air travel to Las Vegas purchased for Danos in 1998, Lori Marcotte's credit card statement containing charges for air travel to Las Vegas purchased for Danos in 1996, and the Golden Nugget Casino room statement for Danos for February 1996 (charged to the BBU address)).

¹²⁶ See Louis Marcotte SITC at 520:21 – 521:1.

¹²⁷ *Id.* at 521:9-18; Louis Marcotte Sen. Dep. at 74:4-8.

reflect what the defendant could afford, and they would ask Judge Porteous to approve the worksheet. The conversations often involved specific references to what prisoners could afford to pay, rather than what was necessary to secure their presence in court.¹²⁸

As a general matter, only the Marcottes (and their employees) and Judge Porteous were present during these conversations. Typically, no defense attorney or representative from the District Attorney's Office was involved.¹²⁹ The testimony of the John Mamoulides, the District Attorney for Jefferson Parish at that time, could not be more clear: "[M]y office didn't participate in the setting of bonds and all." "[W]e stayed away. We wouldn't recommend bond . . . [Bond setting] was always done without a DA there. That could be in the middle of the night or whatever." "[W]e didn't recommend bonds unless we were specifically asked by the sheriff's office or somebody on a flight problem or whatever. It was done without us being there before we even got a charge. And I didn't want my people participating in that."¹³⁰

In contrast to Judge Porteous's willingness to deal directly with the Marcottes – who would walk back to his chambers with Duhon or Wallace in tow – there were other judges of the 24th JDC who would not deal with the Marcottes.¹³¹

¹²⁸ Louis Marcotte SITC at 521:19-24 ("We would get the bond set to the amount the defendant could make."), 523:2-7, 524:17 – 525:1; Duhon SITC at 662:11-21.

¹²⁹ See Louis Marcotte SITC at 508:22-24. Judge Porteous's counsel represented in his opening statement that Judge Porteous would consult with the District Attorney's Office before setting bond. See Turley SITC Opening Statement at 88:21-25.

¹³⁰ John Mamoulides Senate Impeachment Trial Committee Hearing Testimony ("Mamoulides SITC") 1768:22-23, 1800:8-11, 1802:15-20. See also Lori Marcotte Sen. Dep. at 113:9 – 114:4 (no District Attorney involvement in the "vast, vast, majority of the bonds that Judge Porteous set"); Louis Marcotte Sen. Dep. at 14:7-14.

¹³¹ See Griffin SITC at 1844:16 – 1845:7 (mentioning three judges in particular among others who would "work with the lawyers rather than the bondsmen."). Similarly, former District Attorney Mamoulides's testimony reflects his understanding that bond matters were

Judge Porteous thus took numerous actions in his judicial capacity that he knew were calculated to maximize the financial benefit to the Marcottes in their business – after all, that’s why they were there asking him to set or reduce bonds.¹³² Judge Porteous would make himself available to set bonds, and the Marcottes enjoyed easy access to him (whereas there were numerous judges who did not want to deal with bond matters at all, or did not want to deal with the Marcottes directly, preferring instead to deal with attorneys for those who were arrested). The Marcottes would go by his chambers, would drop off paperwork with Rhonda Danos, or call at his house.¹³³ Judge Porteous would set bonds for the Marcottes that other judges did not want to handle.¹³⁴ He would devote extra effort to figure out ways to set or reduce bonds and exercise his discretion in ways to set bonds that would be of financial value to the Marcottes. He would be inventive and take political risks in “splitting bonds.”¹³⁵

An inevitable consequence of Judge Porteous’s willingness to set bonds at levels requested by the Marcottes was the financial squeezing of families, who, as a result of the conspiratorial relationship, paid more than they otherwise would have paid to secure the liberty of the arrestee pending trial. Thus, for example, if the Marcottes anticipated that a given prisoner would be released by the magistrate with no commercial bond, the Marcottes would go to Judge Porteous to set a commercial bond, permitting the Marcottes to earn some money in the form of a

typically handled by defense attorneys looking out for the best interests of their clients, not by the bail bondsmen seeking to maximize profits. *See Mamoulides SITC* at 1777:11-17.

¹³² *See Louis Marcotte SITC* at 525:2-5.

¹³³ *Id.* at 521:25 – 522:5; Duhon *SITC* at 661:21 – 662:10; Wallace *SITC* at 682:2-6 (Judge Porteous “was a judge that Mr. Marcotte would frequently interact with bonds”)

¹³⁴ *See Louis Marcotte SITC* at 525:9 – 526:2.

¹³⁵ *See Lori Marcotte SITC* at 650:10-19; Lori Marcotte Sen. Dep. at 53:5-10, 57:3-19, 114:25 – 115:14.

premium, rather than nothing at all. Senator Risch accurately described the corrupt and insidious nature of the Judge Porteous-Marcotte relationship in the following observations when former State Judge Bodenheimer was on the stand:

[I]t appears to me the bail bondsmen came to you, they had already interviewed the family, they knew what they could get out of the family. And according to the indictment, you and the bail bondsman conspired to see that the family would have to pay the maximum you could possibly soak out of them. That's what I get out of this.¹³⁶

E. August 1994 – Louis Marcotte's Statements to the FBI in Connection with the FBI's Background Check of Judge Porteous

The corrupt relationship between Louis Marcotte and Judge Porteous played out further in the summer of 1994, when Judge Porteous was undergoing his background check investigation in connection with his potential nomination to be a federal judge. At that time, Louis Marcotte was interviewed by the FBI, and lied, not only to help Judge Porteous become a federal judge, but to protect Judge Porteous (and himself) from the exposure of their corrupt relationship.

On August 1, 1994, Louis Marcotte was interviewed by the FBI for the first time as part of the background check of Judge Porteous. Judge Porteous told him that the FBI was going to be coming to interview him.¹³⁷ As to Judge Porteous's drinking and financial situation, the FBI write-up of that interview reports:

He [MARCOTTE] advised that the candidate will have a beer or two at lunch, but has never seen him drunk. He has no knowledge of the candidate's financial situation.¹³⁸

¹³⁶ Bodenheimer SITC (questioning by Senator Risch) at 1323:2-16.

¹³⁷ See Louis Marcotte SITC at 532:10-15; HP Ex. 69(b) (FBI Background Check of Judge Porteous at PORT 503-04).

¹³⁸ HP Ex. 69(b) (FBI Background Check of Judge Porteous at PORT 504).

And, as to Judge Porteous's general integrity, the FBI write-up reports:

He is not aware of anything in the candidate's background that might be the basis of attempted influence, pressure, coercion or compromise or that would impact negatively on the candidate's character, reputation, judgement or discretion.¹³⁹

Louis Marcotte's statement that Judge Porteous "will have a beer or two at lunch" was false. In truth and in fact, Louis Marcotte had seen Judge Porteous drink "five, six, seven Absolut [vodka] straight up." Marcotte testified that he deliberately lied to the FBI to help Judge Porteous.¹⁴⁰

Louis Marcotte's statement to the FBI that he had no knowledge of the candidate's financial situation was also false. Marcotte knew that Judge Porteous was having financial problems. Marcotte drew that conclusion from Judge Porteous's beat up cars that Judge Porteous asked him to repair, and his knowledge of Judge Porteous's costly lifestyle, including the fact that Judge Porteous gambled and drank.¹⁴¹

Finally, Louis Marcotte's statement that he was "not aware of anything in [Judge Porteous's] background that might be the basis of attempted influence, pressure, coercion, compromise, or that would impact negatively on [Judge Porteous's] character, reputation, judgement, or discretion" was also false. First and foremost, Louis Marcotte was aware of his own relationship with Judge Porteous, and knew it was improper. He knew he was in a position

¹³⁹ *Id.*

¹⁴⁰ See Louis Marcotte SITC at 531:16 – 532:16; Louis Marcotte Task Force at 49; Louis Marcotte Sen. Dep. at 39:16-21 (four or five Absolut Vodkas), 139:3-5 (Louis Marcotte had never seen anybody drink as much as Judge Porteous at the lunches).

¹⁴¹ See Louis Marcotte SITC at 532:23 – 533:8; Louis Marcotte Task Force at 49 ("[B]y looking at the surroundings and the problems with the drinking and the cars and asking people for repairs and stuff like that, you know, one would think that, hey this guy is struggling. And by looking at the cars, you could see that he was struggling.").

to “destroy Judge Porteous.”¹⁴² Nonetheless, Louis Marcotte lied to the FBI to protect Judge Porteous and help him get his lifetime appointment, because Judge Porteous had been good to him, and because Marcotte wanted to protect himself.¹⁴³

Louis Marcotte’s false statements to the FBI on Judge Porteous’s behalf were part of the corrupt relationship between Marcotte and Judge Porteous, characterized by Marcotte doing things for Judge Porteous and Judge Porteous doing things for Marcotte. Louis Marcotte met with Judge Porteous soon after the FBI interviews and told Judge Porteous, in substance, “thumb’s up” or that he (Marcotte) had given Judge Porteous “a clean bill of health.”¹⁴⁴

F. Judge Porteous’s October 1994 Set-Aside of Aubrey Wallace’s Felony Conviction

1. Background – Judge Porteous’s 1993 Expungement of Jeffery Duhon’s Conviction.

In 1993, at Marcotte’s request, Judge Porteous expunged the burglary conviction of Jeffery Duhon, a Marcotte employee who was also married to Louis’s other sister (and who also did personal services for Judge Porteous). Louis Marcotte wanted Duhon to obtain a bail bondsman’s license, but Duhon was not eligible because of the burglary conviction. Marcotte approached Judge Porteous and asked him to expunge the conviction – “To be honest with you, I rode hard on him, you know, for maybe a couple months, hey, when are you going to do it, when

¹⁴² Louis Marcotte SITC at 533:14 – 534:2, 603:12-17. *See also* Louis Marcotte Task Force at 50 (acknowledging that he “was lying” not only because of his knowledge of Judge Porteous’s “actions with the gambling, the drinking” but because of Louis Marcotte’s knowledge of his own relationship with Judge Porteous, which gave him leverage over Judge Porteous).

¹⁴³ *See* Louis Marcotte SITC at 532:16-22, 533:9-13.

¹⁴⁴ Louis Marcotte SITC at 535:13-22. *See also* Louis Marcotte Task Force at 51, 64 (shortly after the FBI interview, Marcotte met with Judge Porteous and “told him [Judge Porteous] everything that they asked about” and that he had given Judge Porteous “a clean bill of health.”).

are you going to do it, when are you going to do it, and at some point he did it.”¹⁴⁵ Pursuant to Louis Marcotte’s request, Judge Porteous expunged the conviction.¹⁴⁶ Judge Porteous’s action in expunging Duhon’s conviction was particularly noteworthy because Duhon had been sentenced by Judge E. V. Richards, not Judge Porteous, “[s]o what [Judge Porteous] did was he took the conviction out of another section and brought it in his section and then expunged the record.”¹⁴⁷

2. Judge Porteous’s Set-Aside of Aubrey Wallace’s Burglary Conviction

At around the time of Judge Porteous’s nomination to be a federal judge, in late summer 1994, Louis Marcotte asked Judge Porteous to set aside the felony burglary conviction of Aubrey Wallace, one of his employees.¹⁴⁸ Wallace had provided personal services to Judge Porteous – taking care of Judge Porteous’s cars and doing repairs at his house – at Louis Marcotte’s direction. Louis Marcotte asked Judge Porteous, in substance, “could you get this guy’s record expunged so he can become a licensed bail agent,” and pressed Judge Porteous to set aside

¹⁴⁵ Louis Marcotte SITC at 530:4-5.

¹⁴⁶ *Id.* at 530:8-10.

¹⁴⁷ *Id.* at 528:10 – 530:20. *See also* Duhon SITC at 655:10-15; Louis Marcotte Task Force at 48; Lori Marcotte Sen. Dep. at 100:12-18 (“My brother was the hound, keep going, let’s get it done, let’s get it done, let’s get it done.”).

Duhon had nothing to do with getting the expungement done or paying the lawyer who handled the paperwork. Louis Marcotte told Duhon that he (Marcotte) had taken care of it. Duhon had no recollection of a lawyer filing papers on his behalf. *See* Duhon SITC at 665:22 – 666:16, 670:4-8. The fact that a different Judge may have set aside the conviction prior to Judge Porteous expunging it does not materially impact the fundamental fact that upon Louis Marcotte’s request, Judge Porteous took a judicial action. For whatever reasons, Judge Richards, to whom Duhon’s case was assigned, had not expunged or would not expunge the conviction, so Judge Porteous – at Marcotte’s request – took that judicial action. Further, though the terms “setting aside” and “expunging” are used to describe judicial acts which have some similarity, expunging a conviction is certainly a qualitatively different act, as it results in even the arrest records being destroyed.

¹⁴⁸ *See* Louis Marcotte SITC at 535:23 – 536:6. This incident is also discussed in Section VI of this brief, which addresses Article IV of the Articles of Impeachment.

Wallace's conviction.¹⁴⁹ Judge Porteous agreed to do so but only after he was confirmed by the Senate, because he did not want to jeopardize his "lifetime appointment."¹⁵⁰ Marcotte testified:

Q. And do you recall Judge Porteous's response [to Marcotte's request to set aside Wallace's conviction]?

A. He kind of put me off and put me off. And he said look, Louis, I'm not going to let anything stand in the way of me being confirmed and my lifetime appointment, so after that's done I will do it.

In fact, that is what Judge Porteous did. He set aside Wallace's conviction on October 14, 2001, only after he had been confirmed by the Senate but prior to being sworn in as a federal judge.¹⁵¹

The proof that Judge Porteous undertook this judicial action at Louis Marcotte's request is supported by overwhelming evidence, including the testimony of Louis Marcotte, Wallace, and Wallace's attorney.¹⁵² Louis Marcotte's testimony that Judge Porteous told him that he (Judge Porteous) would set aside Wallace's conviction after Judge Porteous was confirmed is corroborated by the very fact that Judge Porteous did in fact set aside the conviction only after confirmation. Further, the understanding of Judge Porteous's judicial action as arising from his corrupt conspiratorial relationship with Louis Marcotte is underscored by the fact that the set-aside was unsupported as a matter of law, nor defensible as an act of discretion. The facts and

¹⁴⁹ Louis Marcotte SITC at 536:4-7.

¹⁵⁰ The significance of the timing of the set-aside is further discussed later in this brief, in connection with the discussion of Article IV and Judge Porteous's concealing material facts from the Executive Branch and the Senate in connection with his nomination and confirmation.

¹⁵¹ See Louis Marcotte SITC at 536:8-12. This incident is discussed in Section VI, dealing with Article IV.

¹⁵² See Wallace SITC at 690:1-6, 690:11-23; Robert Rees Senate Impeachment Trial Committee Hearing Testimony ("Rees SITC") at 1975:3-8, 1975:22-25 (agreeing that Marcotte had discussed Wallace's set-aside with Judge Porteous).

circumstances of this set-aside illustrate the nature and extent that Judge Porteous was beholden to Louis Marcotte.

The most significant aspect of the set-aside is that it reflects Judge Porteous's undertaking a judicial action at the request of Louis Marcotte during his last days as a state judge. However, a consideration of the laws and facts further demonstrates Judge Porteous's judicial action in setting aside Wallace's conviction was an ill-motivated, corrupt judicial act, that violated the law and was not justified by any sound considerations of policy.

Judge Porteous's set-aside of Wallace's conviction was unlawful for two reasons. First, in order to set aside the conviction, Judge Porteous had to amend the underlying sentence, from a sentence that did not authorize the set-aside to one that did. However, over four years had elapsed since Judge Porteous sentenced Wallace in 1990, and the Louisiana sentencing laws imposed strict time limits that prohibited Judge Porteous from amending the sentence. The pertinent sentencing laws ("Article 881") permitted a judge to amend a sentence only prior to its execution.¹⁵³ Judge Porteous not only did not amend Wallace's sentence prior to its execution,

¹⁵³ Article 881, entitled "Amendment of sentence," provided: "Although the sentence imposed is legal in every respect, the court may amend or change the sentence, within the legal limits of its discretion, prior to the beginning of execution of the sentence." See HP Ex. 69(d) at PORT 672 (LOUISIANA CODE OF CRIMINAL PROCEDURE, Art. 881A (1994 ed.)) (emphasis added).

The Notes that accompany that provision make it clear that the law operates as a strict time limit on when a judge may amend a sentence. The "Official Revision Comment" states that the Louisiana district judges were "strongly against any provision, such as [Rule 35 of the Federal Rules of Criminal Procedure], which authorized reduction of a sentence after the beginning of its execution. Such a procedure can subject the sentencing judge to continuous harassment by the defendant's relatives, friends and attorneys, and would virtually constitute the judge a 'one man pardon board' as several of the judges aptly point out." By limiting the power of judges to amend sentences prior to their execution, the provision permits some reconsideration in exceptional cases, without subjecting the sentencing judge to a substantial period of harassment and pressures. See also Mamoulides SITC at 1814:23-24 ("I don't think you can change a sentence after they started serving the sentence under Louisiana law.").

he amended it after Wallace had completed the sentence.¹⁵⁴ Thus, notwithstanding that he had no power to do so, Judge Porteous amended the sentence so that Wallace was purportedly eligible to have his conviction set aside.

Second, Wallace did not meet the standards for set aside even under the amended sentence. Article 893E of the pertinent sentencing laws – pursuant to which Wallace’s sentence purported to comply after it was amended – permitted the sentencing judge to set aside a conviction only if the defendant completed probation satisfactorily.¹⁵⁵ However, Wallace had not completed probation satisfactorily. To the contrary, Judge Porteous had terminated Wallace’s probation unsatisfactorily due to Wallace’s conviction and incarceration on unrelated drug charges.¹⁵⁶ Thus, the set-aside was unlawful even under the amended sentence. The degree

¹⁵⁴ Wallace was arrested on burglary charges on May 8, 1989; he pleaded guilty to the felony charge of simple burglary on June 26, 1990; he was sentenced by Judge Porteous the same day to a suspended sentence of three years incarceration and placed on probation for two years. At the time of his May 1989 burglary arrest, Wallace was under indictment for felony drug charges (PCP and cocaine) – an offense alleged to have occurred on December 15, 1988. At the time of his burglary guilty plea and sentencing, the drug charges were outstanding. Judge Porteous did not sentence Wallace under the Article 893E of the Louisiana Code of Criminal Procedure that would permit the sentence to be set aside if Wallace successfully completed probation. The fact that Wallace had an outstanding drug case at the time of the burglary sentence may explain why Judge Porteous did not want to give Wallace the benefit of an 893E sentence. *See* Mamoulides SITC at 1814:11-17.

¹⁵⁵ Article 893E provided, in pertinent part: “When the imposition of a sentence has been suspended by the court for the first conviction only, as authorized by this Article, and the court finds at the conclusion of the probationary period that the probation has been satisfactory, the court may set the conviction aside and dismiss the prosecution.” *See* HP Ex. 69(d) at PORT 676 (LOUISIANA CODE OF CRIMINAL PROCEDURE, Art. 893E (1994 ed.)) (emphasis added).

¹⁵⁶ On February 26, 1991, while he was on probation for the burglary conviction, Wallace pleaded guilty to the felony drug charges of possession of over 28 grams of cocaine and possession of PCP and was sentenced to five years incarceration. As a result of Wallace’s incarceration on the drug charges, Judge Porteous entered an order dated December 11, 1991:

IT IS HEREBY ORDERED BY THE COURT that the subject’s probation is hereby terminated unsatisfactorily.

that Judge Porteous had to ignore state law underscores his willingness to take judicial actions for the benefit of Louis Marcotte.

At the time Judge Porteous set aside Wallace's conviction, the evidence is overwhelming that Judge Porteous undertook this action at Louis Marcotte's insistence, at a time when Marcotte had leverage over Judge Porteous by virtue of Marcotte's knowledge of their corrupt relationship, and at a time when Judge Porteous was indebted to Marcotte as a result of Marcotte's lies on Judge Porteous's behalf during the background check process. In short, Judge Porteous's judicial action in setting aside Wallace's conviction was a corruptly motivated judicial act that violated the law and was not justified by any sound considerations of policy.¹⁵⁷

G. November 1994 - Judge Porteous's Interview by the Metropolitan Crime Commission.

In October of 1994, Mike Reynolds, the prosecutor in the courtroom in connection with the Wallace set-aside proceedings, complained to the Metropolitan Crime Commission (MCC) — a citizen's watchdog group — that Judge Porteous had illegally set aside the conviction of Aubry

See HP Ex. 81 (*State v. Wallace*, Case No. 89-001 (case file for drug case)); HP Ex. 82 (*State v. Wallace*, Case No. 89-2360 (case file for burglary case)).

The defense has argued that Judge Porteous had to make subtle rulings against a complex landscape. There is no legal ambiguity in the provisions of law at issue, and, as discussed in the next Section, Judge Porteous admitted that he acted unlawfully as to the timing of his act in amending the sentence. There is no evidence in any of the proceedings that Judge Porteous made the subtle rulings that the defense now claims were at issue.

¹⁵⁷ See Louis Marcotte SITC at 547:6-9; Wallace SITC at 690:11 – 691:18, 714:4-7; Louis Marcotte Task Force at 51) (“Q. Was there any question in your mind that he set aside the conviction as a favor to you? A. Yes, he did it for me.”).

Wallace.¹⁵⁸ After receiving the allegation, Rafael Goyeneche, the President of the MCC, researched the procedural and legal background of the Wallace case.¹⁵⁹

On November 8, 1994, eleven days after Judge Porteous was sworn in as a federal judge, Goyeneche, along with a colleague, interviewed Judge Porteous in his chambers in the federal court building.¹⁶⁰ Goyeneche reduced that interview to a memorandum shortly after the interview took place.¹⁶¹

At the outset of the interview, Judge Porteous stated: “[L]ets not sugar coat anything, in other words you guys think I’m dirty.”¹⁶² Judge Porteous thereafter falsely denied having “frequent” lunches with the Marcottes, falsely denied that the Marcottes paid his way to Las Vegas, and falsely and “vehemently” denied that he amended Wallace’s sentence out of friendship or at the request of Louis Marcotte. Those portions of the interview were memorialized as follows:

The Judge freely admitted that he has known Mr. Marcotte for a number of years and considers him to be a friend. We asked the Judge if he frequently ate lunch with Mr. Marcotte and provided him with the name of the two restaurants they frequent. He admitted that he has had several lunches with Mr. Marcotte, but he didn’t know if he would term his lunches with Marcotte as “frequent.” Additionally, we asked if he had traveled to Las Vegas with Mr. Marcotte and he confirmed that he had. The Judge stated that six or seven people went as a group to Vegas and Marcotte was a member of the group. The Judge when asked did

¹⁵⁸ See Rafael Goyeneche Senate Impeachment Trial Committee Hearing Testimony (“Goyeneche SITC”) at 719:6-14.

¹⁵⁹ See *id.* at 721:17 – 722:14.

¹⁶⁰ See *id.* at 727:6-22. See also HP Ex. 69(b) (FBI Background Check of Judge Porteous at PORT 594-597).

¹⁶¹ See Goyeneche SITC at 727:24 – 728:5, 728:24 – 729:13, 730:5-15.

¹⁶² See Goyeneche SITC at 728:9-18; HP Ex. 69(d) at PORT 594 (MCC Intelligence Report).

Marcotte pay his way, quickly changed the subject. Porteous when asked a second time advised that Marcotte did not pay his way to Vegas.

* * *

The Judge vehemently denied that he amended the sentence out of friendship for or at the request of Louis Marcotte.¹⁶³

Goyeneche specifically raised the issue of the lawfulness of the set-aside. Goyeneche informed Judge Porteous that he (Goyeneche) believed that Judge Porteous's action in amending Wallace's sentence was unlawful and not permitted under the Louisiana sentencing laws (Article 881), which provided authority for a Judge to amend a sentence only before the sentence was executed, and in this instance Judge Porteous amended Wallace's sentence after it was completed.¹⁶⁴ In response, "[Judge Porteous] admitted that his actions were contrary to Article 881 but defended his actions by stating that the assistant district attorney who was present in the Court should have objected to the amendment of Wallace's sentence."¹⁶⁵ The judge made this claim notwithstanding the District Attorney's policy of not interfering in a judge's sentencing decision.¹⁶⁶

Judge Porteous ended the interview by telling Goyeneche to "do what you think you have to do."¹⁶⁷

¹⁶³ HP Ex. 69(d) at PORT 594-597 (MCC Intelligence Report). *See also* Goyeneche SITC at 731:13 – 732:10.

¹⁶⁴ *See* Goyeneche SITC at 735:4-23; HP Ex. 69(d) at PORT 672 (Sentencing Laws).

¹⁶⁵ HP Ex. 69(d) at PORT 597 (MCC Intelligence Report). *See also* Goyeneche SITC at 736:5-16.

¹⁶⁶ *See* Mamoulides SITC at 1815:11-22.

¹⁶⁷ HP Ex. 69(d) at PORT 597 (MCC Intelligence Report). *See also* *See* Goyeneche SITC at 737:7-11.

The events surrounding the Wallace set aside were reported in the New Orleans Times-Picayune in a March 19, 1995 article:

U.S. District Judge Thomas Porteous, while serving his final weeks on the state bench in Jefferson Parish, illegally amended a convicted drug offender's burglary sentence and then removed it from the man's record, according to the Metropolitan Crime Commission.¹⁶⁸

H. Judge Porteous's Relationship with Louis Marcotte and Lori Marcotte While He was a Federal Judge

1. Continuation of the Relationship

Though the Marcottes' relationship with Judge Porteous changed when he became a federal judge, it did not come to an end.¹⁶⁹ The Marcottes continued to maintain an association with Judge Porteous, and continued to take him to lunch, although not at the same frequency as when he was a state judge.

In particular, the Marcottes would bring Judge Porteous to lunch with them when they sought to recruit other state judicial officers to take his place in a similar corrupt scheme, or to impress business executives. On these occasions, Judge Porteous "brought strength to the table" by his presence and his assistance. As Louis Marcotte explained: "It would make people respect me because, you know, I am sitting with a Federal judge."¹⁷⁰ As Lori Marcotte described: "So

¹⁶⁸ See HP Ex. 119(a) (Times-Picayune article: "Amending Sentence Questioned, Federal Judge Defends Actions").

¹⁶⁹ See Louis Marcotte SITC at 537:21 – 538:20.

¹⁷⁰ Louis Marcotte Task Force at 52. In his Task Force hearing testimony, Marcotte was asked why he wanted to maintain a relationship with Judge Porteous after he became a federal judge:

Mr. MARCOTTE. Because, number one, he was a Federal judge. Right there, that brings strength to the table whenever he sits down with me.

* * *

going to lunch with Judge Porteous as a federal judge, other judges in the 24th Judicial Court would view us as trusted people because we were hanging around with a federal judge.”¹⁷¹

2. Actions by Judge Porteous for the Marcottes

a. *Judge Porteous Assists the Marcottes with State Judge Ronald Bodenheimer*

Judge Porteous had direct, first-hand knowledge that the Marcottes dealt with judges in a corrupt manner. Nevertheless, he used the power and prestige of his office as a federal judge to help the Marcottes by vouching for their honesty, vouching for their practices, and helping to recruit his successor.¹⁷²

In 1999, Louis Marcotte asked Judge Porteous to speak to newly elected state judge Ronald Bodenheimer on the Marcottes’ behalf so that Bodenheimer could “step into [Judge Porteous’s] shoes.”¹⁷³ He told Judge Porteous: “Judge, tell this guy [Bodenheimer] I am a good

Mr. MARCOTTE. It would make people respect me because, you know, I am sitting with a Federal judge.

* * *

Mr. DUBESTER. And were there people who you deliberately wanted to have Judge Porteous at the table with when you had a lunch or a meeting with?

Mr. MARCOTTE. Yes, I wanted to try to get as many people to the table with Porteous when I was there, because, again, he brought strength to the table. And I also wanted him to groom the people that I was at the table with. I wanted those guys to do bonds, as well.

Id.

¹⁷¹ Lori Marcotte SITC at 611:25–612:10.

¹⁷² Judge Porteous could not report to law enforcement his knowledge that racketeering activity was rampant at the 24th JDC without incriminating himself. So, for years, while a federal judge, Judge Porteous remained silent as to his knowledge, thus permitting the Marcottes to operate corruptly in that courthouse without law enforcement interference.

¹⁷³ Louis Marcotte SITC at 538:24 – 539:12.

guy. Tell him that commercial bonds is the best thing for the criminal justice system and that – ask him would he take – ask him would he take your spot when – because you left now and I needed somebody to step in to Porteous’s shoes so I can get the same things done that I got done when Porteous was there.”¹⁷⁴

At Louis Marcotte’s request, Judge Porteous spoke to Judge Bodenheimer. Prior to that conversation, Bodenheimer “kind of stayed away from Louis Marcotte intentionally” because, at that time, according to Bodenheimer, “the rumor was that [Marcotte] was doing drugs.” During his conversation with Bodenheimer, Judge Porteous spoke highly of Louis Marcotte’s honesty in the bond business. Bodenheimer took Judge Porteous’s statements seriously. As a result of that conversation, Bodenheimer began to set bonds for the Marcottes.¹⁷⁵

The Marcottes and Bodenheimer gradually developed a relationship that took on the characteristics of the relationship that had previously existed between Judge Porteous and the Marcottes. The Marcottes began providing Bodenheimer meals, house repairs, and a trip to the Beau Rivage casino, and Bodenheimer “became helpful to the Marcottes in setting bonds.”¹⁷⁶

Bodenheimer pleaded guilty in March of 2003 to a federal corruption count arising from his corrupt relationship with the Marcottes. The charges in the Information, and the facts admitted as part of the factual proffer, describe criminal conduct committed by Bodenheimer that was comparable in material respects to that committed by Judge Porteous in his dealing with the Marcottes. Among the overt acts charged in the Information was that Bodenheimer:

¹⁷⁴ Louis Marcotte Task Force at 53.

¹⁷⁵ See Bodenheimer SITC at 1255:7 – 1256:6, 1257:24 – 1258:1, 1260:7-10.

¹⁷⁶ Louis Marcotte SITC at 539:25 – 540:10. See also Louis Marcotte Task Force at 53; Lori Marcotte Sen. Dep. at 74:13-16 (“some repairs on his house”); Louis Marcotte Sen. Dep. at 86:5-8, 115:21 – 116:5.

regularly set, reduced, and split bonds underwritten by a Jefferson Parish bail bonding company in criminal cases pending before him and other judges, irrespective of whether he was scheduled for “magistrate duty”. . . . BODENHEIMER routinely set the bonds at a level requested by the bail bonding company in a manner which would tend to maximize the company’s profits; that is, by securing the maximum amount of premium money available from the criminal defendant and his family.¹⁷⁷

The factual proffer signed by Bodenheimer stated that he “enriched[ed] himself by setting, reducing, and splitting bonds in various criminal matters pending before him as well as other judges on terms most advantageous to the bail bonding company in exchange for things of value, including meals, trips to resorts, campaign contributions, home improvements, and other things of value.”¹⁷⁸

On April 28, 2004, Bodenheimer was sentenced to 46 months incarceration on the corruption count, to run concurrently with two other felony offenses to which he pleaded guilty.¹⁷⁹

¹⁷⁷ HP Ex. 88(d) (*United States v. Bodenheimer*, Case No. 02-219, Superseding Bill of Information at 3). See also Bodenheimer SITC at 1296:4-19.

¹⁷⁸ HP Ex. 88(f) (*United States v. Bodenheimer*, Case No. 02-219, Factual Basis at 10). See also Bodenheimer SITC 1298:12 - 1299:8.

¹⁷⁹ See HP Ex. 88(h) (*United States v. Bodenheimer*, Case No. 02-219, Judgment and Probation/Commitment Order).

Similarly, Judge Alan Green was indicted September 29, 2004, along with Marcotte employee Norman Bowley, on several charges arising from Judge Green’s corrupt relationship with the Marcottes. As noted above, Judge Porteous played an instrumental role in assisting the Marcottes in forming a relationship with Green when he was a state judge.

The charges against Green were similar to those against Bodenheimer and describe judicial conduct in words that capture Judge Porteous’s conduct as well. The Indictment alleged that Green received things of value as part of a “scheme to maximize BBU’s and the Marcottes’ profits from writing bail bonds in Jefferson Parish and elsewhere.” The things that Green did are essentially the same as what Judge Porteous did: “[I]n return for things of value, ALAN GREEN would make himself available to BBU; quickly respond to the requests of BBU; and set, reduce, increase, and split bonds to maximize BBU’s profits, minimize BBU’s liability, and hinder BBU’s competition[.]” See HP Ex. 93(a) (*United States v. Green*, Case No. 04-295, Indictment).

*b. Justice of the Peace Kerner, Justice of the Peace Centanni,
and Insurance Company Representative Stotts*

Judge Porteous's help with Bodenheimer – which proved to be a boon for the Marcottes – was similar to the actions he took on their behalf with others.

The Marcottes sought to get close to Justice of the Peace Charlie Kerner, and they set up a lunch with Kerner and Judge Porteous at the Beef Connection in 1997. At that lunch, Judge Porteous vouched for the Marcottes, telling Justice of the Peace Kerner that he could trust the Marcottes and that the Marcottes were good people. At that luncheon, Louis Marcotte took out a Louisiana law book and started telling Kerner how he could set bonds. Kerner was uncomfortable in the relationship Judge Porteous was encouraging him to form with the Marcottes and decided that he had no interest in pursuing that relationship and “got up at that lunch and left.”¹⁸⁰

Similarly, Judge Porteous also attended a lunch with Justice of the Peace Kevin Centanni and Lori Marcotte. However, Centanni was not interested in setting commercial bonds and nothing resulted from that lunch.¹⁸¹

On June 29, 2005, the jury found Green guilty of Count Three of the Indictment, which incorporated the scheme set forth above. Judge Green was sentenced on February 9, 2006, to 51 months incarceration, to be followed by three years of supervised release. *See* Ex. 93(b)(*United States v. Green*, Case No. 04-295, Judgment in a Criminal Case) (referencing date and counts of conviction).

¹⁸⁰ Lori Marcotte SITC at 612:11 – 613:8. *See also* Lori Marcotte Sen. Dep. at 117:12-25); Louis Marcotte Sen. Dep. at 110:12 – 111:1, 112:24 – 113:1; Lori Marcotte Task Force at 56–57 (“We had Rhonda set up a lunch and had Judge Porteous attend. And we went to the Beef Connection and we showed up. My brother had the law book in his hand, and we had instructed Judge Porteous to explain about the power of the Justice of the Peace being able to set bonds. And he did.”).

¹⁸¹ *See* Lori Marcotte Sen. Dep. at 118:9-15.

The Marcottes also took Judge Porteous out to several lunches with Norman Stotts, who was the Marcottes' "boss" at the insurance company on behalf of which the Marcottes wrote bonds. Stotts had the responsibility and authority to decide what type of bond writing authority the Marcottes were allowed to have, and was thus critical to the Marcottes' business. The Marcottes brought Judge Porteous to meals with Stotts "to develop trust, reputation, stability on our part, that was a good way for the insurance company to give us a high writing level." As Lori Marcotte described: having Judge Porteous present "made us look important."¹⁸²

3. Meals and Other Hospitality Provided by the Marcottes to Judge Porteous After He Became a Federal Judge

As part of its investigation of the Marcottes, the Department of Justice obtained records from the "Beef Connection" starting in 1997 and obtained some work calendars of the Marcottes starting in the 1999 time frame. The following chart reflects lunches at the Beef Connection, at which Judge Porteous was in attendance, in the period for which records exist and were obtained.¹⁸³

¹⁸² Lori Marcotte SITC at 613:9 – 614:11.

¹⁸³ See HP Ex. 372(a) (August 6, 1997); HP Ex. 372(b) (August 25, 1997); HP Ex. 372(c) (November 19, 1997); HP Ex. 372(d) (August 5, 1998). The exhibits for the last two dates also include the pertinent pages from a BBU calendar that contain a reference to Judge Porteous on the given date. See HP Ex. 373(c) (February 1, 2000); HP Ex. 373(d) (November 7, 2001). The exhibits supporting the first four dates include, for each date, a copy of the meal check from the Beef Connection and the pertinent page from Lori Marcotte's American Express Card monthly statement. The meal checks reflect the purchase of "Abs" or "Abso" – short for "Absolut" – Judge Porteous's drink of choice.

Date	Calendar Entry	Restaurant	Credit Card	Amount
8/6/97	No calendars located	Beef Connection	Lori Marcotte American Express	\$287.03
8/25/97	No calendars located	Beef Connection	Lori Marcotte American Express	\$352.42
11/19/97	No calendars located	Beef Connection	Lori Marcotte American Express	\$395.77
8/5/98	No calendars located	Beef Connection	Lori Marcotte American Express	\$268.84
2/1/00	"Lunch w/Portious [sic] @ Beef Connection"	Beef Connection	Lori Marcotte American Express	\$328.94
11/7/01	"12:00 - Giacobbe & Porteous @ Beef Connection"	Beef Connection	Norman Bowley (BBU employee)	\$635.85

The Marcottes were also instrumental in arranging for Judge Porteous to be a speaker at the Professional Bail Agents of the United States ("PBUS") Conventions. In July 1996, the PBUS held its annual convention at the Hotel Sonesta in New Orleans, at which the Marcottes arranged for Judge Porteous to be a speaker. The convention was hosted by the Marcottes, who paid for many of the expenses of that convention, including food and drinks for Judge Porteous.¹⁸⁴ In July 1999, the PBUS held its annual convention at the Beau Rivage resort in Biloxi, Mississippi. Again, the Marcottes arranged for Judge Porteous to attend and be a speaker at that convention and paid for some of the events and entertainment at that convention.¹⁸⁵

¹⁸⁴ See Lori Marcotte SITC at 614:12-25; HP Ex. 90(a) (Professional Bail Agents of the United States ("PBUS") Mid-Year Conference Program).

¹⁸⁵ See Lori Marcotte SITC at 615:1-12; HP Ex. 90(b) (Professional Bail Agents of the United States Mid-Year Conference Program).

Judge Porteous did not disclose the fact that the PBUS paid for his hotel or any other reimbursement in connection with the July 1999 PBUS convention in his Financial Disclosure Report for calendar year 1999. In contrast, Judge Porteous *did* disclose on his 1999 Financial Disclosure Report the following comparable events for which he was reimbursed: (1) "Jefferson

4. Louis Marcotte's April 2003 Affidavit for Judge Porteous

On April 17, 2003, one month after Bodenheimer pleaded guilty, Louis Marcotte signed an affidavit prepared by Judge Porteous's attorney, and at the lawyer's request, which was designed to exculpate Judge Porteous. That affidavit stated, in pertinent part:

At no time have I ever given money or anything of value to Judge Porteous for reducing or altering any bond.¹⁸⁶

Louis Marcotte believed that the affidavit was "completely false" "[b]ecause all of the meals and the cars and the wining and dining, the trips, all that was for him to do bonds."¹⁸⁷ Louis Marcotte knowingly signed the false affidavit to protect and help Judge Porteous.¹⁸⁸ Indeed, that affidavit, which ended up in the hands of the FBI, was really no different in substance that Louis Marcotte's false statements to the FBI in 1994 – motivated by Marcotte's desire to conceal from law enforcement Judge Porteous's corrupt conspiratorial relationship with Louis Marcotte. Each set of false statements had their own pernicious consequences – the 1994 false statements helped Judge Porteous become a federal judge; this 2003 false affidavit was part of an effort to obstruct justice at the behest of Judge Porteous (or his agent) and was designed to permit Judge Porteous to evade prosecution, and, presumably, to permit him to maintain his

Bar Association, 4/15/99, Speaker CLE Seminar, Biloxi, Mississippi (Hotel);" (2) "Louisiana State Bar Association, 6/9–6/12/99, Speaker CLE Seminar, Destin Fla. (Hotel, Food and Mileage);" and, (3) "LSU Trial Advocacy Program, 8/9–8/11/99, Faculty Member, Baton Rouge, La (Hotel, Food and Mileage)." HP Ex. 105(a) (1999 Financial Disclosure Form). *See also* Agreed Stipulation of Fact 160. Judge Porteous makes much of the fact that he was an expert in bond matters. There would have been no reason not to disclose the fact that he spoke at this convention other than the fact that it would bring attention to his on-going relationship with the Marcottes.

¹⁸⁶ HP Ex. 280 (Louis Marcotte Affidavit). *See also* Louis Marcotte SITC at 544:2 – 545:2.

¹⁸⁷ Louis Marcotte SITC at 545:3-6.

¹⁸⁸ *See* Louis Marcotte SITC at 545:7-20.

position as a federal judge. In both instances, nearly a decade apart, the acts of Marcotte in making false statements to the FBI constitute conduct fairly attributable to Judge Porteous – who knew that Marcotte was lying on his behalf in furtherance of their ongoing corrupt conspiratorial relationship.

1. Summary

Louis Marcotte needed a judge to set bonds as he requested and a judge who would legitimize Louis Marcotte's role and burnish his reputation – a need that Judge Porteous could and did satisfy. In return, Judge Porteous sought a lifestyle he could not afford, and Louis Marcotte provided him with food and drink, car repairs, home repairs, and travel (to Las Vegas) – cash substitutes that Louis Marcotte would and did willingly provide. Thus, the relationship between the things solicited and received by Judge Porteous and his judicial acts in setting bonds for the Marcottes, and expunging and setting aside convictions, was a classic “on the take” corruption scheme.

When John Mamoulides became the District Attorney in the same judicial district, he and his assistants had the power to set bonds. At some point after he became the District Attorney, Mamoulides received a gift certificate from a local bail bondsman, Rock Hebert. He returned it and instituted a policy that prohibited his assistants from accepting things of value from bail bondsmen. Mamoulides did not want the assistants beholden to the bail bondsmen and thought there was something potentially corrupting in the bondsmen giving gifts to public officials who could set bail.¹⁸⁹

Such a conclusion is obvious, and it does not take a District Attorney to spell out the reasons why. Moreover, these concerns with a bond-setting official receiving things from the

¹⁸⁹ See Mamoulides SITC 1795:10 – 1798:1.

bail bondsman applies to the same or even greater extent when that official is a judicial officer who has routine, daily and familiar interactions with the bail bondsman. If Mamoulides had been informed that Judge Porteous was taking judicial actions to benefit the Marcottes, who were doing him favors, he would have told Judge Porteous that it was wrong.¹⁹⁰

Indeed, there can be little pretense that the Judge Porteous–Louis Marcotte relationship was anything other than a corrupt business relationship. They were not friends as that term would have been understood – they had little or nothing in common other than their financial needs. The only reason the Marcottes took him to lunch, took him to Las Vegas, fixed his cars, or fixed his house was because he was assisting them in setting bonds and using the prestige of his office to recruit other judges to the same corrupt scheme.¹⁹¹ Louis Marcotte described the relationship for what it was, that he gave Judge Porteous things of value because: “I wanted service, I wanted access, and I wanted to make money.” As Louis starkly put it: “He would do more when we would do more for him,”¹⁹² and described that after the Marcottes took Judge Porteous to lunch or took care of his car, Judge Porteous would be “more apt to do things” for them.¹⁹³

This conspiratorial relationship encompassed not only the things that Marcotte gave Judge Porteous and the bonds that Judge Porteous set while he was a state judge, but the full range of acts they took for each other, spanning Judge Porteous’s tenure on the federal bench.

¹⁹⁰ *Id.* at 1806:17 – 1807:6.

¹⁹¹ *See* Louis Marcotte SITC at 537:12-20.

¹⁹² Louis Marcotte Task Force at 47. *See also* Louis Marcotte Sen. Dep. at 62:20-21, 123:10-25.

¹⁹³ Louis Marcotte SITC at 528:8-10, 603:3-7. *See also* Lori Marcotte Sen. Dep. at 123:2-6 (agreeing that “because of those things [the Marcottes] were doing, Judge Porteous took the extra step every time he could exercise discretion in [their] behalf”).

This included statements that Marcotte made for Judge Porteous to help him become a federal judge, statements Marcotte made for Judge Porteous to help him stay a federal judge (and avoid prosecution), the continued actions by Marcotte to take Judge Porteous to expensive lunches, and the continued public vouching by Judge Porteous for his co-conspirator. Indeed, Judge Porteous could hardly refrain from vouching for Marcotte – he could not tell the truth, because to do so would incriminate himself.

J. Louis Marcotte's and Lori Marcotte's Guilty Pleas

In March 2004, Louis Marcotte pleaded guilty to a racketeering conspiracy that commenced prior to 1991. The temporal scope of the scheme is consistent with the inception of the corrupt relationship between the Marcottes and Judge Porteous and encompassing that relationship while he was on the 24th JDC. The Information's elaboration of the acts of the judicial conspirators describes the actions of Judge Porteous. The Information described the racketeering conspiracy, in pertinent part, as follows:

3. It was a further part of the conspiracy that, in return for things of value, certain judges would make themselves available to BBU; quickly respond to the requests of BBU; and set, reduce, increase, and split bonds to maximize BBU's profits, minimize BBU's liability, and hinder BBU's competition.

4. It was a further part of the conspiracy that, to allow BBU to maximize profits, the conspirator judges would engage in the practice of "bond splitting". . . . At BBU's request, the conspirator judge would set the commercial portion of the bond at an amount the defendant could afford and would set the balance in some other manner. BBU would then post the commercial portion of the bond and collect a percentage of that bond as commission. This practice allowed BBU to maximize its profit and minimize its liability.¹⁹⁴

¹⁹⁴ HP Ex. 71(a) (*United States v. Marcotte*, Case No. 4-061, Bill of Information at 4 (March 3, 2004)).

Louis Marcotte was sentenced August 28, 2006 to 38 months incarceration, followed by three years of supervised release.¹⁹⁵ Lori Marcotte pleaded guilty at the same time as Louis Marcotte to conspiracy to commit mail fraud.¹⁹⁶ She was sentenced August 28, 2006 to three years probation, including six months of home detention.¹⁹⁷

Louis Marcotte described Judge Porteous's overall impact on the Marcottes' business as follows:

- Q. Was there any judge in the courthouse who was more helpful to you in your bail bonds business than Judge Porteous?
- A. I would think for the duration of the time, it would be Porteous, then it would be Green and Bodenheimer. Bodenheimer and Green were running pretty close neck and neck.
- Q. And Bodenheimer and Green, did they both end up going to jail?
- A. Yes they did.¹⁹⁸

**K. Judge Porteous Should Be Convicted and Removed From Office
Based on the Allegations and Proof of Conduct Charged in Article II**

1. The Conduct Constitutes "High Crimes and Misdemeanors"

The corruption and the abuse of the judicial position at the heart of the Judge Porteous--Marcotte relationship demonstrate that Judge Porteous is not fit to be a judge. He repeatedly accepted things of value from Louis Marcotte and took a series of judicial actions (setting bonds, expunging and setting aside convictions) that benefited the Marcottes. The relationship resulted

¹⁹⁵ See HP Ex. 71(e) (*United States v. Marcotte*, Case No. 4-061, Judgment in a Criminal Case (Sept. 8, 2006)).

¹⁹⁶ See HP Ex. 71(a) (*United States v. Marcotte*, Case No. 4-061, Bill of Information at 14--15 (March 3, 2004)).

¹⁹⁷ See HP Ex. 73(d) (*United States v. Marcotte*, Case No. 4-061, Judgment in a Criminal Case (Aug. 28, 2006)).

¹⁹⁸ Louis Marcotte Sen. Dep. at 120:24 – 121:11.

in Marcotte, on two occasions (in 1994 and 2003), lying for his co-conspirator to the FBI, and in Judge Porteous, among other things, setting aside or expunging the convictions of two Marcotte employees who were doing home and car repairs for Judge Porteous. Moreover, Judge Porteous had economic power over the Marcottes – he could sign or reject their bond requests; he could make himself available or unavailable; he could use his influence and leadership to help them with other judges or to exercise a leadership role in refusing to deal with them. On every occasion, he used his judicial power to curry their favor, encourage their generosity, enrich himself and support his vices.

In critical ways this relationship did not end when Judge Porteous moved to the federal bench. He helped the Marcottes where he could, especially in the recruitment of new conspirators, like Judge Bodenheimer. And he maintained his silence as to his knowledge of their corrupt activities. Similarly, while Judge Porteous was a federal judge, the Marcottes continued to wine and dine him and maintained their silence as to his corrupt activities, to the point that Louis Marcotte even signed a false affidavit on his behalf at the request of Judge Porteous's attorney – in effect obstructing justice as part of their conspiratorial relationship.

Judge Porteous's conduct with the Marcottes has brought profound disrepute to the federal bench. The record is clear that Judge Porteous was the most significant of the state judges who had corrupt relationships with the Marcottes. But, instead of being criminally prosecuted – as happened to former state judges Green and Bodenheimer – Judge Porteous occupies a place on the federal bench.¹⁹⁹ Judge Porteous's continued presence on the federal

¹⁹⁹ Judge Porteous's attorney has attempted to blunt the conclusion that Judge Porteous engaged in criminal misconduct with Louis Marcotte by stressing that he was never prosecuted for it by the Department of Justice. In his opening statement, counsel stated: "[D]espite the fact that Judge Porteous waived the statute of limitations on crimes, no indictment was ever brought against him, after years of inquiry." See Turley SITC Opening Statement 67:5-8. Counsel's statement flatly misstates the terms of the waiver signed by Judge Porteous.

bench, now that his corruption has been revealed, brings a stain to the judiciary that can be been cleansed only by his removal from office.

2. Judge Porteous Should be Convicted and Removed from Office.
The Fact That Some Portion of the Conduct Alleged in Article II
Occurred Prior to Judge Porteous Becoming a Federal Judge is Irrelevant.

a. Introduction

Judge Porteous, through his counsel, has argued on several occasions, including his opening statement before the SITC, that since some portion of the conduct alleged and proven in Article II occurred while he was a state judge (“pre-federal bench conduct”), such conduct cannot constitute a basis for conviction and removal.

This argument fails for several reasons. First and foremost, the conspiratorial relationship encompassed Judge Porteous’s conduct while a federal judge and included “overt acts” by the two men while Judge Porteous was a federal judge. Also, Judge Porteous’s contention that pre-federal bench conduct – no matter how serious – cannot support

Judge Porteous’s statute of limitations waiver did nothing more than toll the running of the statute of limitations for any offenses as to which the statute of limitations had not already run as of April 5, 2006. The waiver did not revive the ability of the Department of Justice to prosecute offenses – including corrupt conduct while he was a state judge – as to which the statute of limitations had long since run and for which prosecution was therefore barred. The scope of the waiver was explicit: “[N]othing herein has the effect of extending or reviving any such period of limitations that has already expired prior to April 5, 2006.” *See* PORT Exhibit 1003 (Statute of Limitations Waiver). *See also* Title 18, United States Code, Section 3292 (five year statute of limitations for criminal offenses). Whether intentional or inadvertent, counsel’s suggestion that Judge Porteous’s waiver opened the door for the Department to prosecute him for any state court conduct was simply wrong and misstates the plain terms of the waiver.

The Department has formally represented that the statute of limitations was in fact an obstacle to its bringing charges against Judge Porteous, stating: “Although the investigation developed evidence that might warrant charging Judge Porteous with violations of criminal law relating to judicial corruption, many of those incidents took place in the 1990’s and would be precluded by the relevant statutes of limitations.” *See* HP Ex. 4 (Letter from John C. Keeney, Deputy Assistant Attorney General, U.S. Department of Justice, to Hon. Edith H. Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, Re: Complaint of Judicial Misconduct Concerning the Honorable G. Thomas Porteous, Jr. at 1 (May 18, 2007)).

impeachment, does not survive scrutiny. No reading of the Constitution or any other legal authority supports Judge Porteous's argument. To the contrary, pre-federal bench conduct as a basis for impeachment finds support in three distinct places: (1) the Constitution; (2) the impeachment proceedings involving Judge Robert W. Archbald; and (3) the history of judges who were either prevented from or dissuaded from ascending to the federal bench because of corrupt pre-federal bench conduct.²⁰⁰

b. The Constitution, in Providing for Impeachment for Treason, Bribery and High Crimes or Other Misdemeanors, Provides No Time Limit as to When Impeachable Conduct Must Occur

Nothing in the text of the Constitution supports Judge Porteous's position that pre-federal bench conduct cannot be a basis for impeachment and removal from office. As noted in the House Report accompanying the Articles, "the Constitution describes certain types of conduct for which impeachment is warranted ("Treason, Bribery, or other high Crimes and Misdemeanors"), 'it does not say when the misconduct must have been committed,' and certainly does not require that such conduct occur during the tenure of the Federal office from which impeachment is sought."²⁰¹ The ultimate "fitness for office" decision by the Senate as to whether the conduct rises to the level of "high Crimes or Misdemeanors" and warrants the judge's removal does not turn on when that conduct occurred, but instead on whether that conduct so undermines the public trust that the judge must be removed from office.

²⁰⁰ This portion of the brief tracks in substantial respects Section II.B. of The House of Representatives' Consolidated Opposition to Judge G. Thomas Porteous, Jr.'s Five Motions to Dismiss the Articles of Impeachment at 32-42 (July 28, 2010).

²⁰¹ See H.R. Rep. No. 111-427, Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, *Report of the Committee on the Judiciary to Accompany H. Res. 1031* ("Porteous Impeachment Report"), 111th Cong., 2d Sess. at 19 (2010) (quoting Task Force Hearing, Part IV at 30 (Written Statement of Professor Michael J. Gerhardt at 4)).

Further, there is no policy justification for a blanket prohibition on considering pre-federal bench conduct as a grounds for impeachment and removal. The logic of Judge Porteous's position is that even if a federal judge were later found to have committed espionage or murder prior to taking the federal bench, he could not be removed from his lifetime appointment as a federal judge, notwithstanding that proof of such conviction would clearly demonstrate his unfitness for the job and would result in incalculable injury to the reputation of the federal judiciary.

The three distinguished constitutional scholars who testified before the House Impeachment Task Force were unequivocal in their recognition of pre-federal bench conduct as a basis for impeachment.²⁰²

Professor Gerhardt explained in his written statement:

Say, for instance, that the offence was murder—it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a Federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process.²⁰³

Professor Amar stated at the hearing:

Let's take bribery. Imagine now a person who bribes his way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can't immunize the bribery from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.²⁰⁴

²⁰² This testimony was not admitted into evidence by the SITC. It nonetheless constitutes appropriate "legal" materials for the Senate to consider.

²⁰³ See Task Force Hearing, Part IV, *supra* note 15, at 30 (Written Statement of Professor Gerhardt at 4).

²⁰⁴ See Task Force Hearing, Part IV, *supra* note 15, at 17 (Testimony of Professor Amar). Even Judge Porteous's attorney has recognized that impeachment rectifies a fraud in the

Professor Geyh stated:

[A] quid pro quo arrangement with bail bondsmen . . . is the kind of corruption that fairly may be characterized as a violation of the public trust. Who cares if it occurred before [Judge Porteous took the Federal bench]?²⁰⁵

In addition, Professor John C. Harrison of the University of Virginia Law School has submitted his opinion on whether the conduct for which civil officers may be impeached, convicted and removed from office includes only actions that took place while the officers hold the office that is the subject of the impeachment. He notes:

Because impeachment is about the interests of the public, and not primarily about punishing wrongdoing, it is appropriate that a judgement of unfitness may be based on conduct that took place before an office-holder's appointment. Wrongdoing before one enters office can demonstrate serious untrustworthiness just as can wrongdoing while in office, and the ultimate touchstone in impeachment is whether the people can trust the office holder.²⁰⁶

*c. The Archbald Conviction on the "Omnibus" Count
Supports the Impeachment and Removal of Judge Porteous*

confirmation process – when it is revealed that the true character of the person holding office is not what the Senate was led to believe at the time of confirmation:

The thrust of an impeachment trial is that the individual standing before the Senate is not the individual who secured an office by election or appointment. Rather, the later disclosure of misconduct revealed critical information about the individual's virtue or ability to hold public office.

See Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, supra note 14, at 7.

²⁰⁵ See Task Force Hearing, Part IV, *supra* note 15, at 36 (Testimony of Professor Geyh). *See also* Written Statement of Professor Charles Geyh, submitted at the House Impeachment Task Force Hearing, Part IV (Attachment 11 to the House Consolidated Opposition).

²⁰⁶ Letter from Professor John C. Harrison to Alan Baron, Special Impeachment Counsel (July 27, 2010) (Attachment 12 to the House Consolidated Opposition).

The impeachment of Judge Robert W. Archbald raised the issue of whether prior conduct could serve as the basis for impeachment and removal from office.²⁰⁷ Thirteen Articles of Impeachment were brought against Archbald. Six Articles accused him of misconduct on the Commerce Court where he was then assigned at the time of his impeachment and trial; six Articles accused him of misconduct on the district court – his prior judicial appointment. Article XIII set forth allegations that involved his conduct on both courts, and thus is similar to Articles I and II against Judge Porteous, in that the articles refer to conduct which occurred both before and after the judge in question assumed the current judicial position. The Senate convicted Judge Archbald on Article XIII.

Because debate was closed during the floor vote in the Archbald impeachment, there was no formal debate or discussion about the Senate's jurisdiction to convict based upon conduct

²⁰⁷ Judge Archbald was, at the time of his impeachment, a Judge on the Third Circuit Court of Appeals assigned to the Commerce Court. In considering whether to impeach Judge Archbald, the House carefully considered the propriety of bringing pre-Commerce Court charges. The House ultimately concluded that such charges were proper, and in its Report accompanying the Articles, set forth its reasoning for doing so in terms that are particularly apt in considering the conduct of Judge Porteous in this case:

It is indeed anomalous if the Congress is powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments.

See H.R. Rep. No. 946, Impeachment of Robert W. Archbald, Judge of the United States Commerce Court, Report of the Committee on the Judiciary (hereinafter "Archbald Impeachment Report"), reprinted in IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess. at 175 (1973), as reprinted in, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess. at 11311 (1998).

occurring prior to holding the office in question.²⁰⁸ The Senators were not required to state their reasons for their votes, but a small number of Senators did so, and divided equally on the issue of whether prior conduct could be the basis for removal, with approximately six expressing the view one way and approximately six the other. For example, Senator Owen stated:

Mr. Owen: Impeachment is the exercise of political power and not the exercise of mere judicial authority under a criminal code. Impeachment is the only mode of removing from office those persons proven to be unfit because of treason or high crime[s] or misdemeanors.

Whether these crimes be committed during the holding of a present office or a preceding office is immaterial if such crimes demonstrate the gross unfitness of such official to hold the great offices and dignities of the people.

A wise public policy forbids the precedent to be set that promotion in office of a criminal precludes his impeachment on the ground of his discovered high crimes and misdemeanors in a previous office from which he has just been promoted.

For these reasons it is my judgment that articles 7, 8, 9, etc., in so far as they charge crimes committed by Robert W. Archbald while United State district judge, comprise impeachable offense and may be alleged against him as judge of the Commerce Court.²⁰⁹

²⁰⁸ See Proceedings of the U.S. Senate and the House of Representatives in the Trial of Impeachment of Robert W. Archbald, 62d Cong., Sen. Doc. 1140, at 1620–78 (1913).

²⁰⁹ *Id.* at 1647. Several other Senators made similar statements. Senator Poindexter stated that:

[A]lthough the offenses were committed while the respondent was a district judge and before he was appointed circuit judge, yet, since the penalty for impeachable offenses is not only forfeiture of office, but disqualification to hold office thereafter, I am of [the] opinion that the offense charged in these articles, although committed before respondent's appointment as circuit judge, nevertheless disqualify him, on impeachment therefor [sic], from holding office as such circuit judge or as a Judge of the Commerce Court. There is no statute of limitations nor law of limitations in impeachment proceedings.

Id. at 1648. Senator Elihu Root stated: "I have no doubt that respondent is liable to impeachment for acts done while he was a judge of the district court and that the Senate has jurisdiction to try him for such acts." *Id.* at 1650. Senator Gronna stated: "While Judge Archbald was not at the time of the impeachment holding the identical office which he did when the offenses referred to

Though some Senators argued against impeachment on the district court counts, the fact that the Senate ultimately acquitted on those counts means little because the proof on those counts was apparently very weak. One Senator specifically noted that he was voting not guilty on all but one of the district court counts, but that his vote should not be misinterpreted as suggesting that charging prior conduct was improper. Senator Cullom stated:

I have voted "not guilty" on articles 4, 6, 7, 8, 10, 11 and 12, believing that they do not constitute the offense of high crimes and misdemeanors, and not because the acts were committed while the respondent was a judge of the district court. In my opinion the Senate would have jurisdiction to try respondent if the articles should warrant such action.²¹⁰

Although it is impossible to determine what motivated the votes of a majority of Senators in the Archbald case, one conclusion is beyond question: the Senate voted to convict Archbald on the one count that most closely resembles Articles I and II against Judge Porteous in that it alleges conduct both prior to and during his tenure in the current office.

*d. Corrupt Pre-Federal Bench Conduct Has Prevented or Dissuaded Judges
Throughout History from Ascending to the Federal Bench
And Caused Others to Resign Rather than be Impeached*

It is hardly surprising that impeachments typically have involved conduct during the course of the judicial tenure. As a general matter, persons of dubious integrity are not considered for federal judgeships, and there have only been fifteen judicial impeachments in this nation's history. Moreover, those individuals who are selected have to survive an FBI background check – a process that is intended to weed out applicants with significant misconduct in their backgrounds. In addition, applicants with material derogatory information in their backgrounds are likely to self-select out of the process to avoid an inquiry or examination, which may expose

were committed, the office is closely linked to the one he previously held, and the duties he was called on to perform were of the same general nature." *Id.* at 1653.

²¹⁰ *Id.* at 1663.

wrongdoing they wish to keep concealed, and to avoid having to answer forms falsely under oath or make false statements in order to secure the position of federal judge.²¹¹

In two instances where it has been discovered that a federal judge has taken the bench with previously unknown corrupt behavior in his background, the judge has resigned, thus eliminating the need for Congress to consider whether that misconduct warranted impeachment. A consideration of the facts associated with those two instances demonstrates that impeachment would have been warranted, and indeed inevitable, if they had not resigned.

One example of a judge who voluntarily resigned to avoid impeachment is Judge Otto Kerner. After Kerner became a judge on the Seventh Circuit Court of Appeals, he was prosecuted, convicted, and sentenced to jail for his conduct in accepting bribes as the Governor of Illinois, well before he assumed the federal bench. Upon his conviction, Members of Congress and the press called for him to resign or be impeached.²¹² Those calls for resignation or impeachment reflect a commonsense recognition that a judge who committed egregious ethical misconduct before he assumed the bench, in this case involving bribery, must be removed from the bench. The point in time when that conduct occurred was not important. As one author bluntly stated: “[J]udge Otto Kerner, Jr., of the United States Court of Appeals for the Seventh Circuit resigned before inevitable impeachment after he was convicted for conduct that preceded his service.”²¹³

²¹¹ See discussion in Section VI, dealing with Article IV.

²¹² Although some small portion of the counts of conviction involved post-Federal bench actions (perjury or false statements), the calls for resignation or impeachment did not focus on that conduct.

²¹³ See Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, *supra* note 14, at 67 (footnote omitted) (emphasis added).

Another example is that of Judge Hebert Fogel of the Eastern District of Pennsylvania, who resigned as a way of avoiding scrutiny for pre-federal bench conduct. As described in one law review article:

[J]udge Hebert Fogel of the Eastern District of Pennsylvania remained in office for more than a year after he was investigated in 1976 by the Justice Department for business irregularities occurring before he ascended to the bench. Judge Fogel invoked the Fifth Amendment when questioned before a grand jury about his role in a questionable government contract deal involving his uncle. The New York Times reported in November of 1976 that “deputy Attorney General Harold R. Tyler, Jr. has let it be known to Judge Fogel that it would be best for the reputation of the federal judiciary if he left the bench voluntarily.” Judge Fogel resigned about a year later and returned to private practice.”²¹⁴

The possibility that Judge Fogel, if he had in fact engaged in corrupt government contract deals prior to taking the bench, would henceforth be beyond the reach of impeachment was not suggested or considered

Because it would be a rare situation in which serious pre-federal bench misconduct would come to light after confirmation, this issue would, by definition, seldom arise. Judge Porteous’s case constitutes precisely that rare situation.

By concealing critical information (discussed further in connection with the discussion of Article IV), Judge Porteous sneaked through the background investigation process. His pre-federal bench misconduct in Article II only emerged as a result of FBI inquiries into the misconduct of other state judges several years after Judge Porteous had left the state court bench. Unlike Judges Kerner and Fogel, he has not resigned, but claims that no matter how egregious his pre-federal bench conduct, and no matter if his conduct brings the federal courts into disrepute, Congress lacks the power to remove him. Though this is an unusual circumstance, it

²¹⁴ See Emily Field Van Tassel, *Resignation and Removals: A History of Federal Judicial Service – and Disservice – 1789–1992*, 142 U. PA. L. REV. 333, 385 (1993).

is not one that is beyond Congress's Constitutional impeachment and removal power to address and remedy.

e. The Constitution's "Good Behavior" Language Does Not Set Forth a Substantive Standard of Conduct, But Instead Was Intended to Provide for Life Tenure for Federal Judges.

The Constitution's "good behavior" clause does not provide a substantive standard of conduct. Article III, Section 1, of the Constitution provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior

This provision means only that federal judges shall have life tenure – unless impeached. It does not set forth a separate standard for behavior, or in any way limit Congress's ability to impeach and remove for high crimes and misdemeanors – no matter when they occurred.

First, it would be incongruous for the Constitution to set forth specific grounds for impeachment in Article I (treason, bribery, and high crimes and misdemeanors), while at the same time providing for a separate and far more vague standard for removal in Article III (failing to engage in "good behavior").

Second, there is no basis in constitutional history or in the plain reading of the Constitution itself that suggests that the "good behavior" clause was intended to limit Congress in considering when conduct must take place to warrant impeachment. If that were the Framers' intent, then the constitutional definition of impeachable conduct could have provided that such conduct must occur while the judge is in the office from which impeachment is sought. Or, the temporal limitation as to impeachable conduct that Judge Porteous contends is provided by the "good behavior" clause would have been found in Article I (which defined impeachable conduct), and not in Article III (which establishes the judiciary). Judge Porteous's interpretation of the reach of the good behavior clause would not permit impeachment for treason or bribery

that was not disclosed prior to a judge's appointment to the bench. It is an untenable position and should be rejected by the Senate.

In explaining why the "good behavior clause" should be understood as meaning only "that federal judges shall hold tenure for life unless impeached,"²¹⁵ Professor Michael Gerhardt stressed two points. He noted that the Framers "included the phrase 'during good behavior' in the Constitution to contrast the unlimited term of federal judges with the fixed terms for the president, vice-president and members of Congress."²¹⁶ Second, he noted that the "good behavior" language is a lesser standard of conduct than the grounds for impeachment set forth in Article I, and that the Framers had rejected "maladministration" as a ground for removal because it was so vague. Thus, it would conflict with the structure of the Constitution and the Framers' desire for an independent federal judiciary designed to protect citizens from potential overreaching of the federal government if so vague a standard as "good behavior" (in Article III) were read to make it easier to remove federal judges than the "high crimes and misdemeanor" standard in Article I.²¹⁷ As Gerhardt concluded: "It defies common sense for the framers to have taken great pains to have purposefully designed such an awkward system for remedying judicial misconduct but then implicitly left Congress and the president free to remove judges on identical or more lenient grounds through some other, nonspecified, more efficient devices."²¹⁸ Accordingly, no article of impeachment against any judge has ever stated that the allegedly

²¹⁵ GERHARDT, *supra* note 6, at 83.

²¹⁶ *Id.*

²¹⁷ *Id.* at 84.

²¹⁸ *Id.* at 85.

impeachable conduct failed to constitute “good behavior” and thus warranted the judge’s removal from office.

Applying all the recognized and established grounds for conviction and removal – abuse of position of trust, lack of integrity, and bringing disrepute to the judiciary and undermining public confidence in it – Judge Porteous’s conduct warrants conviction and removal for the conduct alleged in Article II and which was established by the evidence.

V. ARTICLE III

A. Introduction

In the late 1990s, Judge Porteous’s credit card debt soared and he began to draw down on his Individual Retirement Account (“IRA”). As discussed above, in the summer of 1999, he solicited and received \$2,000 from Amato; by the end of 1999, he owed over \$100,000 in credit card debt. In the summer of 2000, Judge Porteous consulted with a bankruptcy attorney. In March of 2001, he filed for Chapter 13 bankruptcy.

Judge Porteous’s handling of his bankruptcy is characterized by repeated acts of calculated and premeditated dishonesty, reflecting contempt for the judicial process from the very outset. He filed his initial bankruptcy petition under a false name – “G. T. Ortous” – and used a Post Office Box as his home address. He signed this petition in two places: once over penalty of perjury, the other over the typed name “G.T. Ortous.”

Further, Judge Porteous dishonestly concealed his gambling activities from the bankruptcy court on the various forms and schedules that he signed under oath, which unambiguously called for disclosure of financial activities encompassing his gambling. Judge Porteous also lied on the various bankruptcy forms in order to conceal income, assets, and accounts from the bankruptcy court so that he would have the means to gamble while in bankruptcy. He also incurred gambling debts while in bankruptcy in violation of the clear order

of the bankruptcy court that he not do so. As the House stated at the outset of the trial: “The single organizing principle that arranges this pattern of false statements is Judge Porteous’s desire to conceal assets and to conceal his gambling so that he could gamble while in bankruptcy without interference from the court or the creditors or even his lawyer.”²¹⁹

The actual documents that were filed were physically prepared by Judge Porteous’s attorney, Claude Lightfoot. Some of the false statements in the bankruptcy were part of a joint scheme between Judge Porteous and his counsel, such as filing in a false name. In other areas, such as his gambling, Judge Porteous deliberately kept his attorney in the dark.

Judge Porteous’s conduct in bankruptcy (as with his conduct with Creely and Amato and the Marcotties) reflects a willingness to be dishonest and to lie when it was to his advantage. The fact that he was a federal judge at the time of his bankruptcy, and behaved dishonestly in a federal judicial proceeding, compounds the wrongfulness of his conduct and works a separate injury to the federal judiciary.

B. Judge Porteous’s Financial Circumstances: 1996-2000

From 1996 through 2000, Judge Porteous’s financial circumstances deteriorated substantially. During this time, his outstanding credit card balances increased steadily and exceeded \$180,000 by year-end 2000.²²⁰

The evidence reflects that a major reason for Judge Porteous’s financial problems was his gambling. By the time Judge Porteous took the federal bench in October 1994, he had a history

²¹⁹ Congressman Bob Goodlatte Senate Impeachment Trial Committee Opening Statement at 54:11-16.

²²⁰ See, e.g., HP Ex. 38 (Porteous IRA records); HP Ex. 127 (*In the Matter of Porteous*, Case No. 01-12363, Porteous Bankruptcy Schedules and Statement of Financial Affairs at SC0092 (Bankr. E.D. La. Apr. 9, 2001) (“Bankruptcy Schedules and Statement of Financial Affairs”)) (showing Judge Porteous’s liabilities owed to unsecured creditors to be \$198,246.73).

of gambling and was a “rated player” at the Grand Casino Gulfport in Gulfport, Mississippi, where he held a \$2,000 line of credit (allowing him to take out \$2,000 worth of markers at the casino). After becoming a federal judge, and prior to filing for bankruptcy in March 2001, Judge Porteous became a rated player and opened up lines of credit at 7 other casinos.²²¹ Casino records and witness testimony reflect regular gambling activities from the time Judge Porteous was a state judge and up to and including 2001–2002, when, now on the federal bench, Judge Porteous was in Chapter 13 bankruptcy.²²² In reviewing Judge Porteous’s financial records, the FBI identified over \$66,000 in cash withdrawals at casinos drawn on his credit card accounts and over \$27,000 in checks to and cash withdrawals at casinos from his checking account from July 1996 through July 2000.²²³

²²¹ The casinos where he was a “rated player” were: (1) Beau Rivage Casino in Biloxi, Mississippi, (2) Caesar’s Palace in Las Vegas, Nevada, (3) Caesar’s Tahoe, in Lake Tahoe, Nevada, (4) Casino Magic in Bay St. Louis, Mississippi, (5) Grand Casino Biloxi in Biloxi, Mississippi, (6) Isle of Capri in Biloxi, Mississippi, and (7) Treasure Chest Casino in Kenner, Louisiana. His credit limits ranged from \$2,000 to \$5,000. See HP Ex. 326 (Porteous Central Credit Inc. Gaming Report).

An “established player” or “rated player” at a casino is a player who has filled out a credit application with the casino in order to open up a line of credit. Casinos will thereafter rate that player, “meaning they will keep track of how much he bets, how much he wins, how much he loses.” Rated players are thereafter able to draw on their line of credit at the casino to gamble and are also provided with “comps” from the casinos, in the form of complimentary or reduced rates on hotel rooms, or free meals and drinks. See FBI Agent Wayne Horner Senate Impeachment Trial Committee Hearing Testimony (“Horner SITC”) at 999:4-25; FBI Agent Wayne Horner House Impeachment Task Force Hearing Testimony (“Horner Task Force”) at 23.

²²² See Horner SITC at 999:25 – 1000:17; Horner Task Force at 8–9. See also e.g., HP Exs. 302–323 (various casino records of Judge Porteous between March 2, 2001 and July 4, 2002); HP Ex. 326 (Central Credit Inc. Gaming Report); HP Ex. 337 (FBI Chart of Porteous Gaming Losses (03/28/2000 – 03/28/2001)).

²²³ See Horner Task Force at 9–12. Horner further testified that this was an incomplete list, and that there were “probably some additional credit cards that were not included.” *Id.* at 9.

Not only did his debts increase, but during the 1997–2000 time frame, Judge Porteous made a series of withdrawals from his IRA, causing his IRA account balance, which was approximately \$59,000 at year-end 1996, to drop to approximately \$9,000 by the time he filed for bankruptcy in March 2001. On several occasions, Judge Porteous used the funds he withdrew from his IRA to pay gambling debts by depositing the IRA funds into a Fidelity money market account and writing checks on that account to casinos.²²⁴

C. Concealment of Liabilities on Financial Disclosure Reports

From 1997 to 2000, Judge Porteous signed and filed on an annual basis false Financial Disclosure Reports with the Administrative Office of the United States Courts.²²⁵ Although these reports required Judge Porteous to disclose his liabilities, in filing the forms he concealed his increasing credit card debts.²²⁶ By year-end 1999, for example, Judge Porteous had over \$100,000 in credit card debt on five credit cards, but only reported having two credit cards, with

²²⁴ See Horner SITC at 996:9 – 997:6; HP Ex. 383 (Porteous IRA records); HP Ex. 529 (House Chart 16 (“Judge Porteous’s Use of Fidelity Account Pre-Bankruptcy to Pay Gambling Debts”)). That chart sets forth six pre-bankruptcy checks from 1998 to 2000 to casinos, written from Judge Porteous’s Fidelity account.

²²⁵ Under the Ethics in Government Act of 1978, federal judges are required by law to file annual public reports with the Judicial Conference of the United States, disclosing certain personal financial information. See 5 U.S.C. app. §§ 101(a), 101(b), and 101(f)(11)–(12). Public financial disclosure was intended to “deter some persons who should not be entering public service from doing so,” and to subject a judge’s financial circumstances to “public scrutiny.” See S. Rpt. 95–170, Senate Committee on Governmental Affairs, *Report to Accompany S. 555, “Public Officials Integrity Act of 1977,”* 95th Cong. 1st Sess. 21–22 (1977). (This Act became the “Ethics in Government Act” in its final form.)

²²⁶ Part VI of the Financial Disclosure Report required Judge Porteous to report liabilities by means of a letter code, the pertinent categories being “J” for liabilities of \$15,000 or less, and “K” for amounts between \$15,001 and \$50,000. He was required to list all liabilities to credit card companies where the balance exceeded \$10,000 at any point in the year, and to list those liabilities as of the close of the calendar year for which the Report was filed. See Horner SITC at 969:1 – 971:7. See also, e.g., HP Ex. 103(b) (“Filing Instructions for Judicial Officers and Employees”); House Chart 34 (“Instructions as to the Reporting of Liabilities on the Financial Disclosure Forms”).

a maximum debt of \$30,000 total. Judge Porteous personally instructed his secretary, Rhonda Danos, as to how that portion of the form (Part VI – “Liabilities”) should be filled out. She testified: “He’d fill out the portion and I’d just copy it. . . . I’d just put exactly [on the Report] what was given to me.”²²⁷

The following chart sets forth the liabilities actually disclosed by Judge Porteous by letter code – “J” (signifying liabilities less than \$15,000) and “K” (signifying liabilities between \$15,000 to \$50,000) – as well his actual liabilities along with what he should have reported if he had filed a truthful form.²²⁸

Year	Actually Disclosed	Not Disclosed (December Balance)
1996	Box Checked: “None (No reportable liabilities)”	1) Citibank account, 0426 (\$14,846.47) – J [less than \$15,000]
1997	Box Checked: “None (No reportable liabilities)”	1) MBNA MasterCard 0877 (\$15,569.25) – K [between \$15,001 and \$50,000] 2) MBNA MasterCard 1290 (\$18,146.85) – K 3) Travelers 0642 (\$11,477.44) – J
1998	1) MBNA – J 2) Citibank – J	1) MBNA MasterCard 0877 (\$16,550.08) – K 2) MBNA MasterCard 1290 (\$17,155.76) – K
1999	1) MBNA – J 2) Citibank – J	1) MBNA MasterCard 0877 (\$24,953.65) – K 2) MBNA MasterCard 1290 (\$25,755.84) – K 3) Citibank 0426 (\$22,412.15) – K 4) Citibank 9138 (\$20,051.95) – K 5) Travelers 0642 (\$15,467.29) – K

The Financial Disclosure Reports were signed by Judge Porteous on a signature line directly below the following certification:

²²⁷ See Danos SITC at 879:23 – 880:8.

²²⁸ See Horner SITC at 971:11 – 977:3; HP Exs. 102(a), 103(a), 104(a) and 105(a) (Judge Porteous’s Financial Disclosure Reports for 1996, 1997, 1998 and 1999, respectively); HP Exs. 167, 168, 159 and 170 (credit card statements for year end 1996, 1997, 1998 and 1999 respectively showing balances due); House Charts 30–33 (re: Judge Porteous’s non-disclosure of credit card debts on his Financial Disclosure Forms).

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Below Judge Porteous's signature is the following additional warning in capital letters:

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY
FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO
CIVIL AND CRIMINAL SANCTIONS²²⁹

Judge Porteous's conduct in filing false financial disclosure forms is significant for two reasons. First, it demonstrates that his false statements to the bankruptcy court (discussed below) that concealed his gambling were not by inadvertence, accident or mistake, but rather were part of his common plan or scheme to conceal gambling-related financial information. Second, it reflects Judge Porteous's intent – he would lie on financial forms to protect his ability to gamble without interference.

**D. Judge Porteous's Financial Activities and Relationship with Lightfoot
June 2000 - March of 2001**

In the summer of 2000, Judge Porteous retained attorney Claude Lightfoot as his bankruptcy counsel. Lightfoot had never met Judge Porteous prior to representing him.²³⁰

Lightfoot compiled information and documentation regarding the Porteouses' assets and debts for the purpose of developing a "workout" proposal for their creditors, in an effort to avoid a bankruptcy filing.²³¹ The workout plan would have entailed a partial payment to all

²²⁹ See e.g., HP Ex. 105(a) (Judge Porteous's Financial Disclosure Report (calendar year 1998), filed May 13, 1999).

²³⁰ See Claude Lightfoot Senate Impeachment Trial Committee Hearing Testimony ("Lightfoot SITC") at 1072:24 – 1073:1; Claude Lightfoot House Impeachment Task Force Hearing Testimony ("Lightfoot Task Force") at 41.

²³¹ See Lightfoot SITC at 1073:21-23; Lightfoot Task Force at 42.

creditors.²³² Lightfoot gave Judge Porteous worksheets to fill out. Lightfoot's worksheets sought information that would ultimately be contained in a bankruptcy filing.²³³ Among the documents that Judge Porteous provided Lightfoot in the summer of 2000 was a pay stub from May 2000 that showed Judge Porteous's net monthly income to be \$7,531.52.²³⁴

Lightfoot told Judge Porteous, as he told all his clients, not to incur any new debts, because, in Lightfoot's view, "it is not good faith for such a person [considering bankruptcy] to continue making debt."²³⁵ Nonetheless, Judge Porteous had overriding personal objectives that he did not share with Lightfoot, namely, to continue to gamble, both in the "workout" period and then while in bankruptcy. That goal trumped any considerations of candor toward the Bankruptcy Court.

Judge Porteous knew that if his gambling were made known to the bankruptcy court, his ability to gamble in the future would be threatened. As Lightfoot testified, if he had known that Judge Porteous gambled, he would have asked Judge Porteous many more questions about that topic because "[i]f there are gambling debts, they have to be listed, and you must tell me about them. If you have markers that haven't been redeemed, you could have a bad check problem when they try to pass the marker through as a bad check. So it gives me an opportunity to have a conversation about all those concerns of mine."²³⁶

²³² See Lightfoot SITC at 1071:22 – 1072:23, 1073:18 – 1075:10.

²³³ See Lightfoot SITC at 1073:21-23, 1074:22-24, 1076:4-7; Lightfoot Task Force at 42.

²³⁴ See Lightfoot SITC at 1073:23-24, 1087:23 - 1088:6.

²³⁵ Lightfoot Task Force at 42–43.

²³⁶ Lightfoot SITC at 1173:13-19. See also Lightfoot Task Force at 64.

Accordingly, during the entire course of their attorney-client relationship, Judge Porteous concealed not only from the court, but from his own attorney the pervasive and ongoing nature of his gambling activities. Lightfoot's testimony on this point was clear:

Q. [Mr. Goodlatte] [D]id he [Judge Porteous] ever tell you that he gambled or had any gambling debts?

A. [Lightfoot] No, sir.²³⁷

Lightfoot's SITC testimony is consistent with his prior testimony on this issue. At the Fifth Circuit Hearing, in response to questioning by Chief Judge Jones, Lightfoot testified that he had no knowledge of Judge Porteous's gambling:

Q. [Chief Judge Jones] And you're telling us, as his counsel, in whom he confided for months and months before the time that he was - that he filed this petition, when he continued to gamble almost every week before and after he filed bankruptcy, that you had no earthly idea that this was because of gambling?

A. [Lightfoot] I didn't. I never knew him before, and I - I really didn't know that gambling was an issue with the judge.²³⁸

Thus, during the "workout" period, even though Judge Porteous regularly updated Lightfoot on his various credit card debts, so that Lightfoot would have up to date information in dealing with Judge Porteous's creditors,²³⁹ Judge Porteous failed to disclose to Lightfoot that he continued to gamble, that he had taken out debt from casinos, or that he repaid those debts in full.²⁴⁰ Judge Porteous also failed to disclose to Lightfoot the existence of his Fidelity money

²³⁷ Lightfoot SITC at 1074:25 - 1075:2. *See also id.* at 1076:21 - 1077:2, 1091:17-19; Lightfoot Task Force at 42-43, 65 ("I didn't know [Judge Porteous] gambled . . . whatsoever.")

²³⁸ Claude Lightfoot 5th Circuit Special Committee Hearing Testimony ("Lightfoot 5th Cir.") at 453.

²³⁹ *See* Lightfoot SITC at 1105:14-18; Lightfoot Task Force at 43.

²⁴⁰ In August of 2000, shortly after Judge Porteous began consulting with Lightfoot for the purpose of attempting a workout of Judge Porteous's debts, Judge Porteous requested a credit limit increase at the Treasure Chest Casino from \$2,500 to \$3,000. *See* HP Ex. 326 (Porteous Central Credit Inc. Gaming Report). On September 28, 2000, Judge Porteous wrote a check

market account, which he used to pay significant casino debts (including debts in this workout period).²⁴¹

On December 21, 2000, Lightfoot sent Judge Porteous a copy of the workout letters that had been sent to all but one of Judge Porteous's unsecured creditors. The workout letters listed thirteen debts owed to ten different creditors, totaling \$182,330.23, and offered to pay them approximately 20% of what they were then owed, unlike casinos which Judge Porteous paid in full.²⁴²

At the same time that Lightfoot was working to have the creditors accept 20 cents on the dollar that Judge Porteous owed them from years of accumulated debt, Judge Porteous was in fact incurring new debt from casinos that he repaid in full.²⁴³ Indeed, on December 26, 2000 – five days after Lightfoot sent Judge Porteous a copy of the workout letters – Judge Porteous traveled to Caesars Lake Tahoe and took out a \$3,000 gambling marker. Judge Porteous did not tell Lightfoot about this gambling trip or the \$3,000 extension of credit. Instead, he made a conscious choice to favor casinos over his other creditors as meriting repayment in full.²⁴⁴

drawn on his Fidelity money market account in the amount of \$490 to Casino Magic. *See* Horner SITC at 996:12 – 997:1; HP Ex. 529 (checks written to casinos from Judge Porteous's Fidelity account); House Chart 16 ("Judge Porteous's Use of Fidelity Account Pre-Bankruptcy to Pay Gambling Debts"). On November 30, 2000, Judge Porteous wrote a check drawn on his Fidelity money market account in the amount of \$1,600 to pay the Treasure Chest Casino. To fund that check, Judge Porteous withdrew \$3,000 (paying a 20% penalty) from his IRA and deposited the proceeds of the IRA withdrawal – a \$2,400 check – into his Fidelity account. *See* Horner SITC at 996:12 --997:6; HP Ex. 383 (Porteous IRA records).

²⁴¹ *See* Lightfoot 5th Cir. at 436, 448.

²⁴² *See* HP Ex. 146 (December 21, 2000 Letter from Lightfoot to the Porteouses).

²⁴³ *See* HP Ex. 380 (Caesars Lake Tahoe Records).

²⁴⁴ It is inconceivable that a creditor would have accepted Lightfoot's proposal had it known that it was receiving 20% of what Judge Porteous owed, while casinos which had extended credit to Judge Porteous had received repayment in full.

**E. Judge Porteous's Conduct in the Weeks Immediately Preceding His
March 28, 2001 Filing of His Initial Petition**

In or about late February to early March 2001, Lightfoot concluded that he would be unable to accomplish a workout. He and Judge Porteous decided that Judge Porteous would file for Chapter 13 bankruptcy.²⁴⁵

Once the decision to file for bankruptcy was made, in the period from approximately February 27 through March 27, 2001, Judge Porteous engaged in a series of actions to arrange his financial affairs with the following goals: (1) to pay casinos any outstanding indebtedness so he would not have to list them as unsecured creditors; and (2) to structure certain other financial affairs in anticipation of filing for bankruptcy so as to preserve ways and means of gambling after he filed his petition. The conduct culminated in Judge Porteous's filing for bankruptcy under a false name on March 28, 2001, and filing a series of false financial schedules and a statement of financial affairs (concealing these transactions, his gambling activities and other assets) on April 9, 2001.

1. Judge Porteous's Motives to Conceal Gambling Activities

Casinos have their own credit systems and share credit information with each other. Casinos will run a "central credit report" which is "a credit report specifically aimed at gamblers and casinos and it tracks gaming activity of the casino's customers. With the central credit

²⁴⁵ See Lightfoot SITC at 1075:21-25; Lightfoot Task Force at 43.

Chapter 13 bankruptcies are sometimes described as "wage earner's plans," in that they are only available to individuals who are receiving a monthly income. There is no liquidation in a Chapter 13, and a debtor is therefore allowed to keep his property. In exchange for that opportunity, debtors must provide the bankruptcy trustee "with at least as much in value as they would have received had it been a liquidating Chapter 7 bankruptcy." See The Honorable Duncan Keir Senate Impeachment Trial Committee Hearing Testimony ("Keir SITC") at 1184:7-12; the Honorable Duncan Keir House Impeachment Task Force Hearing Testimony ("Keir Task Force") at 68.

report a casino can determine whether or not a gambler has a good credit history at the casinos or a bad credit history at casinos.”²⁴⁶ Judge Porteous had gambled at casinos for years, had filled out numerous applications at casinos, had taken out credit at casinos, and had casinos run his credit history. Judge Porteous understood that it would impact his ability to obtain credit from casinos in the future, and thereby impact his ability to gamble, if he were to default on any casino debts or if the casinos were to know that he had filed for bankruptcy.²⁴⁷ Accordingly, Judge Porteous’s conduct prior to and while in Chapter 13 bankruptcy reflects his concern that every casino debt be paid in full.

2. Incurring and Paying off Gambling Debt – Grand Casino Gulfport

On February 27, 2001, Judge Porteous gambled at the Grand Casino Gulfport (“Grand Casino”) and took out two \$1,000 markers.²⁴⁸

On March 27, 2001 – the day before he filed for bankruptcy and while the \$2,000 in Grand Casino markers was still outstanding – Judge Porteous deposited \$2,000 into his personal Bank One checking account. That account otherwise would not have had sufficient funds to have paid the markers at that time. Judge Porteous made sure the deposit was exactly \$2,000 – the amount of the outstanding markers – by including a \$40 check drawn on his Fidelity account along with a \$1,960 cash deposit.²⁴⁹

²⁴⁶ Horner Task Force at 25-26.

²⁴⁷ See *id.* at 19 (“[I]f a gambler gets a negative history on his central credit report, what happens is the other casinos generally cut him off.”).

²⁴⁸ See Horner SITC at 983:22 – 984:1; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report).

²⁴⁹ See Horner SITC at 983:22 – 986:16, 1003:19 – 1005:7; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report); HP Ex. 144 (Porteous Bank One Records); HP Ex. 143 (Fidelity Money Market Statement, including \$40 check); House Chart 6 (“Undisclosed Creditor (Grand Casino Gulfport)”).

The Grand Casino Gulfport markers cleared Judge Porteous's Bank One account on April 5 and 6, 2001, a week after he filed for bankruptcy.²⁵⁰ Thus, Grand Casino Gulfport was an unsecured creditor on March 28, 2001, when he filed for bankruptcy. Unlike other creditors, Grand Casino was paid in full.

3. Incurring and Paying off Gambling Debt – Treasure Chest Casino

On March 2, 2001, Judge Porteous gambled at Treasure Chest and took out seven \$500 markers. He repaid four markers in chips that same day and left the casino owing \$1,500.²⁵¹ (This was in addition to the \$2,000 he owed Grand Casino at that time.)

On March 27, 2001, Judge Porteous paid \$1,500 in cash to the Treasure Chest Casino to pay off his outstanding indebtedness.²⁵² This transaction occurred the same day as Judge Porteous's \$2,000 deposit into his Bank One checking account to cover the Grand Casino

Grand Casino records reflect that the casino deposited the markers for collection at some point prior to March 24, 2001, and that Judge Porteous's balance as of March 24, 2001 was \$0. However, the markers were returned as "uncollected," and the Grand Casino records reflected \$2,000 due and owing as of April 3, 2001. FBI Agent Horner determined that there was a problem with Judge Porteous's bank account number on the markers. Notwithstanding the ambiguity in the casino records that suggested a \$0 balance on March 28, 2001, Judge Porteous in fact owed, and knew that he owed, the casino \$2,000 when he filed for bankruptcy on March 28, 2001. As discussed in the text, Judge Porteous deposited \$2,000 into his Bank One account on March 27, 2001 – a transaction that (1) can only be explained by a desire to make sure that there were funds in the account sufficient to pay the markers and (2) reflects his knowledge of the existence of that debt on March 27, 2001.

²⁵⁰ See Horner SITC at 985:6-7, 1003:19 – 1004:13; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report); HP Ex. 144 (Porteous Bank One Records); HP Ex. 143 (Fidelity Money Market Statement, including \$40 check); House Chart 6 ("Undisclosed Creditor (Grand Casino Gulfport)").

²⁵¹ See Horner SITC at 986:18 – 987:6; HP Ex. 302 (Treasure Chest Customer Transaction Inquiry); House Chart 2 ("Undisclosed Payments to Creditors Within 90 Days of Bankruptcy - Treasure Chest Casino").

²⁵² See Horner SITC at 987:6-8; HP Ex. 302 (Treasure Chest Customer Transaction Inquiry); House Chart 2 ("Undisclosed Payments to Creditors within 90 Days of Bankruptcy - Treasure Chest Casino").

markers.²⁵³ Thus, Treasure Chest was a preferred creditor which, as will be discussed, should have been disclosed by Judge Porteous in his bankruptcy filings.

4. Filing for an Income Tax Return

On March 23, 2001, the Porteouses signed their income tax return for the year 2000 and claimed a tax refund in the amount of \$4,143.72.²⁵⁴ This was an asset that was specifically required to be disclosed on his bankruptcy filings. It was not disclosed.

5. Paying Fleet Credit Card in Full

On March 23, 2001, Judge Porteous asked his secretary, Rhonda Danos, to write a check out of her personal checking account, in the amount of \$1,088.41, to pay his wife's Fleet credit card bill in full. Judge Porteous never disclosed to Ms. Danos that he was filing for bankruptcy; she only discovered this information after it was disclosed in the local newspaper.²⁵⁵

The March 23, 2001 credit card payment to Fleet was handled by Judge Porteous in a manner that was inconsistent with the payments in prior months. The Porteouses had paid but a portion of the amounts owing to Fleet on their January and February statements, had made those payments from their personal checking account, and had made the payments several weeks after the statements had been issued. In contrast, Judge Porteous paid the March statement in full, out of Danos's account, four days after it was issued. It is reasonable to infer that he did this so that it would be paid prior to filing for bankruptcy in order to avoid disclosing Fleet as an unsecured

²⁵³ One troubling aspect of this flurry of activities to pay off gambling debts is that it reflects Judge Porteous's ready access to cash when he needed it, notwithstanding that he was filing for bankruptcy the next day. It is unknown where he got the cash.

²⁵⁴ See HP Ex. 141 (Judge Porteous's 2000 Tax Return); Homer SITC at 990:2-25; House Chart 3 ("Judge Porteous's Undisclosed Tax Refund").

²⁵⁵ See Danos SITC at 877:14 – 878:10.

creditor.²⁵⁶ This payment to Fleet, like his payment, to Treasure Chest, made Fleet a “preferred creditor” that should have been disclosed. That payment was not disclosed.

F. March 28, 2001 - Judge Porteous Files His Initial Voluntary Bankruptcy Petition Under the False Name “G.T. Ortous” Using a Post Office Box Address

On March 28, 2001, Judge Porteous filed a Petition for Chapter 13 bankruptcy (the “Initial Petition”) in the United States Bankruptcy Court for the Eastern District of Louisiana.²⁵⁷

At some point shortly prior to filing for bankruptcy, Judge Porteous and his counsel agreed on a scheme to file under a false name.²⁵⁸ Lightfoot explained that the local newspaper published the names of people who file bankruptcy and that this way they could keep Judge Porteous’s name out of the paper.²⁵⁹

Judge Porteous willingly agreed to the scheme and did not protest in any way, nor did he suggest that it would be wrong for a federal judge to file an official court document, signed under penalty of perjury, with a false name.²⁶⁰

As part of his effort to conceal his identity, on March 20, 2001, Judge Porteous opened a post office box. The purpose of opening the post office box was to use that address in his bankruptcy filing.²⁶¹

²⁵⁶ See Horner SITC at 992:3 – 994:17; HP Ex. 140 (Fleet credit card statements); HP Ex. 144 (Bank One records); HP Ex. 329 (Fleet credit card statement, with accompanying check written by Rhonda Danos).

²⁵⁷ See HP Ex. 125 (*In the Matter of Porteous*, Case No. 01-12363, Voluntary Petition (Bankr. E.D. La. March 28, 2001) (“Initial Petition”).

²⁵⁸ See Lightfoot SITC at 1079:22 – 1080:7; Lightfoot Task Force at 44; Lightfoot 5th Cir. at 435.

²⁵⁹ See Lightfoot SITC at 1080:2-13; Lightfoot Task Force at 44.

²⁶⁰ See Lightfoot SITC at 1080:20 – 1081:10.

²⁶¹ *Id.* at 1082:9-21. See also HP Ex. 145 (Porteous P.O. Box Application).

Judge Porteous's Initial Petition was filed with the false names "G.T. Ortous" and "C.A. Ortous" as the debtors and also listed the P.O. Box address instead of Judge Porteous's actual residential address. Judge Porteous signed the petition twice – once over the typed name "G.T. Ortous" and the other "under penalty of perjury that the information provided in this petition is true and correct."²⁶² Judge Porteous admitted at the Fifth Circuit Hearing that the names used in the Initial Petition were false.²⁶³

Though Judge Porteous has sought to blame Lightfoot for this chain of events, Lightfoot's actions neither excuse nor mitigate the wrongfulness of Judge Porteous's conduct. Judge Porteous's filing for bankruptcy in a false name constituted perjury for which "advice of counsel" is simply no defense. There is never an excuse for knowingly lying on a document that is being signed under penalty of perjury in a bankruptcy proceeding.²⁶⁴ As an attorney, and, as a federal judge, Judge Porteous is not in the same position *vis-à-vis* his attorney as a lay client being advised about arcane procedures of bankruptcy law. Finally, as a purely factual matter, Judge Porteous had his own agenda throughout the bankruptcy process and was making strategic decisions, including concealing material facts from the Bankruptcy Court, independent of his attorney's advice or knowledge, to conceal his gambling. The fact that his attorney was a willing participant in this fraudulent filing does not absolve Judge Porteous of responsibility. Even if his attorney was willing to subvert his own legal and ethical obligations, that does not mitigate the

²⁶² See HP Ex. 125 (Initial Petition), *supra* note 257; Lightfoot Task Force at 44.

²⁶³ Porteous 5th Cir. at 55.

Federal Rule of Bankruptcy 1005 requires that the caption of a bankruptcy petition include the name of the debtor and "all other names used by the debtor within six years before filing the petition." FED. R. BR. P. 1005 (1975).

²⁶⁴ See Keir SITC at 1186:7-13, 1187:19 – 1188:3; Henry Hildebrand Senate Impeachment Trial Committee Hearing Testimony ("Hildebrand SITC") at 1883:14-17.

wrongfulness of Judge Porteous's conduct. This was collusion with counsel, not advice of counsel.²⁶⁵

**G. April 9, 2001: Judge Porteous Files His Amended Petition,
Accompanying Schedules, and Statement of Financial Affairs**

1. The Amended Petition

Judge Porteous amended his Initial Petition on April 9, 2001, two weeks after it was filed, replacing the false names and listing his actual residential address.²⁶⁶

2. The Bankruptcy Schedules and Statement of Financial Affairs

Along with the Amended Petition, Judge Porteous filed his Bankruptcy Schedules and his Statement of Financial Affairs on April 9, 2001. Judge Porteous's Bankruptcy Schedules required him to set forth such items as assets, debts, income, and other miscellaneous financial matters. Judge Porteous's Statement of Financial Affairs consisted of a series of questions requiring disclosure of specific financial activities. Judge Porteous signed each document under penalty of perjury. Though they were filed April 9, 2001, these forms should have disclosed Judge Porteous's financial affairs as they existed on the date of the Initial Petition – March 28, 2001.²⁶⁷

Prior to filing the Bankruptcy Schedules and Statement of Financial Affairs, Lightfoot provided Judge Porteous with draft copies and specifically reviewed them with Judge Porteous

²⁶⁵ Lightfoot testified that he is under scrutiny by the Louisiana State Bar for his actions on behalf of Judge Porteous. See Lightfoot SITC at 1180:3-20.

²⁶⁶ See HP Ex. 126 (*In the Matter of Porteous*, Case No. 01-12363, Amended Petition (Bankr. E.D. La. Apr. 9, 2001) ("Amended Petition")). Mr. Lightfoot told the bankruptcy trustee, S.J. Beaulieu, that the false name on the Initial Petition was a typographical error. See S.J. Beaulieu Senate Impeachment Trial Committee Hearing Testimony ("Beaulieu SITC") at 1524:8-22.

²⁶⁷ See HP Ex. 127 (Bankruptcy Schedules and Statement of Financial Affairs), *supra* note 220; HP Ex. 345 (2001 Instructions for Completing Bankruptcy Schedules at p. 45).

“at least twice” and “at length.” Judge Porteous then signed both his Bankruptcy Schedules and his Statement of Financial Affairs under penalty of perjury, declaring that the documents were true and correct.²⁶⁸

Judge Porteous nevertheless failed to disclose the various transactions described above involving the Grand Casino Gulfport, the Treasure Chest Casino, and Fleet credit card, nor did Judge Porteous disclose filing for a tax refund, notwithstanding the fact these disclosures were clearly required by those forms. He also failed to disclose other assets and gambling activities in response to specific questions on the forms requiring their disclosure.

3. False Representations on the Bankruptcy Schedules

a. Failure to Disclose the March 23, 2001 Claim for a Tax Refund

Judge Porteous failed to disclose his claim for a tax refund. The Bankruptcy Schedules required Judge Porteous to disclose “other liquidated debts owing debtor including tax refunds.” (emphasis added). Notwithstanding the fact that Judge Porteous had filed for a \$4,143.72 federal income tax refund on March 23, 2001 – five days before filing his Initial Petition – the box “none” was marked with an “X” in response to the question about tax refunds. Judge Porteous signed that form under penalty of perjury.²⁶⁹

During his Fifth Circuit testimony, Judge Porteous acknowledged that the “none” box was checked.²⁷⁰ When confronted with the fact that the Schedule did not disclose the pending refund, Judge Porteous responded: “When that was listed, you’re right.”²⁷¹

²⁶⁸ Lightfoot SITC at 1084:21 – 1086:2. See also Lightfoot Task Force at 46; HP Ex. 127 (Bankruptcy Schedules), *supra* note 220, at SC00111, SC00116.

²⁶⁹ See HP Ex. 127 (Bankruptcy Schedules), *supra* note 220, at SC00096, SC00116. The Section at issue is Category 17 on Schedule B (“Personal Property”).

²⁷⁰ Porteous 5th Cir. at 80.

The form is unambiguous in requiring the suggested tax refund to be reported. Further, according to Lightfoot, the tax refund should have been disclosed, and if he had known of the pending refund, he would have disclosed it.²⁷² Lightfoot also would have filed an amended schedule to disclose the refund if he had found out about it after the initial schedules were filed: “I would have amended this schedule to list it, had it been absent, and probably informed the trustee, particularly if the meeting of creditors hadn’t been held yet. I would have mentioned it.”²⁷³

On April 13, 2001 – just four days after the Bankruptcy Schedules were filed – Judge Porteous received his entire \$4,143.72 federal tax refund by way of a direct deposit into his Bank One checking account. Judge Porteous acknowledged during his Fifth Circuit testimony that the \$4,143.72 tax refund was deposited into his Bank One checking account on April 13, 2001.²⁷⁴

This tax refund was not only significant because it involved over \$4,000 that could have potentially gone to creditors. In addition, S. J. Beaulieu, the Chapter 13 trustee who was assigned to Judge Porteous’s case, stated that he would have considered the refund in deciding whether to approve the proposed Chapter 13 plan, and the size of the refund suggested that Judge Porteous was over-withholding and had access to disposable income that should have gone to the creditors. In response to questioning from Senator Whitehouse, Beaulieu explained:

²⁷¹ *Id.* at 82.

²⁷² See Lightfoot SITC at 1086:18 – 1087:7; Lightfoot Task Force at 46; Lightfoot 5th Cir. at 447.

²⁷³ Lightfoot SITC at 1087:8-19. See also Lightfoot Task Force at 47. The instructions for completing Category 17 on Schedule B are clear: “Item 17 request [sic] the debtor to list all monies owed to the debtor . . . and specifically, any expected tax refunds.” HP Ex. 345 (2001 Instructions for Completing Bankruptcy Schedules at 62) (emphasis added).

²⁷⁴ Porteous 5th Cir. at 83. See also HP Ex. 141 (2000 Porteous Federal Tax Return); HP Ex. 144 (Porteous Bank One records).

Q. [Sen. Whitehouse.] Now, my question to you is would it have made any difference to the plan that you approved if you had known of the tax return and the other preferences. . . . Basically I'm trying to sort out did it, did it make a difference to anybody that these expenses or assets weren't properly listed since this was a Chapter 13?

A. [Beaulieu] \$4000 [for the tax refund] means about \$300 swing a month; \$3600, or \$4000 a [year]. So now you're talking about \$12,000 going into the kitty.

Q. So that information [the undisclosed tax return] would have made a difference in the plan that you approved?

A. That and I - basically when you get a tax return with [that] dollar amount, . . . that means that the debtor is overdeducting from his paycheck, so that means the paycheck I'm reviewing is down \$300 from the get-go.

So I would have to look at that and say, well, your income should be actually \$300 more per month. So that's in a three-year period about \$10,000, which in this case would be about a 10 percent turnaround

Q. And that's something you have taken into account in your decisions about the plan?

A. Yes sir.²⁷⁵

In his Fifth Circuit testimony, Judge Porteous claimed that he called Lightfoot when he received the refund, and that they discussed what he should do with it.²⁷⁶ Lightfoot specifically

²⁷⁵ Beaulieu SITC at 1549:4 – 1550:21. Chief Bankruptcy Judge Keir, who testified as an expert witness for the House, also made the point that the undisclosed tax refund had significance going forward in determining Judge Porteous's disposable income: "Not only was it an asset that should have come in . . . but in effect it affects the calculation of what is disposable income. If you claim no dependents, no deductions, and have them take out extra money, you can lower that take-home pay. All you are doing is putting it in your own savings account, if you are allowed to do that. Therefore, your monthly payment is also going to be less under this plan calculation." Keir Task Force at 77.

Judge Porteous's bankruptcy case was assigned to Bankruptcy Judge William Greendyke from Texas. Judge Greendyke's trustee, William Heitkamp, testified similarly to Beaulieu as to the significance of the tax refund, namely, that they were to be treated as "part of the Chapter 13 debtor's disposable income," which was "required to be committed to payments in Chapter 13 cases." See William Heitkamp 5th Circuit Special Committee Hearing Testimony ("Heitkamp 5th Cir.") at 397.

²⁷⁶ See Porteous 5th Cir. at 83–84.

denied that such a call occurred. Rather, Lightfoot recalled a “conversation with the judge about a tax return for a later year, and not that particular year” where the issue was whether the tax refund had to have been turned over pursuant to Judge Greendyke’s order.²⁷⁷

b. Omitted and Undervalued Financial Accounts

Judge Porteous also failed to provide truthful information about his Bank One checking account and his Fidelity money market account.

1. The Bank One checking account. The Bankruptcy Schedules (Question 2 on Schedule B (“Personal Property”)) required Judge Porteous to list, among other assets, “checking, savings or other financial accounts” and their value. In response, Judge Porteous disclosed the current market value of his Bank One Checking Account – into which his monthly salary was deposited – as \$100.

This “\$100” answer was false, and the evidence establishes that Judge Porteous knew that it was false. First, the day prior to filing his Initial Petition (March 27, 2001), Judge Porteous deposited \$2,000 into the account – the amount he owed on the Grand Casino markers – so he knew that the account held at least \$2,000 – not the \$100 he reported. Moreover, the opening balance in Judge Porteous’s Bank One account for the period March 23, 2001 to April 23, 2001 (covering the time period of his bank statements) was \$559.07, and the closing balance for the same time period was \$5,493.91. At no time during that month did Judge Porteous’s balance drop to as low as \$100.²⁷⁸

²⁷⁷ Lightfoot SITC at 1141:15-17. *See also id.* at 1142:13-20 (Lightfoot recalled needing to “look to the confirmation order” since it was not a typical order issued in New Orleans); Lightfoot 5th Cir. at 437.

²⁷⁸ *See* Horner SITC at 994:18 – 995:14; HP Ex. 127 (Bankruptcy Schedules), *supra* note 220, at SC00095; HP Ex. 144 (Porteous Bank One records); House Chart 5 (“Undisclosed Account Balance (Bank One Account)”); Porteous 5th Cir. Hrg. at 79–80 (acknowledging during

2. The Fidelity money market account. At the time of his bankruptcy filing, Judge Porteous also had a Fidelity money market account that he used regularly. As noted, he had paid gambling debts to casinos from that account (and did so in the fall of 2000). In the days immediately prior to filing for bankruptcy, Judge Porteous wrote numerous checks drawn on the Fidelity account, including a check the day before he filed his Initial Petition.²⁷⁹

Judge Porteous did not disclose his Fidelity money market account as required in response to the question concerning his accounts. Judge Porteous never told Lightfoot about this account, and he did not include it on the worksheets that he filled out and gave to Lightfoot in the summer of 2000.²⁸⁰ Although there were but a few hundred dollars in the account at the time he filed for bankruptcy, Judge Porteous clearly did not overlook the account. He deliberately failed to report it, and it should have been disclosed. His reason for hiding the amount became clear after his Chapter 13 bankruptcy plan was approved. Judge Porteous thereafter secretly used this account to accumulate cash and pay gambling debts.²⁸¹

his Fifth Circuit testimony that he listed his Bank One checking account under Schedule B as having a balance of \$100).

²⁷⁹ See Homer SITC at 995:15 – 997:20; HP Ex. 529 (Fidelity checks); HP Ex. 143 (Fidelity money market statements); House Chart 16 (“Judge Porteous’s Use of Fidelity Account Pre-Bankruptcy to Pay Gambling Debts”); House Chart 4 (“Judge Porteous’s Undisclosed Fidelity Money Market Account”).

²⁸⁰ See Homer SITC at 997:21-25; HP Ex. 127 (Bankruptcy Schedules), *supra* note 220, at SC00095; Lightfoot 5th Cir. at 436, 448; Porteous 5th Cir. at 85–87 (acknowledging in his Fifth Circuit testimony the existence of his Fidelity money market account, and acknowledging that it was omitted from his Schedule B).

²⁸¹ Counsel misconstrues the significance of this omission, and the collective falsehoods, in his opening statement: “[Judge Porteous] had \$283.42 [in that account]. So let’s round it upwards, shall we? Let’s say it’s \$300. Is that going to be relied on for the removal of a federal judge after 16 years of service?” See Turley SITC Opening Statement at 103:13-18.

c. Understated Income

Judge Porteous did not disclose his true net income. The Schedule requiring disclosure of “Current Income” listed his monthly net income as \$7,531.52 – the amount that was reflected on the pay stub Judge Porteous gave Lightfoot in the summer of 2000. That pay stub was attached to the Schedule. Judge Porteous never disclosed to Lightfoot that his judicial salary had increased in 2001 to \$7,705.51 per month (take home). Therefore, Judge Porteous understated his net income by \$173.99 a month, or \$2,087.88 annually, or over \$6,000 for the three year life of the proposed Chapter 13 Plan.²⁸²

Judge Porteous also had social security taxes withheld from his salary on a monthly basis until he reached a statutorily defined annual gross salary – referred to as the social security “wage base.” He typically reached that income level in July or August of a calendar year, at which point, he was no longer subject to social security tax withholding, and his net monthly salary would increase substantially. In the summer of 2001, Judge Porteous’s monthly net salary increased from about \$7,705 per month to about \$8,500 for the rest of the year – an amount roughly \$1,000 per month more than he reported on his bankruptcy filing, or over \$5,000 more for that year.²⁸³ Because he received salary increases in 2002 and 2003, the difference between what he had reported to the bankruptcy court in 2001 as his net salary and what he actually received after the social security withholding stopped is even more pronounced. In 2002, after

²⁸² Schedule I of the Bankruptcy Schedules, “Current Income of Individual Debtor(s),” required Judge Porteous to list his “current monthly gross wages, salary, and commissions (pro rate if not paid monthly).” See HP Ex. 127 (Bankruptcy Schedules), *supra* note 220, at SC00108-09; HP Ex. 144 (Porteous Bank One records); Lightfoot Task Force at 47.

²⁸³ See Horner SITC at 1013:21 – 1014:12; HP Ex. 451 (Porteous Bank One records for Aug.-Sept. of 2001, 2002, and 2003); Horner Task Force at 26 (testifying that from “August through December [2001], the pay that is deposited in his account every month is about \$8,500”).

the social security withholding stopped, Judge Porteous received in excess of \$8,600 per month (or over \$1,000 more per month than what he reported on his Bankruptcy Schedule). In 2003 he received in excess of \$9,000 per month after the social security withholding stopped. In total, Judge Porteous received thousands of dollars in disposable income for his own use that he never reported and that the creditors never saw.²⁸⁴

d. Schedule of Unsecured Creditors

Judge Porteous failed to disclose Grand Casino Gulfport among his unsecured creditors. As noted, Judge Porteous owed \$2,000 to the Grand Casino Gulfport on March 28, 2001. The markers he had outstanding did not clear Judge Porteous's account until April 5-6, 2001. Though he listed numerous creditors on Schedule F -- "Creditors Holding Unsecured Nonpriority Claims" -- the Grand Casino Gulfport debt was not included.²⁸⁵ For reasons already discussed, Judge Porteous sought and planned for that creditor to receive payment in full, while other creditors to whom he owed money on March 28, 2001 received only a fraction of what they were owed. Judge Porteous could not afford to be in default to any casino if he wanted to continue gambling.

²⁸⁴ See HP Ex. 451 (Porteous Bank One records for Aug.-Sept. of 2001, 2002, and 2003). Judge Porteous, through his attorney, has suggested that he paid even more than required to the trustee. Counsel for Judge Porteous stated in his opening statement: "[J]udge Porteous -- and I want to emphasize this -- paid more than he was scheduled to pay in bankruptcy. He paid more than what originally he was scheduled to pay his creditors." Turley SITC Opening Statement at 95:14-18. To the contrary, the absence of good faith reflected by Judge Porteous's receipt of thousands of dollars of income in excess of what he reported on his schedules and which were not known to the trustee or accounted for in his payment plan, is manifest. Judge Porteous's attorney asserted, in questioning Agent Horner, that the amounts at issue were "a few hundred dollars a month." See Horner SITC at 1054:11. That amount materially understates the impact of the "FICA effect."

²⁸⁵ See Horner SITC at 983:22 -- 984:16, 985:6-8, 1003:19 -- 1005; HP Ex. 127 (Bankruptcy Schedules), *supra* note 220, at Schedule F at SC00102-105; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report); House Chart 6 ("Undisclosed Creditor (Grand Casino Gulfport)").

e. Signed Declaration

At the end of Judge Porteous's Bankruptcy Schedules, he signed a "declaration under penalty of perjury by individual debtor," which stated:

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 18 sheets plus the summary page, and that they are true and correct to the best of my knowledge, information, and belief.²⁸⁶

In fact, the Schedules were not "true and correct to the best of [Judge Porteous's] knowledge, information and belief." They were false because they failed to report his pending tax refund, the true value of his Bank One checking account, the existence of his Fidelity money market account, his true net salary, and the existence of a casino as one of his creditors.

4. False Representations in the Statement of Financial Affairs*a. Undisclosed Payments to Preferred Creditors (Fleet and the Casinos) Within 90 Days of Filing for Bankruptcy*

One of the questions on the Statement of Financial Affairs (Question 3) required Judge Porteous to "[l]ist all payments on loans, installment purchases of goods or services, and other debts, aggregating more than \$600 to any creditor, made within 90 days immediately preceding the commencement of this case."²⁸⁷ The reasons for such an inquiry are obvious – to ensure that the debtor is not picking and choosing whom to pay when he knows he is going into bankruptcy, thereby paying some creditors in full while other creditors receive a fraction of what they are owed. This, of course, is exactly what Judge Porteous had done by paying Treasure Chest and Fleet in full in the weeks prior to filing for bankruptcy.

²⁸⁶ See HP Ex. 127 (Bankruptcy Schedules), *supra* note 220, at SC00111.

²⁸⁷ See HP Ex. 127 (Statement of Financial Affairs) *supra* note 220, at SC00112. The question thus seeks to inquire as to whether the debtor has favored or preferred some creditors over others, by paying some creditors in full to the detriment of others.

Relying on the information that Judge Porteous had provided, Lightfoot entered the answer: “normal installments” in response to Question 3— a term that “was intended to cover the normal installments on his two leased cars and his two home mortgages.”²⁸⁸ That answer – “normal installments” – was false, as a result of Judge Porteous’s actions in the weeks and days immediately preceding filing for bankruptcy.

First, the Schedule failed to disclose Judge Porteous’s payment to Treasure Chest. As noted, on March 2, 2001, Judge Porteous gambled at Treasure Chest and took out seven \$500 markers, for a total extension of credit of \$3,500. He repaid \$2,000 with chips on March 3, 2001, but he did not repay the balance until March 27, 2001 (the day before his Initial Petition was filed), when he made a \$1,500 cash payment to the casino – that is, he made a payment on a debt “aggregating more than \$600 to any creditor, made within 90 days immediately preceding the commencement of this case.” Repayment of the markers to Treasure Chest should have been reported but, as with all of Judge Porteous’s gambling activities, Lightfoot did not include it because he did not know about it.²⁸⁹

²⁸⁸ See HP Ex. 127 (Statement of Financial Affairs), *supra* note 220, at SC00112; Lightfoot Task Force at 48.

²⁸⁹ See HP Ex. 127 (Statement of Financial Affairs), *supra* note 220, at SC00112; HP Ex. 302 (Porteous Treasure Chest Customer Transaction Inquiry); Horner SITC at 986:18 – 988:19; Lightfoot SITC at 1090:1 – 1091:2; Lightfoot Task Force at 48); House Chart 2 (“Undisclosed Payments to Creditors within 90 Days of Bankruptcy - Treasure Chest Casino”).

Additionally, as discussed above, on February 26, 2001, Judge Porteous took out \$2,000 in markers at the Grand Casino, which were in fact outstanding as of the date he filed for bankruptcy (March 28, 2001) and were not reported on the Schedule of Unsecured Creditors. However, if Judge Porteous believed that the markers had in fact been repaid prior to filing for bankruptcy (presumably on March 27, 2001, when he deposited cash for that purpose), that payment should have been disclosed in response to Question 3 on his Statement of Financial Affairs. Again, Lightfoot was unaware of the Grand Casino Gulfport markers.

Second, Judge Porteous also failed to disclose that on March 23, 2001, he had his secretary, Rhonda Danos, pay off his wife's Fleet credit card balance of \$1,088.41.²⁹⁰

Trustee Beaulieu explained that though he could attempt to collect the preferred payments, doing so would "cost us money. I'd have to weigh the cost of going after the preferences."²⁹¹ Because it is unlikely that Beaulieu would have recovered these preferred payments, Judge Porteous has implied that his dishonesty in failing to disclose them has no significance. That argument is not defensible, nor does it excuse his not providing accurate information. The fact that Beaulieu concluded it was not worth his time to file a civil law suit on behalf of the creditors to collect the preferred payments does not render Judge Porteous's statements any less false or any less fraudulent; it just means that there was no practical remedy to cure the effect of the fraudulent misrepresentations.

b. Gambling Losses

Judge Porteous also lied in response to a specific question concerning his gambling. The Statement of Financial Affairs required Judge Porteous to "[l]ist all losses from . . . gambling

²⁹⁰ Judge Porteous's March 23, 2001 payment to Fleet (by way of the Danos check) was credited by Fleet on March 29, 2001. Because this check was not received by Fleet until the day after Judge Porteous initially filed for bankruptcy, Judge Porteous could claim that the payment to Fleet was not in fact made within the 90 days preceding his bankruptcy filing, and thus it was not required to be reported on the Statement of Financial Affairs. However, if this were the case, then Judge Porteous should have listed Fleet as an unsecured creditor, which he did not. See HP Ex. 127 (Bankruptcy Schedules and Statement of Financial Affairs), *supra* note 220, at Schedule F at SC00102-105 and at Statement of Financial Affairs at SC00112; HP Ex. 140 (Fleet credit card statements); HP Ex. 329 (Fleet credit card statement and check written by Danos); Horner SITC at 993:25 – 994:17; House Chart 1 ("Undisclosed Payments to Creditors within 90 Days of Bankruptcy - Fleet Credit Card").

²⁹¹ Beaulieu SITC 1549:24 – 1550:1. Judge Keir testified that if Judge Porteous had disclosed the preferred payments to creditors on his Statement of Financial Affairs, he would have run the risk that the trustee would have sought to void those transfers and bring those payments back into the bankruptcy estate. The casinos would thus be treated the same as other unsecured creditors, and would have received less than full payment on the markers. See Keir Task Force at 71–72.

within one year immediately preceding the commencement of this case or since the commencement of this case.” In response, the box for “none” was checked.²⁹² However, an analysis by the FBI of Judge Porteous’s gambling activities reflecting his “rated play” in the year prior to his bankruptcy filing revealed that Judge Porteous had gross losses of \$12,700 and net losses of \$6,233.20.²⁹³

During his Fifth Circuit testimony, Judge Porteous admitted that his response of “none” to the question concerning gambling losses was incorrect:

- Q. Judge Porteous, do you recall that in the - that your gambling losses exceeded \$12,700 during the preceding year?
- A. I was not aware of it at the time, but now I see your documentation and that - and that’s what it reflects.
- Q. So you - you don’t dispute that?
- A. I don’t dispute that.
- Q. Therefore, the answer “no” was incorrect, correct?
- A. Apparently, yes.
- Q. Even though this was signed under oath, under penalty of perjury, correct?
- A. Right.²⁹⁴

²⁹² See HP Ex. 127 (Statement of Financial Affairs), *supra* note 220, at SC00113.

²⁹³ See Horner SITC at 1000:1-14, 1001:5-12; HP Ex. 337 (FBI Gaming Losses Chart).

²⁹⁴ Porteous 5th Cir. at 99. There is no significance to the “net”/“gross” distinction in any event. The question calls for disclosure of “all losses.” As Senator Risch observed, in questioning Agent Horner:

You know, it seems to me, as I read that, that there’s good reasons why that question is asked on the bankruptcy form, and it seems to me that they don’t ask about a net gain or loss, it just says have they had losses. So if he won and he lost, regardless of what the net result is, the answer to that question should have been yes.

Horner SITC at 1066:3-11.

Though the “gambling” question would not necessarily result in additional money to Judge Porteous’s creditors, a truthful answer to the question would have put the creditors and the court on notice of activities that could threaten the bankruptcy plan. As Lightfoot testified, that question “prompts many other questions for a trustee to ask in the examination of the case.”²⁹⁵

c. Declaration

At the end of his Statement of Financial Affairs, Judge Porteous signed a declaration which stated:

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.²⁹⁶

Again, Judge Porteous’s answers were not “true and correct.” Judge Porteous concealed his payments to Treasure Chest (by cash) and Fleet (through Danos), and failed to disclose his gambling losses notwithstanding questions specifically calling for that information.

H. Judge Porteous’s Post-Filing Activities and the Bankruptcy Creditors Meeting

1. Post-Filing Activities between March 28, 2001 and the Creditors Meeting on May 9, 2001

a. Beau Rivage and Repayment through Danos

Judge Porteous continued to gamble after filing for bankruptcy. On April 6, 2001 – subsequent to filing his Initial Petition (on March 28, 2001) and prior to filing his schedules and forms on April 9, 2001 – Judge Porteous gambled and incurred debt at Beau Rivage Casino.

Judge Porteous repaid the Beau Rivage debt by withdrawing funds from his IRA (in the form of a check), endorsing that IRA check to Danos and having her write a check to the casino. By repaying Beau Rivage in this matter, the payment to Beau Rivage avoided Judge Porteous’s

²⁹⁵ Lightfoot SITC at 1092:3-4. Judge Porteous would have well understood that the bankruptcy court and his attorney would have focused on gambling in the context of approving his Chapter 13 plan.

²⁹⁶ See HP Ex. 127 (Statement of Financial Affairs), *supra* note 220, at SC00116.

accounts altogether. This conduct further evidences his intent to hide gambling debts and is consistent with his behavior prior to filing for bankruptcy. Even if there were only a remote chance that the creditors would seek to review his accounts, by this activity, Judge Porteous made sure that neither his disclosed Bank One account nor his undisclosed Fidelity money market account reflected any payments to Grand Casino in this time frame.²⁹⁷

b. Treasure Chest and Harrah's

Judge Porteous continued to take out credit and incur debt after he filed his bankruptcy forms on April 9, 2001, and prior to the creditors meeting on May 9, 2001.

On April 10, 2001, the day after Judge Porteous filed his forms and schedules with the bankruptcy court, Judge Porteous took out \$2,000 in markers at the Treasure Chest Casino. He paid all the markers back the same day in chips.²⁹⁸

On April 30, 2001, Judge Porteous submitted a casino credit application to Harrah's Casino and requested a \$4,000 credit limit. This application lists "\$0" for indebtedness. Judge Porteous signed the application.²⁹⁹ On that same day, Judge Porteous took out \$1,000 in

²⁹⁷ The sequence of events associated with this Beau Rivage debt is as follows: (1) On April 6, 2001, Judge Porteous requested a one-time credit increase at the Beau Rivage Casino from \$2,500 to \$4,000; (2) On April 7-8, 2001, Judge Porteous took out \$2,000 in markers at the Beau Rivage Casino. He left the casino owing \$1,000; (3) On approximately April 30, 2001, Judge Porteous withdrew \$1,000 from his IRA, which was paid to him in the form of a check. He endorsed the check directly to Danos, and she deposited it into her personal bank account on May 1, 2001; (4) On April 30, 2001, Danos wrote a check payable to the Beau Rivage in the amount of \$1,000. The memo line of that check referenced Judge Porteous. That payment was credited against Judge Porteous's Beau Rivage account on May 4, 2001. See HP Ex. 303 (Beau Rivage Credit History); HP Ex. 304 (Beau Rivage Balance Activity); HP Ex. 382 (records related to \$1,000 Beau Rivage payment); House Chart 11 ("Judge Porteous's Use of Secretary Danos to Pay His Casino Debts in April 2001").

²⁹⁸ See HP Ex. 305 (Treasure Chest Customer Transaction Inquiry).

²⁹⁹ See Horner SITC at 1007:15 – 1008:5; HP Ex. 149 (Harrah's Casino Credit Application); HP Ex. 326 (Central Credit, Inc. Gaming Report for Judge Porteous).

markers at Harrah's Casino and wrote a check to pay these markers. Harrah's held the check for 30 days before depositing it, so the markers were not repaid until May 30, 2001.³⁰⁰

On May 7, 2001 Judge Porteous took out \$4,000 in markers at the Treasure Chest Casino. He left the casino owing this amount and repaid the \$4,000 two days later, on May 9, 2001 – the same day as the Creditors Meeting – in cash.³⁰¹

2. Bankruptcy Creditors Meeting

On May 9, 2001, the Section 341 Creditors Meeting was held in Judge Porteous's bankruptcy case.³⁰² Bankruptcy trustee Beaulieu presided over the hearing, which was attended by Judge Porteous and attorney Lightfoot. As to incurring debt going forward, Judge Porteous was provided with a copy of a pamphlet entitled "Your Rights and Responsibilities in Chapter 13." During his testimony before the Fifth Circuit Special Committee, Judge Porteous acknowledged receiving the pamphlet from the bankruptcy trustee. Section 6 of this pamphlet discussed credit while in Chapter 13 and specifically provided:

You may not borrow money or buy anything on credit while in Chapter 13 without permission from the bankruptcy Court. This includes the use of credit cards or charge accounts of any kind. If you or a family member you support buys something on credit without Court approval, the Court could order the goods returned.³⁰³

³⁰⁰ See HP Ex. 306 (Harrah's Patron Credit Activity).

³⁰¹ See HP Ex. 307 (Treasure Chest Customer Transaction Inquiry).

³⁰² See HP Ex. 129 (*In the Matter of Porteous*, Case No. 01-12363, Trustee's Memo to Record (Bankr. E.D. La. May 9, 2001)); Lightfoot Task Force at 49. See also 11 U.S.C. § 341 (2003). A Section 341 Creditors Meeting is a statutorily mandated meeting of creditors and equity security holders that is held by the bankruptcy trustee. The purpose of a Section 341 Creditors Meeting is to permit examination of the debtor under oath regarding his petition and bankruptcy schedules.

³⁰³ See HP Ex. 130 (Creditors Meeting Hearing Transcript); HP Ex. 148 (Chapter 13 "Rights & Responsibilities" Pamphlet); Porteous 5th Cir. at 60.

Judge Porteous was thereafter placed under oath and asked if everything in his bankruptcy filing was true and correct. Judge Porteous stated, "yes." Judge Porteous was also specifically asked if he listed all of his assets in his bankruptcy filing, and again he answered "yes." He also affirmed that his take home pay was "about \$7,500 a month."³⁰⁴

Bankruptcy Trustee Beaulieu made it clear to Judge Porteous that he was no longer allowed to incur any new debt or to buy anything on credit. Specifically, the trustee told Judge Porteous that he was "on a cash basis now."

Judge Porteous did not disclose at the hearing that between the time of filing for bankruptcy and the date of the Creditors Meeting, he had incurred additional debt (some of which he had paid through Danos) by taking out markers at casinos. Nor did he disclose that he had increased a credit line at a casino, concealed a credit card in his bankruptcy filing, or that he had outstanding markers owed to Harrah's Casino on the date of the meeting.³⁰⁵

Between the Creditors Meeting on May 9, 2001 and the date the Confirmation Order was signed on June 28, 2001, Judge Porteous continued to gamble, take out casino markers, and incur new debt.³⁰⁶

³⁰⁴ See HP Ex. 130 (*In the Matter of Porteous*, Case No. 01-12363, Creditors Meeting Hearing Transcript (Bankr. E.D. La. May 9, 2001) at SC00595-96)).

³⁰⁵ *Id.* at SC00598. As it turned out, the Creditors Meeting was perfunctory, and Judge Porteous's concerns that creditors or the trustee would seek to examine his bank statements were unnecessary. Nonetheless, Judge Porteous's repayment of casino debts by running IRA payments through Danos's accounts, or his various cash payments to the casinos prior to filing for bankruptcy, reflect the care he exercised to hide his gambling from the Bankruptcy Court and creditors.

³⁰⁶ These activities included: (1) On May 16, 2001, Judge Porteous took out a \$500 marker at the Treasure Chest Casino. He repaid the marker the same day in chips; (2) On May 26-27, 2001, Judge Porteous took out \$1,000 in markers at the Grand Casino Gulfport. He paid back \$900 on May 27, 2001 and paid back the remaining \$100 on June 5, 2001; and (3) On June 20, 2001, Judge Porteous took out a \$500 marker at the Treasure Chest Casino. He repaid the marker the same day in chips. See HP Ex. 308 (Treasure Chest Customer Transaction Inquiry);

I. The June 28, 2001 Confirmation of Judge Porteous's Bankruptcy Plan, and Judge Porteous's Subsequent Violations of the Confirmation Order

1. The Order's Prohibition Against Judge Porteous Incurring New Debt

On June 28, 2001, U.S. Bankruptcy Judge William Greendyke signed an Order Confirming the Debtor's Plan and Related Orders (the "Confirmation Order").

If Judge Greendyke had known of Judge Porteous's previously described actions in connection with his bankruptcy filing, Judge Greendyke would not have signed the Confirmation Order, and "would probably have sua sponte objected on the basis of lack of good faith."³⁰⁷

Among its terms, the Confirmation Order prohibited Judge Porteous from incurring new debt without the permission of the trustee:

The debtor(s) shall not incur additional debt during the term of this Plan except upon written approval of the Trustee. Failure to obtain such approval may cause the claim for such debt to be unallowable and non-dischargeable.³⁰⁸

During his Fifth Circuit testimony, Judge Porteous testified that he understood the Confirmation Order at the time the order was entered.³⁰⁹ Judge Porteous's understanding that he needed the bankruptcy trustee's permission to incur new debt is evidenced by the fact that on at least two separate occasions he sought and received such permission.³¹⁰

HP Ex. 309 (Grand Casino Patron Transaction Request); HP Ex. 310 (Treasure Chest Customer Transaction Inquiry).

³⁰⁷ See William Greendyke 5th Circuit Special Committee Hearing Testimony ("Greendyke 5th Cir.") at 384-85. The good faith of the debtor is a confirmation requirement.

³⁰⁸ See HP Ex. 133 (*In the Matter of Porteous*, Case No. 01-12363, Confirmation Order (Bankr. E.D. La. June 28, 2001) ("Confirmation Order")).

³⁰⁹ Porteous 5th Cir. at 62.

³¹⁰ First, on December 20, 2002, the bankruptcy trustee granted Judge Porteous's request to refinance his home. And second, on January 2, 2003, the bankruptcy trustee granted Judge Porteous's request to obtain two new car leases. See Lightfoot Task Force at 49-50; HP Ex. 339 (Beaulieu letter approving home refinancing); HP Ex. 340 (Beaulieu letter approving new car leases).

2. Violations of the Confirmation Order

Judge Porteous was subject to the terms of his Chapter 13 repayment plan for three years. Notwithstanding Judge Greendyke's Confirmation Order that "[t]he debtor(s) shall not incur additional debt during the term of this Plan except upon written approval of the Trustee,"³¹¹ Judge Porteous: (1) took out 42 markers over the course of fourteen different gambling trips at four different casinos, totaling over \$33,000 in debt; (2) applied to increase his credit limit at one of those casinos and thereafter utilized his increased credit line; and (3) obtained and used a new credit card. Judge Porteous did not obtain the permission of the trustee or the bankruptcy court to engage in these activities.

a. Casino Markers

After the Confirmation Order was signed and issued, Judge Porteous continued to gamble on a regular basis and intentionally violated Judge Greendyke's Confirmation Order by incurring debt in the form of taking out casino markers without obtaining permission from the bankruptcy trustee. He obtained casino markers on his existing lines of credit at the casinos and sought an increase on one of his lines of credit.³¹²

Judge Porteous took out at least 42 markers between July 19, 2001 and July 5, 2002. The following chart summarizes Judge Porteous's gambling activity during the first year following the Confirmation Order.

³¹¹ See HP Ex. 133 (Confirmation Order), *supra* note 308.

³¹² See HP Ex. 149 (Harrah's Casino Credit Application); HP Ex. 326 (Central Credit, Inc. Gaming Report for Judge Porteous).

Date	Casino	Number of Markers	Total Dollar Amount	Repayment Date(s)
07/19/2001	Treasure Chest	1	\$500	07/19/2001
07/23/2001	Treasure Chest	1	\$1,000	07/23/2001
08/20-21/2001	Treasure Chest	8	\$8,000	08/20-21/2001 (\$5,000) 09/09/2001 (\$2,000) 09/15/2001 (\$1,000)
09/28/2001	Harrah's	2	\$2,000	10/28/2001
10/13/2001	Treasure Chest	2	\$1,000	10/13/2001
10/17-18/2001	Treasure Chest	9	\$5,900	10/17/2001 (\$1,500) 11/09/2001 (\$4,400)
10/31/2001-11/01/2001	Beau Rivage	6	\$3,000	11/01/2001
11/27/2001	Treasure Chest	2	\$2,000	11/27/2001
12/11/2001	Treasure Chest	2	\$2,000	12/11/2001
12/20/2001	Harrah's	1	\$1,000	11/09/2002
02/12/2002	Grand Casino Gulfport	1	\$1,000	02/12/2002
04/01/2002	Treasure Chest	3	\$2,500	04/01/2002
05/26/2002	Grand Casino Gulfport	1	\$1,000	05/26/2002
07/04-05/2002	Grand Casino Gulfport	3	\$2,500	07/05/2002 (\$1,200) 08/11/2002 (\$1,300)
TOTAL		42	\$33,400³¹³	

Judge Porteous has attempted to suggest that there exists some legal ambiguity into whether borrowing money from casinos – evidenced by the “marker” – constituted a form of

³¹³ See Horner SITC at 1009:23 – 1011:2 (identifying table); House Table 7.

debt. However, there is no ambiguity in this concept. When Judge Porteous borrowed from the casino, or took out a marker, he was then indebted to the casino for the period of time that the marker was outstanding. This is well understood by Judge Porteous's attorney, Lightfoot, bankruptcy trustee Beaulieu, and expert witness Chief Bankruptcy Judge Keir – men who have handled thousands of bankruptcy cases.

In Lightfoot's opinion, a marker was a civil debt: "I believe a marker is at least a promise to pay. Promise to pay is a claim in bankruptcy."³¹⁴ Similarly: "[A] marker, to me, they look just like a check. And as I had researched it in the past, I found that it was – the big fight was whether or not it was a check. But it certainly was a debt in my – and it is a debt in my opinion. It's a promise to pay."³¹⁵

Beaulieu testified that markers constituted indebtedness, and that Judge Porteous's taking out markers violated the confirmation order:

- Q. In your view, does a marker from a casino – is that a form of indebtedness for your purposes?
- A. Yes.
- Q. Now, you know the order that was filed by judge -- was signed by Judge Greendyke said that the debtor is not allowed to incur any new debt without the written permission of the trustee. Do you recall that?
- A. Yes, sir.
- Q. And the evidence is undisputed that in the year following the filing of the petition, and I believe after the order was entered, Judge Porteous, I believe the number – signed up for 42 markers amounting to roughly

³¹⁴ Lightfoot SITC at 1077:16 –1078:4.

³¹⁵ *Id.* at 1179:3-24. *See also* Lightfoot Task Force at 53 ("I have had some cases involving gambling, people who had markers, and, of course, they are a civil liability. It is a debt like any other debt in that sense. So it has to be listed. I would have listed and do list anybody who has a casino-type debt."); *id.* at 64 ("Mr. GOODLATTE. And is there any question in your mind that a marker is a form of indebtedness? Mr. LIGHTFOOT. No doubt at all.")

\$30,000. I could be off in my numbers. But should that have been – first of all, did that violate the order?

A. In my opinion, it does.³¹⁶

Henry Hildebrand, a bankruptcy trustee called as an expert by Judge Porteous, and who has handled 150,000 cases, also testified that Judge Porteous's taking out gambling markers violated Judge Greendyke's Order.³¹⁷

Finally, it is clear that Judge Porteous understood that borrowing from casinos – or taking out markers – constituted a form of debt. Judge Porteous accepted the following definition of a marker in his testimony before the Fifth Circuit Hearing:

A marker is a form of credit extended by a gambling establishment, such as a casino, that enables the customer to borrow money from the casino. The marker acts as the customer's check or draft to be drawn upon the customer's account at a financial institution. Should the customer not repay his or her debt to the casino, the marker authorizes the casino to present it to the financial institution or bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time.³¹⁸

In addition, Judge Porteous's actions immediately preceding his bankruptcy, where he sought to repay his casino markers prior to filing for bankruptcy, make it clear that he understood the markers constituted reportable debt. Thus, notwithstanding Judge Porteous's experts, who sought to cast doubt on the proposition that taking out markers equates with taking out debt, the evidence is uncontested that Judge Porteous understood that a marker was debt for purposes of complying with the confirmation order.

The fact that Judge Porteous violated the confirmation order in taking out other debt by obtaining and using a credit card, as discussed in the next section, confirms Judge Porteous's

³¹⁶ Beaulieu SITC at 1540:22 – 1541:15.

³¹⁷ Hildebrand SITC at 1846:18-22, 1885:13-15.

³¹⁸ See Porteous 5th Cir. at 64–65.

willingness to violate the Confirmation Order. The fact that some of the markers were repaid the same day is not relevant to the conclusion that they constituted prohibited debt at the moment Judge Porteous received the chips for markers. As Chief Bankruptcy Judge Keir explained:

“When the casino pushes the markers across the counter to the gambler, who doesn’t immediately pay for them, but will pay for them, the gambler is now obligated to pay the casino for the value of the markers. That’s when the debt arises. That is debt, and all debts are covered by the order.”³¹⁹

Finally, Judge Porteous’s handling of these debts again explains why he did not disclose the Fidelity money market account. To make his November 9, 2001 payment of \$4,400 to the Treasure Chest Casino, Judge Porteous withdrew \$1,760 from his IRA, which he deposited into his Fidelity money market account, and he then wrote a check for \$1,800, payable to the Treasure Chest Casino, drawn on his Fidelity account. (Judge Porteous repaid the remaining \$2,600 on November 9, 2001 in cash.)³²⁰

Similarly, to make the August 11, 2002 payment of \$1,300 to the Grand Casino Gulfport, Judge Porteous once again used his undisclosed Fidelity money market account. He wrote a

³¹⁹ Keir SITC at 1995:3-8. *See also id.* at 1194:17 – 1195:22; Keir Task Force at 79 (“The debt is incurred when the marker is taken. That is when the debt arises. You owe the money. And it is the incurrence of the debt that was prohibited by the order.”).

³²⁰ *See* Homer SITC at 1011:11-23; HP Ex. 316 (Treasure Chest Casino Customer Transaction Inquiry); HP Ex. 530 (IRA and Fidelity records showing \$1,760 withdrawal from IRA and \$1,800 check written out of Fidelity to the Treasure Chest Casino); House Chart 19 (“Judge Porteous’s Use of Undisclosed Fidelity Account in Bankruptcy to Pay Casino Debts”) (referred to as “Chart 18” in the SITC transcript). In addition, Judge Porteous used the undisclosed Fidelity account to accumulate cash outside of his disclosed Bank One account. By May of 2002, Judge Porteous accumulated a balance of \$8760.37 in the Fidelity account, while the balance in the Bank One account was \$1120.91. In June of 2002, his Fidelity balance was in excess of \$7,843.37, and his Bank One balance was \$857. *See* Homer SITC 1016:1-14; House Chart 18 (“Judge Porteous’s Use of Undisclosed Fidelity Account to Accumulate Cash Outside of Disclosed Bank One Checking Account”).

check to the Grand Casino on July 26, 2002 for \$1,300 drawn on the undisclosed Fidelity account, which cleared the casino on August 11, 2002.³²¹

b. Judge Porteous's Application For, and Use of, a New Credit Card

On August 13, 2001 – less than two months after Judge Greendyke's Confirmation Order was entered – Judge Porteous applied for a new Capital One credit card, without seeking the approval of the bankruptcy trustee. The credit card carried a \$200 credit line. Judge Porteous began using it immediately for dining out, clothing purchases, theater tickets, gasoline, and groceries, among other things. In May 2002, Judge Porteous's credit line was increased to \$400, and in November 2002, it was increased again to \$600.³²²

When Judge Porteous obtained and used this new Capital One credit card without permission from the Trustee, he violated Judge Greendyke's Confirmation Order.³²³

c. Taking Out an Additional Line of Credit

On July 4, 2002, Judge Porteous succeeded in increasing his credit limit at the Grand Casino Gulfport from \$2,000 to \$2,500. Immediately thereafter, Judge Porteous gambled at the casino and took out \$2,500 in markers.³²⁴

³²¹ See Homer SITC at 1011:24 – 1012:5; HP Ex. 325 (Grand Casino Patron Transaction Report); HP Ex. 530 (Fidelity check written by Judge Porteous to the Grand Casino for \$1,300); House Chart 19 ("Judge Porteous's use of Undisclosed Fidelity Account in Bankruptcy to Pay Casino Debts") (referred to as "Chart 18" in the SITC transcript).

³²² See Homer SITC at 1008:23 – 1009:14; HP Ex. 341(a) (Capital One Credit Application); HP Ex. 341(b) (Capital One Statements).

³²³ See Keir SITC at 1196:16 – 1197:7; Hildebrand SITC at 1885:16-20.

³²⁴ See HP Ex. 324 (Grand Casino Gulfport Credit Line Change Request); HP Ex. 325 (Grand Casino Gulfport Patron Transaction Report); Horner Task Force at 18 (identifying the Grand Casino Credit Line Change Request and identifying Judge Porteous's signature on the document; testifying that a casino will not increase a gambler's credit line without the gambler proactively requesting the credit line increase).

3. Lightfoot's Knowledge of Judge Porteous's Post Confirmation Order Conduct

Judge Porteous did not tell Lightfoot that he had taken out markers, applied for a new credit card, or sought credit line increases at casinos:

Q. Did Judge Porteous ever tell you that he gambled on credit from casinos after the confirmation order?

A. No.

Q. Would it have been a surprise to you that he took 14 gambling trips and signed 42 markers during the year after his confirmation?

A. I didn't know about it, so it's a surprise.³²⁵

J. Judge Porteous Should Be Convicted and Removed From Office for the Conduct Alleged in Article III

1. The Conduct Demonstrates Judge Porteous is Not Fit For Office

Judge Porteous's misconduct in connection with his Chapter 13 bankruptcy constitutes "high crimes" for which he should be convicted and removed from office. Judge Porteous's conduct demonstrates that he is not fit to hold office. He committed numerous acts of dishonesty: filing for bankruptcy under a false name; concealing his tax refund; paying off and concealing preferred creditors; and hiding accounts. The lies and false statements reflect a premeditated determination to continue gambling and to conceal gambling debts while in bankruptcy, which he did notwithstanding a court order forbidding him to do so. Moreover, his dishonest conduct consisted of more than filling out forms. Rather, he undertook a series of financial actions such as having his secretary make payments to creditors, or paying off a casino in cash the day prior to filing, that demonstrate his intent (and vigilance) to create and maintain a false picture of his financial activities before the bankruptcy court. He willfully and deliberately violated a judicial order, and the evidence demonstrated that he did so in a premeditated fashion

³²⁵ Lightfoot SITC at 1099:17-25.

– by concealing an account (Fidelity) that he could use secretly to pay gambling debts at the time he filed for bankruptcy .

His conduct was “material” in many respects. First, the amounts at issue were significant. There would have been \$300 more a month available to creditors if Judge Porteous had disclosed the tax refund, and an additional \$175 a month if he had reported accurately his true income (putting aside the greater amounts he would have received once the social security withholding stopped – amounts of which Judge Porteous certainly was aware). Plus, there was another \$4,588 that he opted to pay to certain undisclosed creditors that was, therefore, not available to his disclosed creditors. (The fact that these amounts were spread out among three creditors – Grand Casino Gulfport (\$2000), Treasure Chest (\$1500) and Fleet (\$1088) so that it was not efficient for the trustee to seek to collect these amounts from these entities – does not diminish in the slightest the fraudulent nature of Judge Porteous’s conduct.)³²⁶ Moreover, his failure to disclose material facts fundamentally distorted the bankruptcy proceeding. Judge Porteous had reason to conclude that if he were honest, he would have invited further scrutiny into his financial affairs, resulting in curbs on his gambling activity.

A fundamental requirement for obtaining bankruptcy relief is that the debtor act in “good faith.” Dishonesty in the filing of bankruptcy petitions is the antithesis of good faith. Bankruptcy Judge Greendyke has indicated that if he had known all the facts concerning Judge Porteous’s conduct, he “would probably have sua sponte objected on the basis of lack of good faith.”³²⁷ Lightfoot testified that one of the reasons he instructed Judge Porteous pre-bankruptcy to stop taking on debt was because of this “good faith” requirement: “Well, by the time someone

³²⁶ See Keir SITC at 1197:8-23. The “defense” of “no harm, no foul” is not available to one who violates a bankruptcy judge’s court order.

³²⁷ Greendyke 5th Cir. at 385.

is in a financial distress sufficient to be consulting about a bankruptcy, it is not good faith for such a person to continue making debt. So I always admonish them not to do it anymore, not to make any more credit card charges, et cetera.”³²⁸

Judge Porteous’s actions in connection with his bankruptcy proceedings “cast a cloud on the integrity of the judiciary.”³²⁹ The bankruptcy system depends on the honesty and candor of the debtors in disclosing financial information.³³⁰

Judge Keir testified to the effect on the bankruptcy system as the result of Judge Porteous’s actions:

Because Judge Porteous served as a judge, he obviously must have known what the words “under penalty of perjury” mean. And by falsely putting down information or omitting information and admittedly falsely doing it in the petition, he obviously must have known he was committing a perjurious act. And that seems to be - to go certainly to intent.

In addition, although not part of the bankruptcy code, it’s my view that these actions cast a cloud, if you will, on the integrity of the judiciary, and that public officials, whether they’re elected or appointed, have a duty to not have that kind of cloud cast on the integrity of the government.

If the public has no confidence in its courts, there aren’t enough police officers, there are not enough judges, there are not enough officials of any kind that are . . . going to keep the peace in the public and make this an orderly society. There has to be that level of confidence, and this kind of activity certainly would attack and weaken that.³³¹

³²⁸ Lightfoot Task Force at 43. *See also* Keir SITC at 1199:7-18 (“it’s a requirement under Section 1325 of the Code that a plan be proposed in good faith”); Keir Task Force at 74.

³²⁹ Keir SITC at 1198:17-23.

³³⁰ *See* Keir SITC at 1185:11-25; Hildebrand SITC at 1878:1-9, 1878:16 – 1879:8; Ronald Barliant Senate Impeachment Trial Committee Hearing Testimony at 1921:16-19.

³³¹ Keir SITC at 1198:9 – 1199:6. *See also* Keir Task Force at 72, 69-70 (explaining that “the whole system demands and depends upon the honesty of the honest but unfortunate person who seeks relief.” Individuals simply can’t just decide “that they can do whatever they want, ignoring laws, and so long as you can’t measure the particular damage of the violation, there is no violation at all. That would be chaos.”)

In short, as charged in Article III, “Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.” Federal judges oversee bankruptcy court appeals. How could any member of the public who might have a bankruptcy matter before Judge Porteous in the future have confidence in any decision he would render, knowing that the Judge himself condones filing under a false name under penalty of perjury? The simple answer is, they could not. Judge Porteous’s conduct in his bankruptcy so undermines the public trust, he cannot be allowed to remain on the bench.

2. Judge Porteous’s Conduct Constitutes a “High Crime”
Warranting Conviction and Removal from Office

Judge Porteous has argued that Article III should be dismissed because it alleges private, minor, bankruptcy misconduct for which Judge Porteous was never prosecuted. Specifically, he claims that (1) his conduct was arguably “personal” and (2) the Department of Justice concluded that his conduct did not merit prosecution. However, neither argument is relevant to whether Judge Porteous’s conduct constitutes a “high Crime” warranting conviction and removal from office.³³²

Article III clearly charges that, by his conduct in the bankruptcy proceedings, “Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the federal judiciary, and demonstrated that he is unfit for the office of federal judge.”³³³ Whether similar conduct by a private person would warrant a criminal prosecution is

³³² of The House of Representatives’ Consolidated Opposition to Judge G. Thomas Porteous, Jr.’s Five Motions to Dismiss the Articles of Impeachment at 47–52 (July 28, 2010).

³³³ See H. Res. 1031, 111th Cong., 2d Sess., at 6 (2010).

a far different issue than whether that same conduct by a federal judge on matters that touch centrally upon his duties, would warrant his removal from office.³³⁴

Judge Porteous's argument, which rests on the "private" nature of the financial misconduct, is fundamentally indistinguishable from the argument that Judge Claiborne raised and that the Senate rejected in that Impeachment trial. In that case, Articles of Impeachment against Judge Claiborne charged him with filing false tax returns. In his motion to dismiss, Judge Claiborne argued in terms that track Judge Porteous's claims here, namely, that impeachment "was designed to reach those in high places guilty of official delinquencies or maladministration" and that the charges against him were "based on alleged private misconduct, as distinguished from official misconduct."³³⁵ In its response, the House stressed that nothing in the text of the Constitution supported the private / public distinction and stated that if the Framers sought impeachment to be limited to "official" conduct, they certainly could have included such a limitation in the Constitution. Moreover, as the House explained in Claiborne, that narrow view of impeachable conduct was "offered and rejected by the Framers of the Constitution," and that the Framers "rejected, at two separate junctures, the concepts of

³³⁴ Judge Porteous further complains that Article III fails to set forth all the elements of a criminal offense. As set forth above, the Articles of Impeachment do not purport to allege violations of specific criminal laws and need not do so to sustain a conviction by the Senate.

³³⁵ See [Judge Claiborne's] Motion to Dismiss the Articles of Impeachment on the Grounds They Do Not State Impeachable Offenses at 3, *reprinted in Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate*, ("Claiborne Impeachment Report") S. Hrg. 99-812, 99th Cong., 2d Sess., at 244, 246 (1986). As to whether "non-official" conduct could constitute a basis for impeachment, Judge Claiborne further went on to argue: "[o]ffenses not immediately connected with office, such as murder, burglary, and robbery, are left to the ordinary course of judicial proceedings, while impeachment was historically limited to misconduct in office." *Id.*

professional ‘malpractice’ or ‘maladministration’ as the sole basis for the impeachment of federal officials.”³³⁶

At the oral arguments, Judge Claiborne’s counsel repeated the arguments he had made in his written motion, arguing, for example: “[O]ur position, of course, is that there is no allegation at this point in time that the behavior of Judge Claiborne in any way was related to misbehavior in his official function as a judge; it was private misbehavior. And we submit that, based on that private conduct, it is not an impeachable offense.”³³⁷ In response, House Manager Kastenmeier reiterated: “As has been pointed out, it would be absurd to conclude that a judge who had committed murder, mayhem, rape, or perhaps espionage in his private life, could not be removed from office by the U.S. Senate.”

Chairman Mathias, on behalf of the Senate Impeachment Trial Committee, denied Judge Claiborne’s motion to dismiss, ruling:

There is neither historical nor logical reason to believe that the Framers of the Constitution sought to prohibit the House from impeaching and the Senate from convicting an officer of the United States who had committed treason or bribery or any other high crime or misdemeanor which is a serious offense against the government of the United States and which indicates that the official is unfit to exercise public responsibilities, but which is an offense which is technically unrelated to the officer’s particular job responsibilities.³³⁸

³³⁶ See [The House of Representatives’] Opposition to [Judge Claiborne’s] Motion to Dismiss Articles of Impeachment for Failure to State Impeachable Offenses at 3–4, *reprinted in* Claiborne Impeachment Report, *supra* note 335, at 443–44.

³³⁷ See Proceedings of the Senate Impeachment Trial Committee [Judge Claiborne], Statement of Oscar Goodman, Esq. (counsel for Judge Claiborne) (Sept. 10, 1986), *reprinted in* Claiborne Impeachment Report, *supra* note 335, at 77.

³³⁸ See Proceedings of the Senate Impeachment Trial Committee [Judge Claiborne], Statement of Senator Mathias (Sept. 10, 1986), *reprinted in* Claiborne Impeachment Report, *supra* note 335, at 113–14.

The Senate ultimately convicted Claiborne on the tax evasion article, a verdict that resolved any question that “personal” misconduct may warrant a judge’s conviction and removal.

The Judge Walter Nixon impeachment in 1989 further illustrates the inapplicability of the private conduct versus official conduct distinction and provides additional grounds to reject Judge Porteous’s claims. In that case, Judge Nixon had attempted to persuade a local sheriff to go easy on the prosecution of one of Judge Nixon’s business associates, an individual who had provided Judge Nixon with lucrative investment opportunities. Thereafter, when investigated for bribery for having taken things of value from the business associate, Judge Nixon lied to the FBI and the Grand Jury and denied he had spoken to the Sheriff. Ultimately, Judge Nixon was impeached for lying to the FBI and committing perjury before the grand jury.

The Judge Nixon case establishes the propriety of impeachment when it is shown that a federal judge made false statements under oath and took other acts of concealment to interfere with a federal judicial proceeding, even one which had no bearing on any case in his own courtroom. Judge Porteous’s false statements and pattern of concealment in the bankruptcy case fall well within the Nixon precedent.

Similarly, the fact that Judge Porteous was never prosecuted for the bankruptcy conduct is likewise not relevant. As noted at the outset, the fundamental inquiry involves fitness for office. Whether an individual has been criminally prosecuted (let alone convicted) is wholly irrelevant to whether a given course of conduct warrants impeachment.

The essence of the argument advanced by Judge Porteous was addressed by the House in connection with the impeachment of Judge George English for a variety of acts for which he was not criminally prosecuted. The Report accompanying the Articles noted there may well be circumstances where:

[a] civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and . . . his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution.³³⁹

Under Judge Porteous's theory of constitutional interpretation, Congress can impeach only if the Department of Justice prosecutes. Aside from the fact that most of the impeachments in this country's history have not followed criminal prosecutions, there is no principled basis for Congress – either the House or Senate – to abdicate its constitutionally assigned roles associated with the exercise of the impeachment power, conflate the power to impeach with the power to prosecute, and cede that power to the Attorney General of the United States.

Indeed, the Senate has spoken clearly that the existence of a federal prosecution – even a federal criminal conviction – does not drive its consideration of whether the conduct alleged in the Articles of Impeachment warrants conviction and removal. Judge Claiborne was ultimately convicted and removed by the Senate for his conduct. The Senate acquitted on the Article which specifically charged the federal conviction as grounds for impeachment. Similarly, the Senate convicted and removed Judge Hastings, even after he was acquitted in his jury trial.

The Report accompanying the Articles of Impeachment of Judge Porteous addressed the relevance of the fact that the Department of Justice did not prosecute Judge Porteous:

First, the nature of Congress's determination whether to impeach is fundamentally different from DOJ's decision whether to prosecute. Congress does not decide guilt or innocence with reference to a criminal statute. Rather, it is for Congress to make what is in essence a "fitness for office" determination. Congress alone has the power to remove an unfit Federal judge, and conduct that renders a judge unfit may not necessarily violate a criminal statute.

Second, Congress has an independent responsibility to review the evidence and cannot rely on DOJ's assessment of what the evidence reveals. Thus, just as the

³³⁹ Impeachment of Judge George W. English, *excerpts from* Cong. Rec. (House), Mar. 25, 1926 (6283-87), *reprinted in* IMPEACHMENT, SELECTED MATERIALS, HOUSE COMM. ON THE JUDICIARY, Comm. Print (1973) at 164.

House heard the evidence involving Judge Samuel B. Kent, and before that of Judges Walter Nixon and Robert Collins, and did not rely solely on the fact that each of those judges had been criminally convicted, so it is proper for Congress to consider and review the evidence that relates to the conduct of Judge Porteous, even though some of that evidence (but not all) was considered by the Department of Justice.

* * *

Fifth, the Impeachment Task Force has . . . uncovered new evidence that simply was not considered by the Department, . . . [specifically] the Task Force and the Committee had the benefit of the Fifth Circuit hearings which expanded on the evidence available to the DOJ.

The evidence is clear that that Judge Porteous's dishonest statements and acts in his bankruptcy proceedings demonstrate that he cannot be entrusted with upholding the integrity of federal judicial proceedings, notwithstanding the Department of Justice's failure to prosecute. The evidence is clear that Judge Porteous's continued presence on the federal bench brings the federal judiciary into disrepute. The evidence is clear that Judge Porteous has demonstrated, by his contempt for federal judicial process that he is not fit to be a federal judge.

VI. ARTICLE IV

A. Introduction

In the summer of 1994, on the eve of his nomination to become a United States District Judge, Judge Porteous was engaged in two corrupt schemes. One scheme involved Robert Creely and the law firm Amato & Creely (the "curatorship scheme"), whereby Judge Porteous would assign curatorships to Creely, and the law firm would kick back approximately half the fees in cash to the judge. The other scheme was a corrupt relationship with the Marcottes and their bail bonding business whereby Judge Porteous would set bail at amounts requested by the Marcottes (to maximize their profits), and set aside or expunge the convictions of his employees, in return for favors from the Marcottes such as meals, a trip to Las Vegas, and house and car repairs.

Article IV alleges that during his background check to be a federal judge, Judge Porteous made a series of materially false statements, as follows: (1) denying under oath on his Supplemental SF-86 that there was anything “in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known;” (2) “falsely [telling] the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion,” and (3) representing under oath on a Senate Judiciary Committee Questionnaire that, to the best of his knowledge, he did “not know of any unfavorable information that may affect [his] nomination.”³⁴⁰

Article IV alleges that these statements were false because, in truth and in fact, as Judge Porteous well-knew, he had engaged in corrupt relationships with attorneys Creely and Amato, and with bail bondsman Louis Marcotte and that if the Senate became aware of this unfavorable information it would have destroyed any chance of confirmation.

B. Judge Porteous’s False Statements to the FBI

In 1994, Judge Porteous, in connection with his nomination to be a Federal judge, was the subject of an FBI background check and was required to submit to interviews, and fill out various forms and questionnaires.³⁴¹

³⁴⁰ H. Res. 1031, Art. IV.

³⁴¹ See generally HP Ex. 69(b) (FBI Background Check of Judge Porteous).

1. The Supplement to the SF-86

Judge Porteous filled out and signed a document entitled "Supplement to Standard Form 86 (SF-86)." (The "Standard Form 86" is entitled "Questionnaire for Sensitive Positions (For National Security)"). That form sets forth the following question and answer by Judge Porteous:

10S. [Question] Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details?

[Answer] NO

Judge Porteous signed that document under the following statement:

I understand that the information being provided on this supplement to the SF-86 is to be considered part of the original SF-86 dated April 27, 1994 and a false statement on this form is punishable by law.³⁴²

As part of the background check, Judge Porteous was interviewed by the FBI on July 6 and 8, 1994 about the contents of this form.

That statement was false because, in fact, he had received illegal kickbacks from Creely (and the firm Amato and Creely) and had a corrupt relationship with the Marcottes which "could be used by someone to coerce or blackmail" Judge Porteous.

2. FBI Interviews – July 6–8, 1994 and August 18, 1994

Judge Porteous, when interviewed by the FBI on July 6 and 8, 1994, was asked a series of questions designed to elicit information which might bear upon his fitness to serve as a federal judge. The FBI Agents, in their write-up of the interview, recorded Judge Porteous as stating:

PORTEOUS said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgement, or discretion.³⁴³

³⁴² *Id.* at PORT 0298.

³⁴³ See HP Ex. 69(i) (Un-redacted copy of Judge Porteous FBI interview).

In or about late July 1994, the FBI in New Orleans sent the results of its initial background investigation to FBI Headquarters in Washington D.C. After review by FBI Headquarters, further investigation was requested. In particular, FBI Headquarters directed by way of a teletype dated August 12, 1994, directed the agents to ask specific questions of various persons related to certain allegations concerning Judge Porteous's conduct in setting bonds. The agents were directed to inquire of specific persons whether Judge Porteous had received monies from an attorney to reduce bond in the "Keith Kline" case, and whether he had improperly reduced a bond for money in another case handled by a bondsman named Adam Barnett. The agents were then directed to re-interview Judge Porteous to provide him with an opportunity to address the allegations.³⁴⁴ The instructions from FBI Headquarters to the agents in New Orleans also specifically directed the agents to ask the "coercion/integrity" questions of the individuals who were to be interviewed or re-interviewed.³⁴⁵

Accordingly, Judge Porteous was interviewed a second time by the FBI on August 18, 1994, about concerns related to 1993 allegations that he had received monies from an attorney and a bail bondsman to reduce bond for Keith Kline. He was also questioned about his reduction of an unrelated bond where the bondsman was Adam Barnett.

In the August 18, 1994 interview, FBI Agent Bobby Hamil, as directed by FBI Headquarters, also asked Judge Porteous the "coercion/integrity" questions. In that interview, which Hamil memorialized in an FBI "302" on the same day, Judge Porteous stated "that he was unaware of anything in his background that might be the basis of attempted influence, pressure,

³⁴⁴ See HP Ex. 69(b) at PORT 0478-480 (FBI Background Check of Judge Porteous).

³⁴⁵ *Id.*

coercion or compromise and/or would impact negatively on his character, reputation, judgement or discretion.”³⁴⁶

Thus, on two occasions in the summer of 1994, the FBI asked Judge Porteous the “coercion/integrity” questions described above. On both occasions, Judge Porteous denied being aware of anything in his background that might be the basis of “attempted influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgement or discretion.” On both occasions, those statements were false, because at that very time, Judge Porteous was engaging in the two separate corrupt relationships that have been described.

Further, at the August 18th interview, Judge Porteous was also asked about misconduct in setting bonds (particularly whether he took bribes to reduce bond in the “Keith Kline” case) as well as his relationship with bail bondsman Adam Barnett (which, as the evidence before the SITC revealed, included corrupt aspects).³⁴⁷ Judge Porteous was thus put on specific notice in this second FBI interview that misconduct in connection with his bond-setting practices was material to the FBI (and the Executive Branch) in assessing his fitness to be nominated. Judge Porteous nonetheless falsely denied there was anything in his background that would “impact negatively on his character, reputation, judgement or discretion.”

³⁴⁶ *Id.* at PORT 0493-494.

³⁴⁷ Evidence was presented at the SITC Hearing that Judge Porteous had set bonds at Barnett’s requests, and that Barnett had paid for Judge Porteous’s car repairs. *See* Louis Marcotte SITC at 515:11-15. In addition, evidence was presented in the form of a newspaper article, *see* HP Ex. 119(z), that Barnett had used his personal residence, which had little equity, as part of the equity portion of various “split bonds” that he obtained from Judge Porteous. The article reported that Barnett used this same piece of property as security for several bonds, including two set by Judge Porteous. At his second background check interview with the FBI, Judge Porteous described Barnett as “a trusted bondsman who he had known a long time.” *See* Ex. 69(b) at PORT 0493 (Porteous Background Check Documents).

Judge Porteous was nominated to be a federal judge on August 25, 1994.³⁴⁸

3. September 6, 1994 - Senate Committee on the Judiciary Questionnaire

On September 6, 1994, Judge Porteous, in his United States Senate Committee on the Judiciary "Questionnaire for Judicial Nominees," was asked the following question and gave the following answer:

[Question] Please advise the Committee of any unfavorable information that may affect your nomination.

[Answer] To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.

The signature block in the form of an "Affidavit," reads as follows:

AFFIDAVIT

I, Gabriel Thomas Porteous, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Gretna, Louisiana, this 6 day of September, 1994.³⁴⁹

It was signed by Judge Porteous and by a notary. Again for the reasons described in connection with the Supplement to the SF-86 and the FBI interviews, Judge Porteous's answer, under oath, to the Senate, was knowingly false.

Thus, Judge Porteous's four written and oral statements were in each instance false, made with the intent to deceive, and made with intent of procuring the judicial office without disclosing material information which would have affected his obtaining the federal office.

At no time during these interviews or in filling out the questionnaires did Judge Porteous inform the FBI, the White House, or the Senate that, at the very time he was being considered for a federal judgeship, he was engaged in two on-going corrupt relationships, namely, the

³⁴⁸ See Ex. HP 9(a) (President Clinton's Nomination of Judge Porteous).

³⁴⁹ See Ex. HP 9(f) (Senate Judiciary Committee Questionnaire (Question 11 and Signature Block), at 33-34).

“curatorship scheme” with Creely and the firm of Amato & Creely, and the corrupt relationship with the Marcottes and their bail bonding business.

The questions are sufficiently precise, and Judge Porteous was well aware of his conduct that should have been disclosed in response to these questions. He cannot plausibly contend that the fact that he was assigning curatorships to the Creely and receiving a portion of fees back from his firm would not subject him to pressure or impact negatively on his character. He cannot plausibly contend that the fact that he was receiving car repairs and other things of value from a bail bondsman for whom he was routinely setting bonds as requested or setting aside convictions of employees doing his errands would not subject him to pressure or impact negatively on his character. As Professor Akhil Amar testified:

[E]veryone knows what is actually at the core of the question[s]. Are you an honest person? Are you a person of integrity? Do you have the requisites to hold a position of honor, trust, and profit? Do you have judicial integrity? That is at the core of all these questions. That is not at the periphery. And what he lied about was his gross misconduct as a judge: taking money from parties, taking money in cash envelopes, not reporting any of this to anyone. . . .³⁵⁰

In short, Judge Porteous would have understood the questions as seeking out information as to corrupt, illegal behavior or behavior which otherwise constituted an abuse of his judicial office. Furthermore, in the second of his two FBI interviews, Judge Porteous was put on explicit notice that his relationship with bondsmen was material to the consideration of his judicial appointment. Judge Porteous’s knowledge that the details of his relationship with Marcotte were material, and his concern that they be concealed, is evidenced by Judge Porteous’s efforts to learn exactly what Marcotte was asked and what he told the FBI. Finally, Judge Porteous’s

³⁵⁰ See Professor Akhil Amar House Impeachment Task Force Hearing Testimony at 34–35; see also Professor Calvin Mackenzie Senate Impeachment Trial Committee Hearing Testimony at 2039:6 – 2040:4 (kickbacks to attorneys should have been disclosed in response to the catchall questions).

understanding of the materiality of that relationship, and his intent to conceal it, is further evidenced by his set-aside of the Wallace conviction, and by his timing of that set aside, discussed in Section E below.

C. The Louis Marcotte Interviews

Notably, both Louis Marcotte and Robert Creely – Judge Porteous’s confederates in the two corrupt schemes – each made false statements to the FBI on Judge Porteous’s behalf.

On August 1, 1994, Louis Marcotte was interviewed by the FBI. That interview is discussed in detail as part of the evidence associated with Article II.³⁵¹ In substance, Louis Marcotte – on behalf of Judge Porteous – lied to the FBI when interviewed on August 1, as to his knowledge of Judge Porteous’s financial circumstances, his alcohol usage, and in response to the general “integrity” questions. Soon after that interview, Louis Marcotte informed Judge Porteous the substance of the interview and told that Judge Porteous that he (Marcotte) had given Judge Porteous a “clean bill of health.”³⁵² Thus, at the time Judge Porteous was re-interviewed by the FBI on August 18, and at the time he signed his Senate Judiciary Committee Questionnaire on September 6, Judge Porteous could confidently conceal his corrupt relationship with Louis Marcotte from the FBI, because he knew that Louis Marcotte had also misled the FBI.³⁵³

³⁵¹ See Section IV.

³⁵² See Louis Marcotte SITC at 583:21-24; Louis Marcotte Task Force at 64.

³⁵³ Judge Porteous, through counsel, has completely mischaracterized one aspect of the allegations set forth in Article IV. Included in that Article is the allegation: “As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench.” Judge Porteous has characterized this factual allegation as follows: “[T]he House specifically impeached Judge Porteous on the failure to mention a brief conversation he had with Louis Marcotte. . . . Now, the House Managers have said that the judge should be impeached because he failed to mention this conversation when he filled out these forms, when he filled out the

D. The Robert Creely Interview

On August 1, 1994, Robert Creely was interviewed by the FBI as part of Judge Porteous's background check. In that interview, Creely stated that he "knows of no financial problems on the part of the candidate, and the candidate appears to live within his economic means."³⁵⁴

background form, for example. The only problem [is that] the conversation occurred after the forms were filled out. It was impossible for him to put into these documents a conversation that hadn't occurred yet." Turley SITC Opening Statement at 108:19 – 109:10.

This argument on behalf of Judge Porteous is fatally flawed because Judge Porteous's counsel has his facts wrong.

Even the most superficial reading of Article IV makes it clear that it does not allege that Judge Porteous "fail[ed] to mention a brief conversation he had with Louis Marcotte." Judge Porteous's counsel is simply mischaracterizing what Article IV alleges in order to make a false and misleading argument.

Second, Judge Porteous's counsel is incorrect about the sequence of events concerning Marcotte's interview with the FBI and when Judge Porteous signed the Senate Judiciary Committee Questionnaire. Marcotte was interviewed by the FBI on August 1, 1994 at which time he lied on behalf of Judge Porteous, giving him a "clean bill of health." Shortly thereafter Marcotte informed Judge Porteous that he lied to the FBI on Judge Porteous's behalf. Accordingly, by the time Judge Porteous was re-interviewed by the FBI on August 18, he was aware that Marcotte had lied to the FBI in an effort to help him. Moreover, Judge Porteous signed his Senate Judiciary Committee Questionnaire on September 6, 1994, long after he was aware Marcotte had lied on his behalf. Once again he let Marcotte's lies stand uncorrected in answering the Questionnaire under oath.

Ultimately, this entire argument on behalf of Porteous is a total red herring. Article IV sets out four instances when Judge Porteous lied in order to get his cherished "lifetime appointment." These lies encompass corrupt relationships with lawyers and bail bondsmen which should have been revealed in response to the questions posed. Judge Porteous repeatedly lied because he knew that the truth was the death knell for his ambitions. The only way he could obtain the position was to lie to the Senate. The mischaracterization of Article IV is a transparent effort to avoid the consequences of Judge Porteous's repeated lies about facts that would have ended his opportunity to get his "lifetime appointment."

³⁵⁴ See HP Ex. 69(b) (Porteous Background Documents at PORT 0476-477).

Creely's statement that he "[knew] of no financial problems of Judge Porteous" was false, as Creely knew Judge Porteous had significant financial problems. As he testified before the SITC: "[N]o, he was not living within his means."³⁵⁵

On the same day of Creely's interview, Judge Porteous assigned a curatorship to Creely and continued to assign curatorships – perpetuating the corrupt scheme – through his confirmation and swearing in.³⁵⁶

E. The Aubrey Wallace Set Aside

1. The Facts

At around the time of Judge Porteous's nomination, Louis Marcotte made several requests of him to set aside Aubry Wallace's conviction.³⁵⁷ Judge Porteous agreed to do it, but informed Marcotte that he would do so only after he was confirmed, because he did not want to jeopardize his "lifetime appointment." Marcotte testified:

Q And do you recall Judge Porteous's response [to Marcotte's request to set aside Wallace's conviction]?

A He kind of put me off and put me off. And he said look, Louis, I'm not going to let anything stand in the way of me being confirmed and my lifetime appointment, so after that's done I will do it.³⁵⁸

Senator McCaskill specifically inquired as to whether the "lifetime appointment" phrase was Louis Marcotte's or Judge Porteous's:

³⁵⁵ See Creely SITC at 277:19 – 280:9

³⁵⁶ See HP Ex. 189(224) (curatorship assigned by Judge Porteous to Creely on August 1, 1994); HP Ex. 189(225) (August 9, 1994); HP Ex. 189(226) (August 18, 1994); HP Ex. 189(219) (August 29, 1994); HP Ex. 189(223) (Sep 13, 1994); HP Ex. 189(222) (Sep. 21, 1994).

³⁵⁷ Aspects of the Wallace set-aside are discussed in Section IV.

³⁵⁸ Louis Marcotte SITC at 536:9-12 (emphasis added).

Q. [Sen. McCaskill] [W]as that particular phrase, “his lifetime appointment,” was that the words of Judge Porteous or was that something you supplied in terms of the context?

A. That was the words of Judge Porteous.

Q. And did Judge Porteous use the word “lifetime appointment” whenever he referred to his appointment to the federal bench?

A. Yes, he does.³⁵⁹

Louis Marcotte has consistently described the events surrounding the Wallace set aside – to the FBI in 2004, and later to the House and Senate – including Judge Porteous’s statement that he would wait until after he was confirmed to set aside the conviction so that it would not jeopardize his “lifetime appointment.”

For example, in his Task Force Testimony, Louis Marcotte described the conversations he had with Judge Porteous concerning Wallace’s set aside as follows:

Mr. SCHIFF. Can you tell us a little bit about the conversations you had with him where he indicated that he was concerned with confirmation if they found out about this or if the newspapers made it public?

Mr. MARCOTTE. Yeah. He just didn’t want to make himself- he was worried about the confirmation, but he was trying to- he didn’t want anything to come up that would, you know, cause him a problem from being confirmed.

Mr. SCHIFF. And can you tell us what his words were, as best you can recall, how he expressed to you his concern that things might become public?

Mr. MARCOTTE. He said, “Louis, I am not going to let Wallace get in the way of me of becoming a Federal judge and getting appointed for the rest of his life to set aside his conviction. Wait until it happens, and then I’ll do it.”³⁶⁰

³⁵⁹ Louis Marcotte SITC at 607:16-23.

³⁶⁰ Louis Marcotte Task Force at 60 (emphasis added). *See also* Louis Marcotte Sen. Dep. at 143:23 – 145:12 (adopting 2004 statement to the FBI that Judge Porteous “was not going to risk a lifetime judicial appointment for Wallace”).

Further, in both his SITC testimony as well as in his House testimony, Louis Marcotte specifically mentioned that Judge Porteous stated he was concerned about the press finding out about the set-aside.³⁶¹

Judge Porteous's actions corroborate Marcotte's recollection of the conversation, and reflect Judge Porteous carrying out his expressed intent to set aside the conviction only after his confirmation.

There was no reason for Judge Porteous to wait until after his confirmation to set aside the conviction. As a procedural matter, it was necessary for Judge Porteous first to amend the sentence prior to setting it aside. This step was put in motion when, on September 20, 1994, Robert Rees, on behalf of Wallace, filed a "Motion to Amend Sentence."³⁶² On September 21,

³⁶¹ In his SITC testimony, Marcotte mentioned that Judge Porteous had a concern that the set-aside "would come out in the newspaper." Louis Marcotte SITC at 536:22-23. Marcotte testified similarly, and provided further detail, in his House Task Force testimony:

Mr. SCHIFF. You mentioned that, with respect to Mr. Wallace, that Judge Porteous expressed a reservation about setting aside the conviction until his confirmation took place. Can you tell us a little bit about that conversation? You said you had to press him. Did he tell you why he was concerned it would affect his confirmation?

Mr. MARCOTTE. Because if anyone—if the newspaper grabbed hold of it, then he would be worried that it would interfere with him being—his confirmation.

Mr. SCHIFF. So he was aware that this was something that——

Mr. MARCOTTE. Probably wasn't kosher.

Mr. SCHIFF. And, for that reason, the Senate might not confirm him if he knew that he was setting aside a conviction as a favor to you?

Mr. MARCOTTE. Yes, sir.

Louis Marcotte Task Force at 59.

³⁶² See HP Ex. 82 (*Louisiana v. Aubrey N. Wallace*, No. 89-2360, Motion to Amend Sentence (24th Jud. Dist Ct., Jeff. Par., La. Sep. 20, 1994)).

1994, Judge Porteous held a hearing and amended Wallace's sentence to permit the conviction be set aside.³⁶³ Judge Porteous entered the order amending sentence orally at the hearing, and the following day entered a written order.³⁶⁴ As of September 21, 1994, after having amended the sentence, there was nothing to prevent Judge Porteous from setting aside the conviction at that time. However, consistent with his previously expressed intent to hide his actions, Judge Porteous chose to wait, for he had not yet been confirmed.³⁶⁵

Judge Porteous was confirmed by the Senate on October 7, 1994.³⁶⁶ Thereafter, on October 14, 1994, Judge Porteous held an unnoticed hearing at which he orally set aside Wallace's conviction. He entered a written order to the same effect on that day.³⁶⁷

Absolutely nothing in Wallace's case occurred between September 21, 1994 (when Judge Porteous amended the sentence) and October 14, 1994 (when he set it aside) that explains the delay. The only event of significance that explains the timing is that Judge Porteous was confirmed in the interim. As Judge Porteous made clear to Marcotte, he was going to set aside

³⁶³ As described in the discussion of the facts associated with Article II, the set aside had a variety of legal infirmities. The discussion in this Section addresses the significance of the set-aside as reflecting Judge Porteous's intent, and does not otherwise address its legal merits.

³⁶⁴ See HP Ex. 69(d) (*State of Louisiana v. Aubrey Wallace*, No. 89-2360, Transcript of Proceedings at PORT 0620-624 (24th Judicial Dist. Ct., Jeff. Par. Sept. 21, 1994)); HP Ex. 82 (*Louisiana v. Aubrey N. Wallace*, No. 89-2360, Order (amending sentence) (24th Jud. Dist Ct., Jeff. Par., La. Sep. 22, 1994)).

³⁶⁵ See Rees SITC t 1986:8 –1987-6.

³⁶⁶ See HP Ex. 9(c) (Congressional Record Reflecting Senate Confirmation of Judge Porteous).

³⁶⁷ See HP Ex. 69(d) (*State of Louisiana v. Aubrey N. Wallace*, No. 89-2360, Transcript of Proceedings at PORT 0625-629 (24th Jud Dist. Ct., Jeff. Par., La. Oct. 14, 1994); HP Ex. 82 (*State of Louisiana v. Aubrey N. Wallace*, No. 89-2360, Order (setting aside arrest and dismissing charges) (24th Jud. Dist Ct., Jeff. Par., La. Oct. 14, 1994)).

the conviction only after his Senate confirmation so as not to jeopardize his confirmation to his “lifetime appointment,” and that’s exactly what he did.

2. The Significance of the Set-Aside

The facts associated with the set-aside provide powerful evidence of Judge Porteous’s wrongful intent. He explicitly expressed to Marcotte his intent to conceal material facts from the Senate, and he took actions that effectuated his expressed intent. Judge Porteous’s actions demonstrate that he knew that his relationship with Louis Marcotte was improper, material to the Senate and had to be concealed. There is no ambiguity as to Judge Porteous’s concerns and the manner in which he acted to hide his corrupt relationship.

Judge Porteous’s actions in connection with the set-aside also demonstrate that he well understood the questions he had been repeatedly asked during the background check, and the answers those questions were designed to elicit. Judge Porteous’s decision to delay the Wallace set-aside reflects his knowledge that his relationship with Marcotte was a matter in his background that would reflect negatively on his integrity – that is, that relationship was a matter that should have been properly disclosed to the FBI in response to the integrity questions that the FBI posed to him. Similarly, Judge Porteous’s willingness to set aside Wallace’s conviction at Marcotte’s request constitutes proof positive that Judge Porteous was in fact subject to coercion, leverage, and compromise. In fact, Judge Porteous felt compelled to act on Louis Marcotte’s request – during the time when Louis Marcotte had leverage over him – by taking an unjustifiable judicial action arising out of their conspiratorial relationship.³⁶⁸

³⁶⁸ When pressed, Louis Marcotte acknowledged he could have “destroy[ed]” Judge Porteous – though he would not have done so. Marcotte SITC at 603:8-17.

**F. Judge Porteous Should Be Convicted and Removed
From Office for the Conduct Alleged in Article IV**

1. The Conduct Constitutes “High Crimes and Misdemeanors”

Judge Porteous’s conduct in making false statements to the FBI and the Senate in order to procure his judicial appointment established that he engaged in “high Crimes and Misdemeanors” that render him unfit to hold the office of United States District Judge. The acts of repeated dishonesty – under oath and to law enforcement agencies – demonstrate he is not fit to be a judge.

The conduct at issue is particularly significant because, in effect, Judge Porteous obtained his judicial appointment by fraud. If impeachment, conviction and removal were not permitted, then an individual who attained his judicial position by fraud would, in essence, be immune from removal – no matter what he concealed during his background check. The implications from failing to remove a judge upon proof of his dishonesty prior to his confirmation on material matters that go to the heart of judicial integrity would be to reduce and demean the Senate confirmation process to a game of hide the ball – there is no need to disclose anything that the Senate would not learn on its own, and, once confirmed, a federal judgeship is a lifetime safe harbor. While that may be the system that Judge Porteous would have the Senate adopt, it is certainly not one contemplated by the Constitution or the Senate.

Professor Gerhardt testified that “lying to or defrauding the Senate in order to be approved as a Federal judge” is serious as a stand-alone matter in that it “plainly erodes the essential, indispensable integrity without which a Federal judge is unable to do his job”³⁶⁹:

For, by defrauding the Senate in his confirmation proceedings, Judge Porteous has engaged in misconduct that is egregious and has a more than obvious connection to his present position. The nexus is that Judge Porteous deprived the Senate of

³⁶⁹ Professor Michael Gerhardt House Impeachment Task Force Hearing Testimony at 24.

information that would undoubtedly have changed the outcome in his confirmation hearing. His failure to disclose is nothing less than an attack on the integrity of the confirmation process and an affront to the constitutional responsibilities of the President and the Senate.³⁷⁰

In light of the core dishonesty reflected in the conduct in Article IV – dishonesty in the confirmation process to cover up dishonesty in his capacity as a state judge – and in light of the fact that by such dishonesty Judge Porteous perpetrated a fraud on the Senate in obtaining his judgeship, Judge Porteous should now be convicted and removed from office.

2. Judge Porteous's Arguments are Meritless

Judge Porteous mischaracterizes certain aspects of Article IV, and raises a series of complaints that are factually and legally meritless.

First, there is the suggestion that because this conduct occurred prior to Judge Porteous's taking the federal bench, it cannot constitute a basis for impeachment. This issue was fully addressed in the discussion of Article II. There is no basis for the Senate to decline to consider pre-federal bench conduct that meets the "high Crimes and Misdemeanors" standard for conviction and removal. The facts underlying Article IV illustrate precisely why pre-federal bench conduct must be considered. They demonstrate that Judge Porteous obtained his position on the federal bench by misconduct, fraud, and by concealing material facts. There is nothing in the Constitution that requires that the Senate overlook this conduct, or prevents the Senate from

³⁷⁰ See Task Force Hearing, Part IV, *supra* note 15, at 31 (written statement of Prof. Michael J. Gerhardt at 5). Similarly, as Professor Amar testified before the Task Force, after stating why pre-Federal bench "bribery" would constitute impeachable conduct:

Now what is true of bribery is equally true of fraud. A person who procures a judgeship by lying to the President and lying to the Senate has wrongly obtained his office by fraud and is surely removable via impeachment for that fraud.

Amar Task Force at 18.

removing Judge Porteous from office to remedy the fraud he perpetrated to obtain nomination and confirmation.

Second, Judge Porteous has suggested that the questions at issue seek solely for Judge Porteous to disclose “embarrassing information.” Thus, Judge Porteous’s attorney characterized the questions at issue in Article IV as akin to the following: “Did Judge Porteous failure [sic] to disclose information that he, Judge Porteous, thought would be embarrassing to President Clinton?”³⁷¹

This characterization of Article IV is simply not accurate. Only one of the four questions specified in Article IV asked anything about “embarrassing” information. That question was on the Supplement to the SF-86, which asked the following: “Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details?” Judge Porteous’s answer “NO” applied in equal terms to both the “coercion/blackmail” as well as the “embarrassment to the President” parts of that question. None of the other three questions specified in Article IV request that Judge Porteous disclose “embarrassing” information. In the FBI interviews, he was asked twice whether he was concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion. Then he was asked by the Senate whether there was “any unfavorable information that may affect [his] nomination.” Counsel’s attempt to characterize all four of these questions as little more than vague attempts to elicit “embarrassing” information is disingenuous and contradicted by the plain reading of the questions.

³⁷¹ Turley SITC Opening Statement at I07:25 – 108:3.

Furthermore, the questions are not vague. Judge Porteous well understood those questions and understood precisely the information that they sought he disclose. This is evidenced by his deliberate efforts, in connection with the Wallace set-aside, to conceal such information. Both the experts for the House and the defense's own experts agreed that a truthful answer to these questions requires, among other matters, the disclosure of a kickback scheme. Moreover, the defense expert's own treatise on the appointments process recommends these questions be asked of nominees in a model questionnaire.³⁷²

Judge Porteous takes issue with the purpose and efficacy of the "catch-all questions," as a general proposition. However, there are sound reasons that those questions must be asked.³⁷³ In

³⁷² G. CALVIN MACKENZIA, *INNOCENT UNTIL NOMINATED* (Brookings Institution Press 2001).

³⁷³ The "catch-all" questions serve several valid and necessary purposes: (1) They dissuade persons from seeking Office if they know that to obtain it, they will need to lie under oath to conceal material facts; (2) it is not feasible to design a questionnaire that lists every possible variety of disqualifying misconduct. *See* Mackenzie SITC at 2052:16 – 2054:23, 2077:24 – 2078:8, 2079:19-21 ("I'm not opposed to the catchall questions."); Amar Task Force at 34–35 ("[I]t would really be unfortunate if you had to ask specific questions of a green eggs and ham variety. Were you a crook in a box? Were you a crook with a fox? Were you a crook in the rain? On a train? You know, we know what those questions at their core was about, and he lied at the core. There is vagueness at the periphery, but this was really central."); and (3) they prevent an unworthy candidate from moving through the confirmation process and thereafter defending his or her failure to disclose material derogatory information because no question required its disclosure. As Senator McCaskill observed:

[I]s there any doubt in your mind that if someone skated through that process, didn't disclose information and there was no catchall question, don't you think their defense would be, "[W]ell, no one ever asked me something like that, no one ever asked me that specific question, no one – there was no specific question that addressed that?]"

See Mackenzie SITC at 2077:25 – 2078:6 (questioning by Senator McCaskill).

any event, if Judge Porteous did not like the questions, “All he has to do is say, [‘]I do not wish to be considered for this position.[’]”³⁷⁴ However, he had no license to lie.

Thus, applying all the recognized and established grounds for conviction and removal – lack of integrity, bringing disrepute to the judiciary and undermining public confidence in it – Judge Porteous’s conduct warrants conviction and removal based upon Article IV.

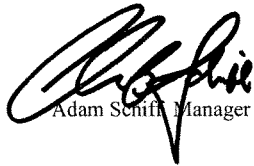
WHEREFORE, the House of Representatives requests that the Senate convict Judge G. Thomas Porteous, Jr. on each of the four Articles of Impeachment and remove him from the Office of United States District Judge for the Eastern District of Louisiana.

³⁷⁴ Amar Task Force at 32.

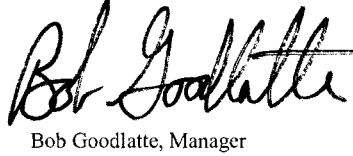
Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

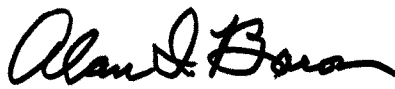
By



Adam Schiff, Manager



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Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

October 29, 2010



Daniel C. Schwartz
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November 3, 2010

VIA EMAIL

The Honorable Claire C. McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: *Impeachment of Judge G. Thomas Porteous, Jr.*

Dear Senator McCaskill and Senator Hatch:

On behalf of Judge Porteous, we write to object strenuously to certain portions of the House's post-trial memorandum and request that the Committee take immediate action to correct the House's improper use of inadmissible material, in order to prevent a result that would be both inequitable and inappropriate.

In their post-trial memorandum, the House extensively cited and relied upon the testimony of Professors Michael Gerhardt, Charles Geyh, and Akhil Amar concerning whether pre-federal conduct could be a proper grounds for impeachment. The Committee previously had ruled that this testimony, taken during hearings in the House, was inadmissible before the Senate and the parties had agreed such testimony would not be considered as evidence in this matter. Respecting this ruling and agreement, Judge Porteous did not respond to or discuss this testimony in his post-trial brief, noting instead that such testimony had been ruled inadmissible by the Committee.¹ The House, on the other hand, inserted numerous block quotes from, and spent several pages of their brief fixated on, that testimony as (dubious) support for their arguments.

This was in clear violation of those rulings by the Committee, *even while acknowledging that the very material being quoted was determined by the*

¹ See Judge G. Thomas Porteous, Jr.'s Post-Trial Brief n.4 (stating that "the defense has not referenced or discussed the testimony before the House of Professors Michael Gerhardt and Akhil Reed Amar regarding the standard of impeachment because that testimony was specifically excluded by the committee from the evidence admitted to the record.")

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 The Honorable Claire C. McCaskill, Chair
 The Honorable Orrin G. Hatch, Vice Chair

Bryan Cave LLP

Committee not to be admissible. This has caused a serious injustice to Judge Porteous.

Indeed, the House Managers and their counsel took affirmative steps to lull the Committee and Judge Porteous into believing that no further discussion or formal order on this issue was required. The House took the opportunity to insert such material into its post-trial memorandum after it became simply too late for the Committee to act before the post-trial pleadings were submitted to the full Senate. Obviously, it is not too late for the Committee to take steps to remediate such a clearly improper effort to place inadmissible materials before the full Senate.

The only appropriate remedy is to require the House to resubmit its post-trial memorandum after removing the offending references and block quotes to Professors Gerhardt, Geyh, and Amar's testimony concerning pre-federal conduct. Judge Porteous further requests that the Committee order the House Managers not to reference or cite such materials in their closing arguments before the full Senate.

Background

On September 27, 2010, the Committee Staff held a meeting with House counsel and counsel for Judge Porteous. During that meeting, counsel for the parties and Committee Staff uniformly agreed that the testimony elicited before the House of Representatives on December 15, 2009, from Professors Gerhardt, Geyh, and Amar (otherwise known as "Task Force Hearing, Part IV") should not and would not be admitted into evidence before the Senate. In fact, counsel for the House specifically withdrew their request to admit such testimony into the Senate record. The House Managers confirmed this point in their post-trial memorandum, noting that "this testimony was not admitted into evidence by the SITC." (House Post-Trial Memorandum n.202.)

House's Post-Trial Memorandum

Nonetheless, in its post-trial memorandum, the House liberally cited, block quoted, and referenced Professors Gerhardt's, Geyh's, and Amar's testimony. For examples, see the follow pages of the House Manager's post-trial memorandum:

- Pages 10 and 11 (consisting almost entirely of long block quotes from the Gerhardt and Amar testimony before the House).
- Pages 11 and 12 (citing the Geyh testimony and a letter from John Harrison to Alan Baron regarding Harrison's opinions regarding the pre-federal conduct issue).²

² This letter was never referenced during the evidentiary hearings or in meetings regarding admitted exhibits, and was not admitted into the record. Moreover, Harrison was never called as a witness before the House or the Senate and was never subjected to cross-examination. Finally, his letter has never been peer-reviewed or subjected to any academic analysis or critique. Like the

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- Pages 78 to 80 (focusing almost exclusively on the testimony provided by Professors Gerhardt, Geyh, and Amar concerning pre-federal conduct, and including several lengthy block quotes).
 - The House specifically states that this portion of their memorandum “tracks in substantial respects Section II.B of the House of Representatives’ Consolidated Opposition to Judge G. Thomas Porteous, Jr.’s Five Motions to Dismiss the Articles of Impeachment at 32-42.” (House Post-Trial Memorandum n.200.) While one might conclude that this overt cutting-and-pasting from a previous brief inadvertently caused the House to include excluded material, such a benign explanation is negated by the House’s statement in footnote 202. There, the House expressly (and unabashedly) states that “[t]his testimony was not admitted into evidence by the SITC. It nonetheless constitutes appropriate ‘legal’ materials for the Senate to consider.” (House Post-Trial Memorandum n.202.) The House provides no basis, Committee ruling, or explanation for this obtuse, self-serving conclusion.
- Page 140 (citing Amar’s testimony before the House).
- Pages 148 to 149 (citing Amar and Gerhardt’s testimony before the House and including long block quotes as alleged support for their arguments).
- Pages 151 to 152 (closing the House’s post-trial memorandum with yet additional cites to Amar’s testimony before the House Committee).

Judge Porteous’s Post-Trial Brief

With regard to pre-federal conduct as an alleged basis for impeachment, Judge Porteous relied upon published books and articles, as well as the historical record of prior impeachments. For example, Judge Porteous cited the published writings of Michael Gerhardt, the Congressional Research Service, Professor Jonathan Turley, Raoul Berger, Daniel Pollitt, and Eleanor Bushnell. He further cited statements made by United States Senators regarding their views on pre-federal conduct. The Committee had explicitly ruled that published works could be relied upon by the parties and did not require separate admission into the record. For example, a published judicial opinion could be cited by the parties, even if it were not specifically entered into evidence.

Consistently, Judge Porteous has not challenged the House’s ability to rely on such sources. In fact, the House cites to some of Gerhardt’s published pieces as well as the works of Professor Turley and Emily Field Van Tessel. The House also cites certain Senators’ statements regarding

testimony of the professors, the House should not be allowed to cite or reference this material in its post-trial memorandum.

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 The Honorable Orrin G. Hatch, Vice Chair

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pre-federal conduct. Judge Porteous is not requesting that this material be removed from the House's post-trial memorandum or that the House Managers be precluded from citing such materials in their closing arguments to the full Senate.

Ultimate Issues Are For the Senate Alone to Decide

The testimony of Professors Gerhardt, Geyh, and Amar before the House, however, is of an entirely different nature. These professors were called upon by the House Impeachment Counsel to provide their opinions regarding an ultimate issue in this matter, namely whether the House could and should impeach Judge Porteous for his allegedly improper pre-federal conduct. These witnesses clearly were called to testify before the House because their views reflected the views of House Impeachment Counsel. While other constitutional experts on impeachment, such as Professor Turley, expressed profound concerns over the basis for the Porteous impeachment to congressional staff and media before the House hearings, the House avoided calling a single academic who opposed the constitutional interpretations advanced by the House Judiciary Committee. This created an intentionally misleading record that omitted the substantial academic disagreement with the articles of impeachment and failed to inform House members of the dangers in the use of pre-federal conduct and other issues.

The inclusion of this testimony in the House's post-trial memorandum is even more cynical and misleading. Indeed, it makes a mockery of the Committee's ruling and the purpose of the Committee as a whole. The House simply has ignored the prior rulings on admissibility by the Senate Committee – and particularly its Chair and Vice-Chair – challenging the legitimacy, purpose, and value of efforts by the individual Senators and staff, through the week of hearings.

Moreover, allowing this material to be included in the final submissions to the full Senate would necessarily and improperly disadvantage Judge Porteous. In reliance on the Committee's ruling and House counsel's statements that such material should not and would not be admitted into the Senate proceedings, Judge Porteous did not respond to this testimony in his post-trial brief (even though it is filled with numerous logical flaws and assumptions). Moreover, Judge Porteous did not call his own expert witnesses to testify at trial on this subject, in compliance with the Committee's decision that such testimony would be inadmissible. Had Judge Porteous been aware that the House would ignore the Committee's ruling and its own commitments regarding the use of this testimony, however, he would have responded appropriately both in the evidentiary hearing before the Committee and in his post-trial brief. Because the taking of evidence before the Committee has been completed, however, the only way to correct this situation is for the Committee to require the House to revise its post-trial memorandum to delete the offending portions.

Accordingly, to prevent manifest injustice and to reject the House Managers' attempt to circumvent the Committee's ruling (as well as their own counsel's statements), Judge Porteous requests that the House be required to resubmit its post-trial memorandum with all references to the testimony of Professors Gerhardt, Geyh, and Amar before the House excised. Judge Porteous

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further requests that the House Managers be barred from referencing that testimony during closing arguments.

We appreciate your attention to this matter and look forward to the Committee's fair resolution of these issues.³

Sincerely yours,



Daniel C. Schwartz

³ Judge Porteous also requests that the Committee issue a final order delineating those exhibits that have been admitted into evidence before the Senate. Counsel for Judge Porteous repeatedly requested such a ruling prior to the submission of post-trial briefs out of concern that the House Managers would cite to or rely upon evidence not offered and admitted into evidence during the evidentiary hearing. As predicted and feared, the House Managers did precisely that throughout their post-trial memorandum. For example, the House Managers continually referenced former Judge Alan Green, despite the fact that he was neither discussed nor referenced during the evidentiary hearings.

Congress of the United States
Washington, DC 20515

November 5, 2010

Via Electronic Mail

The Honorable Claire McCaskill, Chair
 The Honorable Orrin G. Hatch, Vice Chair
 Senate Impeachment Trial Committee
 United States Senate
 Russell Senate Office Building, Room B-34A
 Washington, D.C. 20002

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Post-Trial Memorandum

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to respond to Judge Porteous's counsel's letter of November 3, 2010, in which he "object[s] strenuously" to the inclusion of relevant legal authority in the House's Post-Trial Memorandum. Judge Porteous's letter is riddled with factual misrepresentations that belie the actual record in this case.

First and foremost, the House properly cited to certain opinions of legal experts in support of its legal arguments. The fact that the House unilaterally did not seek to offer such expert testimony as evidence on factual issues has nothing to do with whether the House may properly cite that testimony, and whether the Senate may properly consider it, as authority on legal issues. Further, the House's decision not to offer such testimony as "evidence" cannot possibly support Judge Porteous's contention that the House agreed not to cite the materials for legal propositions. The House did not and would not have unilaterally agreed to conceal relevant legal materials from the Senate.

Moreover, the House clearly explained in its Post-Trial Memorandum that it was citing such testimony as support for its legal position, just as it cited other legal materials. The House specifically represented: "This testimony was not admitted into evidence by the SITC. It nonetheless constitutes appropriate 'legal' materials for the Senate to consider." *See* Post-Trial Memorandum of the House of Representatives ("Post-Trial Memorandum") at 79 n.202. The Senate is free to accept or reject the views of these scholars, just as it is free to accept or reject the views of the scholars cited by Judge Porteous.

Judge Porteous has provided no reasons whatsoever for the Senate to conclude that his citations to Professor Gerhardt are permissible because they come from a book, while the House's citations should be rejected because they come from Professor Gerhardt's public testimony. Such a distinction is indefensible and absurd. (The House cited to testimony

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provided by a law professor on legal issues from the Clinton Impeachment as well. *See* Post-Trial Memorandum at 9–10 n.14.)

Judge Porteous's contention that the House is prohibited from using these materials is particularly bizarre because Judge Porteous's counsel made affirmative use of the expert testimony at trial. In Judge Porteous's opening statement, counsel claimed that Article II charged "what the House's own experts said they could not do." *See* Turley SITC Opening Statement at 83. Judge Porteous's counsel similarly argued that the conduct charged in Article IV "is precisely what the House's own experts warned could not be the basis for removal." *Id.* at 111. Counsel, having baldly (and inaccurately) relied on (and mischaracterized) the testimony for his own purposes at trial, can hardly be heard to object when the House cites that testimony accurately in its Post-Trial Memorandum. Indeed, after referencing the testimony in support of his position, Judge Porteous can hardly object if the Senators actually read such testimony for themselves to see if it supports Counsel's outrageous contentions as to how that testimony should be interpreted. (Indeed, if the experts' Task Force testimony actually supported Judge Porteous's position – as counsel represented to the SITC – it is remarkable that counsel would object so "strenuously" to its consideration by the Senate.)

Judge Porteous's letter asserts that the House has violated rulings by the SITC. That sort of accusation is typically buttressed by reference to an Order or a citation to a statement by a Senator. However, Judge Porteous provides no support for this assertion because, in fact, there is none. To the contrary, in its Disposition of Pre-Trial Motions, dated August 25, 2010, the SITC ruled that the Task Force Hearing testimony was admissible to the extent the witness was subject to cross-examination. Such a ruling by its terms encompassed the testimony of the legal experts, who, in fact, were cross-examined by Judge Porteous's attorney at that Hearing.

Further, consistent with that August 25, 2010 Disposition, it is clear that the operating assumption throughout the entirety of the trial was that such materials were in fact admissible and may be considered by the Senate – precisely the opposite of the reading of the record alleged (but not supported) by Judge Porteous. That was clearly the understanding of counsel for Judge Porteous at the outset of the trial, who, in his opening statement, made reference to the testimony. It was also clearly the understanding of Congressman Schiff, who, in his cross-examination of Professor McKenzie, made reference to the Task Force Hearing expert testimony of Professor Amar as being "part of the record." *See* McKenzie SITC at 2061–62. It was also the understanding of counsel for Judge Porteous, who did not disagree with that characterization, but objected only that Professor McKenzie was being examined as to the "standards or meaning of impeachment." *Id.* at 2063 (statement of Mr. Turley). In response to which, Senator McCaskill pointed out:

But Mr. Turley, in your opening statement, you said – you, in fact, argued that this case did not rise to a level that would support an impeachment. So I think you have injected what standards we should use as it relates to impeachment. You – in fact, the very essence of your case, you have argued that this case does not reach a certain standard that we must achieve. So therefore, I think that the door has been opened for this witness to testify, if he can, and if – as to whether or not he agrees with evidence that has been placed in the record by another law [expert].

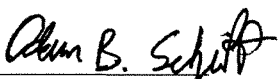
Id. at 2063–64 (statement of Sen. McCaskill) (emphasis added). Just as Mr. Turley took no exception to Mr. Schiff's reference to the expert testimony as having been made "part of the record," Mr. Turley accepted without comment Senator McCaskill's characterization of the procedural history and that the testimony of the law experts had been placed "in the record." Thereafter, Mr. Schiff asked Professor McKenzie numerous questions based explicitly on Professor Amar's Task Force testimony.

The difference between issues of fact and law in this Impeachment is clear. As but one example, the legal determination that pre-Federal Bench misconduct may constitute a "high Crime or Misdemeanor" is entirely separate and apart from the factual issue as to whether the conduct alleged in Articles II and IV was proven. The testimony of the experts has been cited for legal propositions related to the former purpose – consistent with the understanding expressed by Senator McCaskill – not the latter.

In short, no aspect of the procedural history of the proceedings supports Judge Porteous's request that the Senate disregard and refuse to consider relevant legal authority from a House hearing. Judge Porteous's description of the procedural history is affirmatively contradicted by the SITC's Disposition and by the statements of Senator McCaskill, and is affirmatively belied by statements and the conduct of Judge Porteous's counsel throughout the trial, which recognized that those materials may be considered by the SITC.

In effect, Judge Porteous seeks to deprive the Senate of access to highly relevant legal materials as the Senate undertakes its Constitutional duties. The House therefore urges the Senate to consider all relevant materials that may inform its decision as to standards surrounding the impeachment process, including testimony of some of the most respected legal scholars in the country that addressed some of the legal issues presented in this matter.

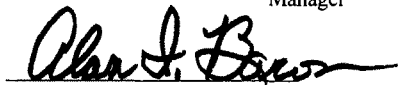
Sincerely,



Adam Schiff
Manager



Bob Goodlatte
Manager



Alan I. Baron
Special Impeachment Counsel

cc: Jonathan Turley (via electronic mail)
Daniel C. Schwartz (via electronic mail)
P.J. Meitl (via electronic mail)
Dan O'Connor (via electronic mail)

In The Senate of the United States
Sitting as a Court of Impeachment

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)

**AMENDED POST-TRIAL MEMORANDUM
OF THE HOUSE OF REPRESENTATIVES¹**

Congressman Adam Schiff
House Impeachment Manager
2447 Rayburn House Office Building
Washington, DC 20515

Congressman Bob Goodlatte
House Impeachment Manager
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Alan I. Baron
Chief Special Impeachment Counsel
Seyfarth Shaw LLP
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Washington, DC 20004

The United States House of Representatives

Dated: November 10, 2010

¹ The House has been advised orally by Senate staff that the Senate Impeachment Trial Committee has ruled that citations to testimony of Constitutional scholars who appeared in the House proceedings are to be omitted from the House's Memorandum.

The House agrees that testimony of legal experts on the ultimate issue of whether Judge Porteous has committed a high Crime or Misdemeanor is inappropriate because it would encroach on the Senate's unique function. The House, however, believes that the testimony of these Constitutional experts on the issue of whether pre-federal bench conduct can be considered as a basis for removal from office should be available to the Senate and does not impinge on the Senate's role. Nevertheless, the House has amended its Post-Trial Memorandum in light of the directive set out above, and has, where possible, substituted different citations to the same scholars in support of its position. These include the treatise by Professor Michael Gerhardt that was also cited by Judge Porteous.

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I. INTRODUCTION

On March 11, 2010, by unanimous votes,² the House of Representatives (the “House”) charged G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana, with four Articles of Impeachment, setting forth a range of misconduct demonstrating that Judge Porteous is not fit to be a federal judge. The evidence establishes that Judge Porteous exploited his judicial office to implement a kickback scheme involving his assignment of cases to attorneys, exploited his judicial office to solicit and accept cash and other things of value from attorneys and bail bondsmen, lied to the FBI and the Senate to obtain his judicial appointment and engaged in repeated dishonest acts in a federal bankruptcy proceeding, including filing under a false name – all actions in separate spheres of conduct that compel the conclusion that Judge Porteous should be removed from office.

In the brief that follows, the House summarizes the evidence that was adduced before the Senate Impeachment Trial Committee (SITC) on each Article of Impeachment. The facts are not complex, and indeed, much of the evidence is not in dispute. Rather, the true dispute is simply that Judge Porteous believes his conduct amounts to nothing more than an appearance problem, notwithstanding clear and indisputable evidence of his blatant corruption and dishonesty under oath.

For all the reasons set forth below, the House submits that the Senate should convict Judge Porteous on each of the four Articles of Impeachment now pending before it.

² The votes were as follows: Article I: 412–0; Article II: 410–0; Article III: 416–0; and Article IV: 413–0.

II. EXECUTIVE SUMMARY

A. Procedural History

Prior to the unanimous votes in the House, Judge Porteous's conduct had been the subject of inquiry by both the Executive Branch and the Judicial Branch. In late 1999, the Department of Justice (the "DOJ") and the Federal Bureau of Investigation (the "FBI") commenced a criminal investigation of Judge Porteous. The criminal investigation continued for several years, and ultimately ended in early 2007, without an indictment. In a letter dated May 18, 2007, the DOJ submitted a formal complaint of judicial misconduct to the Honorable Edith H. Jones, Chief Judge, United States Court of Appeals for the Fifth Circuit. The DOJ Complaint Letter described numerous instances of alleged misconduct by Judge Porteous that demonstrated his unfitness as a judge.

Upon receipt of the DOJ Complaint Letter, the Fifth Circuit appointed a Special Investigatory Committee to investigate the Department's allegations. The Special Committee conducted a hearing and issued a Report dated November 20, 2007, which concluded that Judge Porteous engaged in misconduct which "might constitute one or more grounds for impeachment." On December 20, 2007, by a majority vote, the Judicial Council of the Fifth Circuit accepted and approved the Special Committee's Report and likewise concluded that Judge Porteous "had engaged in conduct which might constitute one or more grounds for impeachment under Article I of the Constitution." The Fifth Circuit Judicial Council thereafter certified these findings and the supporting records to the Judicial Conference of the United States. On June 17, 2008, the Judicial Conference of the United States determined unanimously, upon recommendation of its Committee on Judicial Conduct and Disability, to transmit to the Speaker of the House a Certificate "that consideration of impeachment of United States District Judge G. Thomas Porteous (E.D. La.) may be warranted."

B. Facts

Article I alleges and the evidence establishes that Judge Porteous, while a state judge, initiated and implemented a corrupt “kickback” scheme with Robert Creely and the law firm of Amato and Creely whereby Judge Porteous assigned “curatorship” cases to Creely and the Amato and Creely law firm gave Porteous approximately half of the legal fees amounting to about \$20,000 in cash. Thereafter, when Porteous became a federal judge, he presided over a non-jury case (Liljeberg) in which Amato entered his appearance six weeks before the scheduled trial date. When opposing counsel filed a motion to recuse Judge Porteous based on his close friendship with Amato, Judge Porteous deliberately misled the parties and did not disclose the corrupt financial relationship that had existed between the Judge and Amato and Creely.

Moreover, while the Liljeberg case was pending and had not yet been decided, Judge Porteous solicited and received a secret cash payment of at least \$2,000 from Amato. Judge Porteous thereafter decided the Liljeberg case very favorably towards Amato’s client. This decision was later reversed in large part in a scathing opinion by the appellate court which characterized the ruling by Judge Porteous as “inexplicable,” “apparently constructed out of whole cloth,” and “close to being nonsensical.”

It is noteworthy that Judge Porteous, in response to questioning by the Special Investigatory Committee of the Fifth Circuit admitted the essential aspects of the corrupt relationship set forth in Article I. He acknowledged that he solicited and received money from Creely; that Creely ultimately balked at giving him money; that he sent curatorship cases to Creely; that “occasionally” he received money after the curatorship cases were sent; and that he solicited and received cash from Amato while the Liljeberg case was pending before him.

Article II alleges and the evidence establishes that Judge Porteous, while a state judge and extending into his tenure as a federal judge, had a corrupt relationship with Louis and Lori

Marcotte, local bondsmen who operated in Louisiana. The evidence established that while Porteous was a state judge, Porteous would set bail bonds as directed by the Marcottes which were designed to maximize the premium the Marcottes could get from the person arrested. In return, the Marcottes took Judge Porteous to expensive restaurants and paid for numerous meals, paid for servicing and repairing his automobiles; replaced a damaged fence at his home, paid for one or more trips to Las Vegas for the Judge and his secretary, and provided other benefits to the Judge.

Of particular note in the relationship is the fact that Judge Porteous was pressured by Louis Marcotte to expunge the conviction of two Marcotte employees so they could be licensed as bail bondsmen. Judge Porteous obliged, but, significantly, told Marcotte that he would not expunge one of the convictions until after Senate confirmation of his position as a United States District Judge, because he did not want to jeopardize his "lifetime appointment." Shortly after Senate confirmation, but before he was sworn in as a federal judge, Judge Porteous did in fact set aside the conviction of Marcotte's employee, an act that was denounced when discovered as unlawful and unwarranted.

The evidence further established that after Judge Porteous became a federal judge he continued to be wined and dined by the Marcottes who wanted his help in recruiting state judges to assume Porteous's former role in setting bonds as requested by them. Judge Porteous obliged them by meeting with state judges and vouching for the Marcottes, thereby using the prestige of his federal office to foster these new corrupt relationships. It is noteworthy that two of those state court judges, Bodenheimer and Green, were ultimately convicted and incarcerated in part because of their corrupt relationships with the Marcottes which closely paralleled

Porteous's prior relationship. Both of the Marcottes ultimately entered pleas of guilty to federal corruption offenses premised on the factual pattern described above.

Article III alleges and the evidence established that Judge Porteous filed for personal bankruptcy in March, 2001. The evidence shows that Judge Porteous filed in a false name ("Ortous") and obtained and listed a post office box as his residence, all filed under penalty of perjury. The evidence further established that Judge Porteous engaged in a pattern of concealing assets so that he could continue to gamble, such as \$4,100 tax refund, lying under oath about preferential payments to certain creditors, particularly casinos where he gambled, concealing gambling losses, and violating a court order which prohibited Judge Porteous from incurring new debt without permission. Judge Porteous blatantly and repeatedly violated the court order by incurring debt at several casinos and by obtaining and using a new credit card.

Article IV alleges and the evidence establishes that Judge Porteous repeatedly lied to the Federal Bureau of Investigation and to the United States Senate in responding to questions posed to him as part of the confirmation process. Judge Porteous was asked on two occasions by the FBI whether he had engaged in conduct whereby someone could influence, pressure, coerce or compromise him in any way, or that would impact negatively on his character, reputation, judgment or discretion. Both times Porteous said he had not engaged in any such conduct. That was clearly false given his corrupt relationship with attorneys Amato and Creely and his corrupt relations with the Marcottes and their bail bond business.

On the Supplement to the SF-86 Form, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him or if there was anything that could embarrass Judge Porteous or the President if publicly known. Judge

Porteous responded “no” to this question and signed the Form under a warning that a false statement was punishable by law.

Judge Porteous’s response was a clear lie given his corrupt relationship with attorneys Amato and Creely and his corrupt relationship with the Marcottes and their bail bond business.

The Senate Judiciary Committee’s Questionnaire for Judicial Nominees posed the question to Judge Porteous whether any unfavorable information existed that could affect his nomination. Judge Porteous answered under oath that to the best of his knowledge there was no such information.

Judge Porteous’s response was also plainly false given his corrupt relationship with attorneys Amato and Creely and his corrupt relationship with the Marcottes and their bail bond business. It is noteworthy that Porteous refused to set aside the conviction of a Marcotte employee until after his confirmation in order not to jeopardize his “lifetime appointment.” There can be no doubt that Judge Porteous knew that he had to hide these corrupt relationships if he had any hope of being confirmed as a United States District Judge. Experts for the House and defense agreed that a truthful answer to those questions would have required Judge Porteous to disclose these corrupt relationships.

C. General Principles of Law Governing Impeachments and Removal³

By means of the impeachment and removal process, the Framers of the Constitution “sought to protect the institutions of government by providing for the removal of persons who

³ The application of these principles, as well as other specific legal concerns that may be raised by the Articles, will be further discussed as applied to the respective articles. For example, the particular considerations associated with “pre-federal bench” conduct are discussed in connection with Articles II and IV, and the allegedly “personal” aspects of Judge Porteous’s conduct in his bankruptcy proceeding are discussed in connection with Article III.

are unfit to hold positions of trust.”⁴ Justice Story similarly observed in the early nineteenth century that “an impeachment is a proceeding of a purely political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property; but simply divests him of his political power.”⁵ Indeed, the fact that the individual who is impeached and removed from office “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law,” makes it clear that impeachment is a remedial provision, not a punitive one.⁶ In this way, the Founders intentionally broke from the British impeachment practice which, upon conviction imposed criminal penalties, up to and including death.⁷ Indeed, any doubt as to whether impeachment proceedings were limited to criminal conduct was settled in the early impeachment inquiries, such as the impeachment and removal from office of Judge John Pickering in 1803 for performing his judicial functions while drunk and for acts of indecency.⁸

Congress has consistently interpreted the Constitution’s definition of impeachable conduct – “treason, bribery or other high Crimes and Misdemeanors” – in light of the “fitness for office” determination that is at the core of the impeachment inquiry. The Report accompanying

⁴ H.R. Rep. No. 101-36, Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87 (hereinafter “Nixon Impeachment Report”), 101st Cong., 1st Sess. at 3–4 (1989). *See also id.* at 5 (“The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct.”).

⁵ Joseph Story, Commentaries on the Constitution § 801 (1833).

⁶ U.S. CONST. art. I, § III, cl. 7.

⁷ *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS, A CONSTITUTIONAL AND HISTORICAL ANALYSIS (Princeton University Press) (1996).

⁸ *See* Articles of Impeachment of Judge John Pickering, *reprinted in* IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess. at 131 (1973), *as reprinted in*, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess. at 1267 (1998).

the 1989 Resolution to Impeach United States District Court Judge Walter L. Nixon summarized the British precedents for impeachment, the events at the Constitutional convention leading to the adoption of the “high Crimes and Misdemeanors” formulation for impeachable conduct, and the interpretation of that term in the 12 judicial impeachments that had occurred prior to 1989.

In its summary of the historical meaning of the term, the Report noted:

The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined “other high Crimes and misdemeanors” to be serious violations of the public trust, not necessarily indictable offenses under criminal laws.⁹

That portion of the Report concluded:

Thus, from an historical perspective the question of what conduct by a federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge’s conduct calls into question his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.¹⁰

⁹ Nixon Impeachment Report, *supra* note 3, at 5. To illustrate the “non-criminal” nature of the “high Crimes and Misdemeanors” standard, the Nixon Impeachment Report further stressed that the term “Misdemeanor” as used in the Constitution was not intended to denote a minor criminal offense, but rather focused on the behavior of the judge, that is, whether the judge “misdemean[ed]” and thus should be removed.

Indeed, when the phrase “high crimes and misdemeanors” first appeared during the impeachment of the Earl of Suffolk in 1386, the term “misdemeanor” did not denote a violation of criminal law. In the context of impeachment, the word focuses on the behavior of a public official, i.e., his demeanor. Gouverneur Morris, a member of the Committee on Style and Revision of the Constitutional Convention and one of the founding fathers responsible for the final revisions to the Constitution, explained the use of the term “Misdemeanor”: “[T]he judges shall hold their offices so long as they demcan themselves well, but if they shall misdemean, if they shall, on impeachment, be convicted of misdemeanor, they shall be removed.”

Id.

¹⁰ Nixon Impeachment Report, *supra* note 4, at 12.

To the same end, the Report that accompanied the Alcee Hastings impeachment resolution stated that the phrase “high Crimes and Misdemeanors” “refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal misconduct.”¹¹ That Report stressed that impeachment is “non-criminal,” designed not to impose criminal penalties, but instead simply to remove the offender from office,¹² and that it is “the ultimate means of preserving our constitutional form of government from the depredations of those in high office who abuse or violate the public trust.”¹³

Thus, “high Crimes and Misdemeanors” include “serious violations of the public trust” as well as “conduct that calls into question [the judge’s] integrity or impartiality” such that “impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.”¹⁴ This understanding of the meaning of “high Crimes and Misdemeanors” in the context of the impeachment of a federal judge is not subject to any legitimate dispute.¹⁵

¹¹ H.R. Rep. No. 100-810, “Impeachment of Alcee L. Hastings, Report of the Committee on the Judiciary to Accompany H. Res. 499 (hereinafter “Hastings Impeachment Report”), 100th Cong., 2d Sess., at 6 (1988).

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ Nixon Impeachment Report, *supra* note 4, at 5 (“The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct.”).

¹⁵ Indeed, counsel for Judge Porteous has adopted this view on more than one occasion. He has stated that “[t]he judicial impeachment cases . . . reflect controversies that raise fundamental questions of legitimacy and conduct that is viewed as incompatible or demeaning to judicial office.” See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L. J. 1, 73–74 (1999). Counsel also recognized that impeachment proceedings have involved not only conduct that “relate[d] to the use of judicial power but . . . conduct that brought disrepute upon the office through personal or (non-judicial) criminal misconduct.” *Id.* at 67–68. On another occasion, counsel has written that “acts which

Some of Judge Porteous's conduct occurred when he was a state judge, some during the confirmation process itself, and the rest while a federal judge. It is clear, however, that conduct which occurs prior to assuming federal office, particularly when the officeholder concealed such conduct during the confirmation process, is an appropriate basis for impeachment and removal from office. To conclude otherwise is to make the position of federal judge a lifetime safe harbor for someone who is able to hide his misdeeds and defraud the Senate into confirming him.

Thus, impeachment and removal is warranted upon proof of misconduct that by itself demonstrates a level of moral depravity and bad judgment, such that it is completely incompatible with the responsibilities of a judge. Say, for instance, that the offense was murder – it is as serious a crime as any, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process. And, if the nominee lied to the Senate about this bad misconduct, then the nominee has not only done something morally reprehensible but he has also engaged in misconduct that directly undermines the integrity of the confirmation process itself.¹⁶

undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law. . . . [T]he essential nexus . . . may be found in acts which, without directly affecting the governmental processes, undermine that degree of public confidence in the probity of executive and judicial officers that is essential to the effectiveness of government.” See *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 28 (1998) (testimony of J. Turley, George Washington University Law School).

¹⁶ See GERHARDT, *supra* note 7, at 108–09. (“Particularly in cases in which an elected or confirmed official has lied . . . to get into their present position, the misconduct that was committed prior to entering office clearly bears on the integrity of the way in which the present officeholder entered office and the integrity of that official to remain in office.”).

A similar conclusion would result from considering the circumstances of a person who bribes his way into office. By definition, the bribery would have occurred prior to the commencement of office holding. But surely that fact cannot immunize the briber from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.¹⁷

Similarly, a corrupt arrangement with bail bondsmen, or accepting kickbacks for curatorships, are the kinds of misconduct that may be fairly characterized as violations of the public trust. Because impeachment is about the interests of the public, and not primarily about punishing wrongdoing, it is appropriate that a judgment of unfitness may be based on conduct that took place before an officer-holder's appointment. Wrongdoing before one enters office can demonstrate serious untrustworthiness just as can wrongdoing while in office, and the ultimate touchstone in impeachment is whether the people can trust the office holder. Thus, it is a gross mistake and terrible policy to conclude that federal officers may be impeached only for misconduct committed while in office or, even more strictly, for misconduct that they committed in their capacity as federal officers. The text of the Constitution has no such requirement, and structure and common sense demonstrate the absurdity of this position.

Judge Porteous's misconduct while a state judge, during the confirmation process, and while on the federal bench is so egregious and inimical to public confidence in the integrity and impartiality of the judiciary that he must be removed from office.

¹⁷ See, e.g. AKHIL REED AMAR, *AMERICA'S CONSTITUTION – A BIOGRAPHY* 201 (Random House) (2005). See also Akhil Reed Amar, *A Symposium On The Impeachment Of William Jefferson Clinton: Reflections On The Process, The Results, And The Future: On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 302 (1999) (using the example of a president who bribed his way into office as being subject to impeachment and removal, even though the conduct occurred prior to taking office).

III. ARTICLE I

A. Introduction

In the early 1970s, Judge G. Thomas Porteous, Jr. practiced law as a partner with Jacob Amato in the law firm Edwards, Porteous & Amato. Robert Creely was an associate who worked for the firm. Amato and Creely ultimately split off and formed an equal partnership. They each remained friends with Judge Porteous.

In 1984, Judge Porteous was elected judge of the 24th Judicial District Court in Jefferson Parish, Louisiana. He took the bench on August 24, 1984, and remained in that position until October 28, 1994 when he was sworn in as a United States District Judge for the Eastern District of Louisiana.

Judge Porteous's ten years as a state court judge were characterized by his dependence on others to provide for and subsidize his meals, entertainment, and lifestyle (including drinking and gambling), as well as essential expenses associated with maintaining his household. This dependence led him into corrupt relationships with attorneys Creely and Amato, described below, and with bail bondsman Louis Marcotte, described in Section IV of this brief.¹⁸

B. Judge Porteous's "Curatorship" Kickback Scheme with Creely and Amato

While he was a state court judge, there came a time when Judge Porteous began to ask Creely for money. At first, he asked for small amounts – \$50 or \$100, money that Creely had in

¹⁸ The record is also clear that Judge Porteous took money from other attorneys as well. See Donald Gardner Senate Impeachment Trial Committee Hearing Testimony ("Gardner SITC") at 1585:14 – 1589:4. Those events are not charged as part of the Articles, but nonetheless corroborate and support the evidence related to Judge Porteous's financial relationship with attorneys Creely and Amato, and his relationship with bail bondsman Louis Marcotte.

his pocket. Judge Porteous would request the money “for various personal issues.” “[I]t would be things like tuition, different things that he needed in his – in his personal life.”¹⁹

At some point in the mid to late 1980s, Judge Porteous requested more significant sums from Creely – amounts in the range of \$500 or \$1,000. Creely resisted giving Judge Porteous the money that was being requested. As Creely testified: “I did tell him I was tired of giving him cash . . . I felt put upon that he continued to ask – I thought it was an imposition on our friendship. . . . I told him a couple of times [‘]I’m tired of giving you money, I’m tired of you asking for money. This isn’t what friends are supposed to do to one another.[’]”²⁰

In response to Creely’s resistance to giving Judge Porteous the money he sought, Judge Porteous conceived what was, in all material aspects, a kickback scheme, whereby Judge Porteous used the power of his judicial office to assign Creely “curatorships” and then requested and received from Creely (and Amato) a portion of the fees received by their law firm for handling those judicial appointments.²¹ This corrupt scheme went on for years.

The proof of this series of events is evidenced by the interwoven and consistent testimony of Creely, Amato and Judge Porteous himself, who testified before a Special Committee of the

¹⁹ See Robert Creely Senate Impeachment Trial Committee Hearing Testimony (“Creely SITC”) at 257:16-18, 298:6-9. See also Robert Creely 5th Circuit Special Committee Hearing Testimony (“Creely 5th Cir.”) at 199; Robert Creely House Impeachment Task Force Hearing Testimony (“Creely Task Force”) at 20 (Judge Porteous would ask for money for “tuition” and “living expenses”).

²⁰ See Creely SITC at 258:4 – 259:16.

²¹ These were legal matters in which Creely was assigned to represent the interests of a missing party. The duties were largely ministerial, such as publishing notices in the newspaper and similar acts. Creely and his firm received a fixed fee of approximately \$200, plus expenses, for each such appointment. Judge Porteous then asked Creely for money from those curatorship fees, and Creely in turn gave Judge Porteous cash as requested.

Fifth Circuit.²² It is also corroborated by the court records evidencing the curatorships assigned by Judge Porteous to Creely. Finally, it is corroborated by evidence of Judge Porteous's similar conduct with bail bondsman Louis Marcotte, where Judge Porteous also used the power of his judicial office for personal financial gain.

Creely testified that after Judge Porteous started assigning the curatorships, "he then started calling and saying, [']Look, I've been sending you curators, you know, can you give me the money for the curators?[']" Although Creely sought to avoid linking the requests for cash with the assignment of curatorships, Creely understood that Judge Porteous "made [that] correlation."²³ Moreover, Creely all but expressly acknowledged the "kickback" essence of the scheme when he testified that Judge Porteous's assignment of the curatorships made it easier for Creely to give Judge Porteous cash since it "wasn't costing anything"²⁴ – i.e., the money he was giving to Judge Porteous came from the curatorship fees. Creely confirmed that he told Amato of Judge Porteous's requests for the curatorship money, and that in response, Amato told Creely

²² In anticipation that he would assert his Fifth Amendment privilege, Judge Porteous was provided formal immunity, which provided that his testimony could not be used against him in any criminal proceeding. See HP Ex. 13 (*Order, In re Matters Involving U.S. District Judge G. Thomas Porteous*, Docket No. 07-05-351-0085 (5th Cir., Aug. 3, 2007)). The Senate Impeachment Trial Committee ruled in advance of the SITC evidentiary hearing in this case that Judge Porteous's Fifth Circuit testimony was admissible in this impeachment proceeding, which is not a criminal prosecution. See *SITC Disposition of Pre-Trial Motions* at 4–5 (Aug. 25, 2010).

²³ Creely SITC at 268:2-4, 17 (adopting grand jury testimony). See also Creely Task Force at 22 ("Mr. DUBESTER. I am asking, in your mind, did you understand that Judge Porteous was assigning you curatorships so that you would have cash to give him back? Mr. CREELY. Eventually, that is what I thought he was doing, yes."); *id.* at 23 (agreeing that Judge Porteous was taking official actions in appointing curatorships to enrich himself).

²⁴ Creely SITC at 271:3-8. See also Creely Task Force at 23 (curatorships were a "justification to help him out so that I didn't have to go and spend my own money on him"); Creely 5th Cir. at 209–10 (curatorships were "basically a way for me to supply him funds as before instead of coming out of my pocket. It was being provided through the curatorships.").

to “[k]eep paying him, it doesn’t cost us anything, it’s not costing us any money, just if he [Judge Porteous] asks for money from time to time, let’s continue giving it to him.”²⁵

Amato – who split the payments to Judge Porteous with Creely 50-50 – corroborated Creely’s account as to what occurred. Amato testified that Creely informed him “that the judge was sending curator cases to him and that he would, in turn, give money to the judge.”²⁶ Amato testified that in his conversation with Creely they agreed they would split the net difference between themselves and the judge, and that “I told him I thought it was going to turn out bad.”²⁷ Amato did not feel comfortable giving Judge Porteous cash from the curators, however, he was not “strong enough” to say no to what he understood to be a classic kickback arrangement.²⁸

²⁵ Creely SITC at 264:12-15.

²⁶ Jacob Amato, Jr. Senate Impeachment Trial Committee Hearing Testimony (“Amato SITC”) at 124:25 – 125:2.

²⁷ Amato SITC at 125:19-24. Amato has testified consistently about his knowledge of the curatorships arrangement on three prior occasions, at each of which he was subject to cross-examination. *See, e.g.*, Jacob Amato, Jr. Senate Deposition (“Amato Sen. Dep.”) at 32:5-8 (“Bob Creely came in my office one day, told me that Porteous was sending curatorships, and he wanted us to, you know, give him some money back, and I told him this is going to wind up bad.”); Jacob Amato, Jr. House Impeachment Task Force Hearing Testimony (“Amato Task Force”) at 99-100 (“Mr. Creely came to me one day and said that Tom - or Judge Porteous asked him for some money based upon sending curatorships. . . . Bob [Creely] would tell me Judge Porteous needs, you know, \$500, \$1,000, whatever it is for the curatorships, and we would each draw a check for whatever half the amount that he requested. . . . [J]udge Porteous sent curator cases to Bob Creely and at some point asked that he . . . receive some of that money.”); Jacob Amato, Jr. 5th Circuit Special Committee Hearing Testimony (“Amato 5th Cir.”) at 238 (“I know . . . from talking to Bob, that he had asked Bob to split curator fees with him some sort of way.”).

²⁸ Amato SITC 125:23 – 126:4. *See also* Amato Task Force at 101 (“Mr. DUBESTER: Okay. Now, did you feel you had a choice but to give Judge Porteous this money? Mr. AMATO: Yes, I think we had a choice, but I just wasn’t strong enough to put an end to it. To put an end to it, I would have to break up my law partnership and break up a friendship that I have had over a number of years with Judge Porteous, and I wasn’t strong enough.”); *id.* at 127 (agreeing that this was a “classic kickback arrangement”); Amato Sen. Dep. at 73:21 – 74:2 (same).

Amato had “no doubt” that the money that he and Creely gave Judge Porteous came from the proceeds of the curatorships assigned to Creely by Judge Porteous.²⁹

When Judge Porteous requested money, the two attorneys would take equal draws from the firm’s operating account. They would put the cash in an envelope and give it to Judge Porteous. The money they received from the curatorships was treated by Creely and Amato as income and taxes were paid on those amounts – even though some portion was being provided to Judge Porteous.³⁰ They provided Judge Porteous cash every few months.³¹ They gave him cash, as opposed to a check drawn on the firm’s accounts, both “to avoid any kind of paper trail,” and because “that’s what Judge Porteous wanted,”³² and because it was “part of the deceit.”³³ In most instances, Creely gave the cash to Judge Porteous, however both Amato and Creely believed that on occasion Amato personally gave Judge Porteous cash as well.³⁴ In any event, Amato had “no doubt” that Judge Porteous knew that the monies he was soliciting and receiving through the curatorship scheme were coming from Amato as well as Creely.³⁵

²⁹ Amato SITC at 127:1-4.

³⁰ See Amato SITC at 129:7-10; Creely SITC at 268:8-10, 376:11.

³¹ See Creely SITC at 341:17 (“several months between requests”); Amato SITC at 241:15-16 (“two or three times a year”).

³² Amato SITC at 128:13; Creely SITC at 363:17.

³³ Amato Task Force at 120.

³⁴ See Amato SITC at 216:25 – 217:1 (as to whether Amato gave the curator money on occasion to Judge Porteous: “I think so. I just don’t recall. But I think so.”). See also Creely SITC at 342:20-21, 342:24 – 343:2 (“either me or Jake” would give Judge Porteous the curator cash, and Amato “probably” did so).

³⁵ Amato SITC at 217:2-5. Judge Porteous knew both men well and had previously been in a law partnership with Amato. In addition, as Amato explained, “We owned our own office building. We had checks. We had business cards. We filed pleadings and, you know, Amato and Creely, a professional law corporation.” See Amato Task Force at 100–01. Creely and

In his testimony at the Fifth Circuit Hearing, Judge Porteous confirmed the essential aspects of his receiving cash from Amato and Creely in connection with the curatorships he assigned to Creely. Judge Porteous admitted that: (1) he received cash from Creely; (2) at some point in time Creely expressed his displeasure with giving Judge Porteous cash; (3) thereafter Judge Porteous started assigning Creely curatorships; and (4) that Judge Porteous's receipt of cash from Creely and Amato followed his assigning Creely curatorships.

First, Judge Porteous testified that he received cash from Creely and Amato:

Q. When did you first start getting cash from Messrs. Amato, Creely, or their law firm?

A. Probably when I was on state bench.

Q. And that practice continued into 1994, when you became a federal judge, did it not?

A. I believe that's correct.³⁶

Judge Porteous confirmed that there came a time when Creely expressed resistance to giving Judge Porteous money before the curatorships started:

Q. Do you recall Mr. Creely refusing to pay you money before the curatorships started?

A. He may have said I needed to get my finances under control, yeah.³⁷

Judge Porteous also admitted that his receipt of cash from Amato and Creely "occasionally" followed his assignment of curatorships to Creely.

Q. And after receiving curatorships, Mr. -- Messrs. Creely and/or Amato and/or their law firm would give you money; correct?

Amato also owned real estate together and had the firm's name -- Amato & Creely -- on the building they owned. *Id.*

³⁶ Judge G. Thomas Porteous, Jr. 5th Circuit Special Committee Hearing Testimony ("Porteous 5th Cir.") at 119.

³⁷ *Id.* at 134.

A. Occasionally.

Q. During the time you were giving Creely and Amato and the law firm curatorships and you were getting cash back, was that cash you received a kickback for the curatorship, in your mind?

A. No, sir.³⁸

Though Judge Porteous took issue with the label “kickback” to describe the arrangement, he did not dispute – indeed he accepted – the description of the arrangement that he had with Creely and Amato as one where he gave “Creely and Amato and the law firm curatorships and [was] getting cash back.”³⁹ Similarly, at a different part of his testimony, Judge Porteous was asked a series of questions by Judge Benavides as to whether he received all the fees from the curatorships he assigned the firm, or just a portion of them. Judge Porteous responded: “I don’t know if it matched each time. That’s all I can tell you Judge. I just don’t know.”⁴⁰ Significantly, Judge Porteous again accepted the fundamental premise of the question – that he received fees from the curatorships – but professed simply not to know whether the monies he received from the two attorneys matched the curatorship fees “each time.”

In addition to the testimony of Creely, Amato, and Judge Porteous, the House located close to 200 judicial orders signed by Judge Porteous assigning Creely “curatorships.” As described in the following chart, these curatorships would have generated fees of nearly \$40,000 to the firm.

³⁸ *Id.* at 132–33.

³⁹ *Id.* at 133.

⁴⁰ *Id.* at 130–33.

Year	Number of Curatorships Assigned by Judge Porteous to Creely/Fee Amount per Curatorship	Total Dollar Amount
1988	18 x \$150, or 18 x \$200	\$2,700 – \$3,600
1989	21 x \$200	\$4,200
1990	33 x \$200	\$6,600
1991	28 x \$200	\$5,600
1992	44 x \$200	\$8,800
1993	28 x \$200	\$5,600
1994	20 x \$200	\$4,000
TOTAL	192	\$37,500 – \$38,400

Thus, Judge Porteous assigned curatorships to Creely resulting in the firm of Amato & Creely receiving fees amounting to at least \$37,500 from 1988 through 1994.⁴¹

Both Creely and Amato have testified consistently that they gave Judge Porteous approximately \$10,000 each, or approximately \$20,000.⁴² For his part, Judge Porteous testified that he had “no earthly idea” how much Creely and Amato gave him, though he did not deny the total could have been more than \$10,000. Judge Porteous testified as follows:

Q. Judge Porteous, over the years, how much cash have you received from Jake Amato and Bob Creely or their law firm?

A. I have no earthly idea.

⁴¹ See House Chart 40; HP Ex. 188 (Letter from Jefferson Parish Court Clerk re: curator fee amounts), HP Exs. 189(1)–(226) (Curatorships).

⁴² See Amato SITC at 131:19-22 (“Over time my best, not estimate but guesstimate would be something under 20,000 or around \$20,000 over a period of 10, 12 years, 15 years, I don’t know.”); Creely SITC at 272:2-4 (“[M]y best estimate of what I gave Judge Porteous was \$10,000, while he was on the state bench.”); Amato Task Force at 101, 108) (agreeing that the total amount was “in the neighborhood of 10 [thousand] to 20 thousand [dollars]”); Amato 5th Cir. at 242, 247).

* * *

Q. It could have been \$10,000 or more. Isn't that right?

A. Again, you're asking me to speculate. I have no idea is all I can tell you.⁴³

On October 28, 1994, Judge Porteous was sworn in as a federal district judge. Judge Porteous was no longer in a position to refer curatorships to Creely and Amato, and he stopped (for the time being) asking them for cash.⁴⁴ The fact that Judge Porteous's requests for cash from Creely and Amato came to an end at the same time he could no longer assign curatorships to them constitutes additional powerful evidence that those two actions were inextricably connected.

C. Lunches, Trips, Expenses and Parties

While Judge Porteous was a state judge, both Amato and Creely each frequently took Judge Porteous to lunch. Amato testified that he took Judge Porteous to lunch "on a regular basis . . . a couple of times a month," amounting to "potentially hundreds of lunches."⁴⁵ The restaurants to which Amato took Judge Porteous included the Beef Connection, the Red Maple, Bertucci's, Ruth's Chris Steak House, Antoine's, Smith & Wolensky's and Galatoire's.⁴⁶ As Amato testified: "We liked to eat well."⁴⁷ Amato paid for food and drink – typically "at least two" vodka drinks for Judge Porteous and sometimes more.⁴⁸ Amato, or other attorneys who

⁴³ Porteous 5th Cir. at 118–19.

⁴⁴ See Amato SITC at 130:17–23; Creely SITC at 275:9–12.

⁴⁵ Amato SITC at 119:6–12, 122:7–9.

⁴⁶ *Id.* at 119:18–25.

⁴⁷ Amato SITC at 119:13–14. See also Amato Task Force at 104 (describing his lunches with Judge Porteous spanning the entirety of their relationship: "[W]e had a good time.").

⁴⁸ Amato SITC at 121:9–15.

may have been in attendance, paid for all but a handful of these lunches, with Judge Porteous paying “rarely,” that is, a “couple of times, two, three times out of a hundred.”⁴⁹

While Judge Porteous was a state court judge, Creely also took Judge Porteous to lunch approximately twice a month. Creely believed that Amato took Judge Porteous out to lunch more frequently than he (Creely) did. When Creely and Judge Porteous went to lunch together, either Creely paid, or someone else paid, but “[n]ot Judge Porteous.”⁵⁰

In addition, the two men hosted Judge Porteous on a variety of hunting and fishing trips, and arranged those trips, some of which involved air travel to Mexico, so that Judge Porteous never paid.⁵¹ In the summer of 1994, when Judge Porteous’s son Timothy was in Washington D.C. for an “externship,” Judge Porteous, through his secretary Rhonda Danos, solicited and received money from Creely and Amato to help pay for Timothy’s expenses.⁵²

Amato and Creely also paid several hundred dollars toward a party for Judge Porteous to celebrate his becoming a federal judge in 1994.⁵³

⁴⁹ Amato SITC at 122:16, 210:12-13. *See also id.* at 119:9-12, 122:7-9, 121:9-11, 122:16; Amato 5th Cir. at 255; Amato Task Force at 104 (recalling that that he had taken Judge Porteous to restaurants “hundreds of times” and that Judge Porteous bought lunch “at least on one occasion.”).

⁵⁰ Creely SITC at 254:9. *See also id.* at 252:5-15, 254:5-9.

⁵¹ *See* Creely SITC at 254:17 – 257:5; Amato SITC at 122:19 – 124:5.

⁵² *See* Timothy Porteous Senate Impeachment Trial Committee Hearing Testimony (“T. Porteous SITC”) at 1243:25 – 1244:9 (“I remember the conversation [Judge Porteous] had had, that he came home and said Bob [Creely] and Uncle Jake [Amato] gave you some money, and they said to have a great time and enjoy the experience.”); Rhonda Danos Senate Impeachment Trial Committee Hearing Testimony (“Danos SITC”) at 872:19 – 874:5 (describing her phone calls to attorneys, including Amato and Creely, and others seeking money for Timothy Porteous’s externship); Amato Task Force at 104 (confirming that he contributed money for Judge Porteous’s son).

⁵³ *See* Danos SITC at 872:2-15 (estimating the attorneys put in about “\$500 each” toward the party).

D. Judge Porteous's Handling of the Liljeberg Case

1. Introduction

On January 16, 1996, as a federal judge, Judge Porteous was assigned a complicated civil action, Lifemark Hospitals of La., Inc. ["Lifemark"] v. Liljeberg Enterprises, Inc. ["Liljeberg"] or "the Liljebergs". The case was scheduled for a non-jury trial in November of 1996. Amato entered his appearance on behalf of the Liljebergs in September of 1996 – approximately six weeks prior to the trial date. Thereafter, Judge Porteous presided over the Liljeberg case without disclosing his corrupt relationship with Amato. Indeed, in 1999, while Amato was awaiting Judge Porteous's decision – a verdict that was worth hundreds of thousands of dollars to Amato and his firm – Judge Porteous solicited two thousand dollars in cash from Amato. Amato acknowledged that he complied with Judge Porteous's request in part because of the financial leverage that Judge Porteous then enjoyed over him. Ultimately, Judge Porteous issued an opinion benefiting Amato in the Liljeberg case that was so bereft of legal support that the Fifth Circuit Court of Appeals, in reversing Judge Porteous, described it as "inexplicable," "a chimera," "constructed entirely out of whole cloth," "nonsensical," and "absurd."⁵⁴

2. The Recusal Hearing in the Liljeberg Case

The Liljeberg case involved a dispute between a hospital (Lifemark) and a pharmacy (Liljeberg), and involved antitrust law, bankruptcy law, real estate law, and contract law. The case was filed in 1993, and had been assigned to other judges before being transferred to Judge

⁵⁴ HP Ex. 63 (*In the Matter of Liljeberg Enterprises Inc.*, 304 F.3d 410, 428–29, 431–32 (5th Cir. 2002) ("5th Cir. *Liljeberg* Opinion")).

Porteous in January 1996. The matter was particularly contentious, with millions of dollars at stake.⁵⁵

The case was set for a non-jury trial before Judge Porteous, to commence November 4, 1996. On September 19, 1996, approximately six weeks prior to the scheduled trial date, the Liljebergs filed a motion to enter the appearances of Amato and Leonard Levenson (another of Judge Porteous's friends) as their attorneys. Judge Porteous granted the motion on September 26, 1996.⁵⁶

Amato was hired on a contingent fee basis, which provided that his law firm would receive 8% of any award. Amato estimated that if the Liljebergs prevailed in the case, he would have received between \$500,000 and \$1,000,000, but would receive nothing if the Liljebergs lost.⁵⁷ The motion to enter Amato's appearance clearly identified him with the firm "Amato and Creely."⁵⁸ Amato knew that one of the reasons he was retained was because of his friendship with Judge Porteous – "I'm sure my relationship with Judge Porteous had something to do with it."⁵⁹

⁵⁵ See Joseph Mole Senate Impeachment Trial Committee Hearing Testimony ("Mole SITC") at 379:13-15; Amato SITC at 189:14-19. See also HP Ex. 50 (Pacer Docket Report *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP, at p. 5 (Docket No. 1), p. 20 (Docket No. 190) ("Pacer Docket Report")).

⁵⁶ See HP Ex. 51(a) (Liljebergs' Motion to Substitute Counsel, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Sept. 19, 1996) ("Motion to Substitute")); HP Ex. 51(b) (Order *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Sept. 23, 1996)).

⁵⁷ See Amato SITC at 132:33 – 133:11, 134:8-15. Mole SITC at 382:19-22 (describing the contingency arrangement).

⁵⁸ See HP Ex. 51(a) (Motion to Substitute), *supra* note 56 (listing Amato as being with the law firm Amato & Creely, P.C.)

⁵⁹ Amato SITC at 220:4-16.

After Amato and Levenson entered their appearances on behalf of the Liljebergs, Lifemark's lead counsel, Joseph Mole, inquired of others as to their relationship with Judge Porteous. After speaking to several individuals, Mole "developed some serious concerns that Mr. Amato and Mr. Levenson's presence in the case would be a problem that would keep the case from having a fair result."⁶⁰

On October 1, 1996, Mole, on behalf of his client Lifemark, filed a motion to recuse Judge Porteous. Mole drafted the motion carefully based on his limited understanding of the facts, alleging in substance "that there was a close relationship between Judge Porteous and Mr. Amato and Mr. Levenson, that they were known to socialize together, that Amato and the judge had been law partners and that the timing created suspicion that it was the best thing for the judge to do, to avoid the appearance of impropriety, to step aside."⁶¹

⁶⁰ Mole SITC at 383:11-14. The Liljebergs' motives for hiring Amato, and the reasons for Mole's concerns, were corroborated by former state judge Bodenheimer, who informed the FBI, and confirmed in his trial testimony, that Judge Porteous had a reputation for awarding verdicts to his friends. *See, e.g.*, Ronald Bodenheimer Senate Impeachment Trial Committee Hearing Testimony ("Bodenheimer SITC") at 1306:19 – 1309:1 (testifying that he previously made a statement to the FBI that was recorded as follows:

Bodenheimer would describe Porteous as corrupt because any time certain lawyers were in Porteous's court, a verdict in that lawyer's favor was assured, which constituted corruption in Bodenheimer's mind. Bodenheimer had heard that type of corruption had continued in Porteous's federal courtroom with Gardner and Levenson and with Amato & Creely to a lesser extent.

Bodenheimer affirmed that he, in fact, "had heard that." *Id.*

⁶¹ Mole SITC at 385:16-23. *See also id.* at 384:18-23, 385:3-7, 432:22-23 (stating that "[t]his is the only motion to recuse I've ever been involved with"). *See also* HP Ex. 52 (Lifemark's Memorandum in Support of Motion to Recuse, Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc., Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 1, 1996)); Joseph Mole House Impeachment Task Force Hearing Testimony ("Mole Task Force") at 141-42 (describing his motion as arguing "that the judge shouldn't be handling a case where two of his closest friends, if not his very closest friends, had just signed up 6 weeks before trial, whose facts had been in litigation since 1987 in one court or another, and that I didn't believe they had anything to add,

Mole had no idea that Amato, along with his partner Creely, had actually given Judge Porteous cash pursuant to the curatorship kickback arrangement, nor did he know about the other things of value that Amato or his partner Creely had provided Judge Porteous. If Mole had known those facts, he would have raised them in his motion to recuse.⁶²

On October 16, 1996, after the parties filed their respective written pleadings, Judge Porteous held a hearing on the recusal motion.⁶³ Both Amato and Levenson were present. During that hearing, Judge Porteous did not disclose the kickback arrangement that he had previously enjoyed with Amato and his partner. Instead, he made a series of misleading statements that characterized his relationship with Amato in benign terms, essentially as being no different than his relationship with countless other friends and members of the Bar:

The Court: Let me make also one other statement for the record if anyone wants to decide whether I am a friend with Mr. Amato and Mr. Levenson, I will put that to rest for the answer is affirmative, yes. Mr. Amato and I practiced the law together probably 20-plus years ago. Is that sufficient? . . . So if that is an issue at all, it is a non-issue.

other than their relationship with the judge, and that if the result came out in a certain way, it would create an appearance that things had not been right”).

⁶² See Mole SITC at 385:24 – 386:10; Joseph Mole 5th Circuit Special Committee Hearing Testimony (“Mole 5th Cir.”) at 169-70.

⁶³ The Liljebergs filed their Opposition, dated October 9, 1996, which was signed by Mr. Levenson; Lifemark filed its Reply to the Opposition, dated October 11, 1996; and the Liljebergs filed a Memorandum in Opposition to Lifemark’s Reply, dated October 15, 1996, again signed by Mr. Levenson. See HP Ex. 53 (Liljebergs’ Opposition to Lifemark’s Motion to Recuse, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 9, 1996)); HP Ex. 54 (Lifemark’s Reply to Liljebergs’ Opposition, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 11, 1996)); HP Ex. 55 (Liljebergs’ Opposition to Lifemark’s Reply, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 15, 1996)). That final pleading attacked Lifemark’s factual allegations, not because they were untrue, but because they were unproven, lacked specificity, and, in essence, alleged nothing more than the existence of “a friendly relationship.” HP Ex. 55 (Liljebergs’ Opposition to Lifemark’s Reply at 2).

* * *

Mr. Mole: I am happy to tell the Judge what the public perception is of the relationship.

* * *

Mr. Mole: I don't know what the Court wants to do with that issue, whether or not the Court wants to make a statement or accept the statement.

The Court: No, I have made the statement. Yes, Mr. Amato and Mr. Levenson are friends of mine. Have I ever been to either one of them's house? The answer is a definitive no. Have I gone along to lunch with them? The answer is a definitive yes.

* * *

Mr. Mole: The public perception is that they do dine with you, travel with you, that they have contributed to your campaigns.

The Court: Well, luckily I didn't have any campaigns. So I'm interested to find out how you know that. I never had any campaigns...

* * *

The Court: The first time I ran, 1984, I think is the only time when they gave me money.

* * *

The Court: [T]his is the first time a motion for my recusal has ever been filed. . . . I guess it got my attention. But does that mean that any time a person I perceive to be friends who I have dinner with or whatever that I must disqualify myself? I don't think that's what the rule suggests. . . . Courts have held that a judge need not disqualify himself just because a friend, even a close friend, appears as a lawyer.

* * *

The Court: Well you know the issue becomes one of, I guess the confidence of the parties, not the attorneys. . . . My concern is not with whether or not lawyers are friends. . . . My concern is that the parties are given a day in court which they can through you present their case, and they can be adjudicated thoroughly without bias, favor, prejudice, public opinion, sympathy, anything else, just on law and facts. . . .

I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off. . . .

[In the Bernard case] the court said Section 450 requires not only that a Judge be subjectively confident of his ability to be even handed but [that an] informed, rational objective observer would not doubt his impartiality. . . . I don't have any difficulty trying this case. . . .

[I]n my mind I am satisfied because if I had any question as to my ability, I would have called and said, "Look, you're right."⁶⁴

At one point in the hearing, Judge Porteous discussed the issue of whether the attorneys had given him campaign contributions and chastised Mole on that issue:

[D]on't misstate, don't come up with a document that clearly shows well in excess of \$6,700 with some innuendo that that means that they gave that money to me. If you would have checked your homework, you would have found that that was a Justice for all Program for all judges in Jefferson Parish. But go ahead. I don't dispute that I received funding from lawyers.⁶⁵

Amato never uttered a word at the recusal hearing about the kickbacks he paid to the Judge, nor did Judge Porteous. Amato described the consequences, were he to have made such a disclosure, as follows: "I would be disbarred, my law partner would be disbarred and that the judge would be sanctioned or defrocked, derobed by the judicial commission. At the time they

⁶⁴ HP Ex. 56 (Recusal Hearing Transcript, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP at 4, 6–7, 8, 10–11, 17–19 (E.D. La. Oct. 16, 1996) ("Recusal Hearing Transcript")) (emphasis added). Among the many devious ploys Judge Porteous utilized at this hearing, one in particular involved his dancing around the issue of disclosure. Mole, for his part, sought for Judge Porteous to make a full disclosure, diplomatically suggesting: "I don't know what the Court wants to do with that issue, whether or not the Court wants to make a statement or accept the statement." *Id.* at 6. In response, Judge Porteous went on the attack, essentially attacking Mole for mischaracterizing the nature of certain campaign contributions that were given. *Id.* at 9–10. Judge Porteous thus side-tracked the hearing into an irrelevant inquiry where he could be on the offense so as to discredit Mole.

⁶⁵ See HP Ex. 56 (Recusal Hearing Transcript at 10), *supra* note 64.

were two of my best friends.” Amato thus left the decision as to what would be disclosed to Judge Porteous, because “[t]he judge knew as much as I knew.”⁶⁶

With Amato (and Levenson) remaining silent in the courtroom, the few factual disclosures about the relationship between Judge Porteous and Amato (and Levenson) were made by Judge Porteous, and, as noted above, these were limited to the statements that he was “a friend with Mr. Amato and Mr. Levenson,” had been a former law partner with Amato, had “gone along to lunch with them,” but had not “been to either one of them’s house,” and that the first time he ran for judge in 1984 was “the only time when they gave me money.” Judge Porteous did not admit that Amato, through his firm Amato & Creely, had given him approximately \$20,000 in cash, including monies funded by Judge Porteous’s assignment of curatorships to Creely. Judge Porteous did not address Mole’s specific statement that he [Mole] had heard that Judge Porteous had traveled with the attorneys, and thus did not disclose, for example, that he had been hunting and fishing with Amato and Creely as their guest on several occasions. Judge Porteous also did not disclose that Amato and Creely had helped pay for his party to celebrate his appointment to the federal bench or had given money to help support Judge Porteous’s son’s 1994 summer externship.

The dishonesty in Judge Porteous’s handling of the recusal hearing is manifest. Even Amato has testified that Judge Porteous was at that time “obligated” to have disclosed their prior financial relationship, that Judge Porteous’s failure to disclose that financial relationship at the recusal hearing was “dishonest,” and that Judge Porteous’s statements concerning the fact that the only time he received cash from Amato and Levenson involved modest campaign

⁶⁶ Amato SITC at 139:4-8, 138:17-18. *See also* Amato Task Force at 103; Amato 5th Cir. at 248-49.

contributions, were “misleading” in that Judge Porteous did not disclose the cash he had received directly from Creely and Amato.⁶⁷

Judge Porteous’s statements minimizing his relationship with Amato – by denying he had ever been to his house, or asserting that they had “gone along to lunch” – depicted a relationship that was totally at odds with the truth. Judge Porteous trivialized Mole’s motion by comparing it to the following: “But does that mean that any time a person I perceive to be friends who I have dinner with or whatever that I must disqualify myself? I don’t think that’s what the rule suggests”⁶⁸ By suggesting merely that he had “dinner with” or “gone along to lunch with” Amato, with no elaboration, he affirmatively concealed the truth: that Amato (and his partner Creely) had paid for hundreds of Judge Porteous’s lunches and dinners at expensive restaurants for a decade or longer, for which Judge Porteous virtually never reciprocated. But more fundamentally, these were attorneys who, for years, paid him thousands in kickbacks. Judge Porteous affirmatively diverted the hearing from the true issues raised in the recusal motion by focusing on whether the attorneys had given him campaign contributions – denying that fact – and criticizing Lifemark’s attorney for raising the issue.⁶⁹

Finally, Judge Porteous made several “lulling” statements – stressing his awareness of and sensitivity to his ethical concerns associated with recusal issues, and suggesting his comfort

⁶⁷ Amato SITC at 230:3-6, 138:1-2, 144:10-13. *See also* Mole SITC at 385:24 – 387:1 (at the time he filed the recusal motion, Mole was unaware that Amato and Creely had given Judge Porteous cash from curatorship cases); Amato Task Force at 103 (agreeing that monies given from Amato and Creely to Judge Porteous was a “material fact that would have been relevant to Joseph Mole and Lifemark”).

⁶⁸ *See* HP Ex. 56 (Recusal Hearing Transcript at 11), *supra* note 64.

⁶⁹ *See* HP Ex. 56 (Recusal Hearing Transcript at 8–10), *supra* note 64.

with the issue having been raised. The most significant example of this tactic was Judge

Porteous's statement:

I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off.⁷⁰

This self-serving statement purported to demonstrate the Judge's sensitivity to his ethical responsibilities and thus bolstered the factual and legal record for appellate review.

Judge Porteous denied the recusal motion after the argument in open court on October 16, 1996 and issued a one paragraph written order that he signed the following day.⁷¹ Lifemark sought a writ of mandamus from the Fifth Circuit. That petition was also denied.⁷²

Lifemark, having lost the recusal motion, felt that it was necessary to "level the playing field," and thus hired Don Gardner, another close friend of Judge Porteous, to be part of its trial team. Lifemark's pleading to the court entering the appearance of Gardner was date-stamped March 11, 1997. Mr. Gardner, who had little to no federal court / complex litigation experience, was brought in solely because he was a friend of the judge.⁷³

⁷⁰ See HP Ex. 56 (Recusal Hearing Transcript at 18), *supra* note 64.

⁷¹ HP Ex. 57 (Judgment, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP at 1 (E.D. La. Oct. 17, 1996)). The written Order merely stated: "On Wednesday, October 16, 1996, the court heard oral argument on Lifemark Hospitals, Inc.'s Motion to Recuse. The Court, having reviewed the motion to recuse, the opposition, the reply, and the response to the reply and having heard oral argument, for reasons stated in open court denies the Motion to Recuse."

⁷² See HP Ex. 58 (Lifemark's Petition for Writ of Mandamus, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 24, 1996)); HP Ex. 59 (Order, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. Oct. 28, 1996)).

⁷³ See Mole SITC at 390:5-7, 390:9 – 392:8; Mole 5th Cir. at 174, 177–80; HP Ex. 60(a) (Motion of Lifemark to Enroll Additional Counsel of Record, *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, Case No.: 2:93-cv-01794-GTP (E.D. La. March 11, 1997)).

**E. Judge Porteous's Relationship with Amato and the Firm Amato & Creely
While the Liljeberg Case Was Pending**

Judge Porteous conducted a bench trial in the Liljeberg case in June and July 1997.⁷⁴ At the conclusion of the trial in July of 1997, Judge Porteous took the case under advisement. He did not issue his opinion until April 26, 2000, nearly three years after trial.⁷⁵

1. Meals

Amato and Creely continued to take Judge Porteous to lunches after the Liljeberg trial ended and prior to Judge Porteous issuing his written decision in that case. The restaurants where Amato took Judge Porteous included Ruth's Chris Steak House, the Beef Connection, Andrea's, and Emeril's.⁷⁶ From May 1999 to April 2000 (during which time the Liljeberg case was pending), the following chart reflects some of the meals attended by Judge Porteous and paid for by Amato, as reflected on Amato's credit card statements and his calendars for that period, which were produced to the Department of Justice pursuant to a grand jury subpoena.⁷⁷

Date	Restaurant	Amount	Calendar Notes
05/05/99	Sal and Sam's Metairie	\$56.45	"Tom Porteous"
05/26/99	Cannon's Restaurant	\$28.40	"GTP Parking \$5"
06/16/99	Ruth's Chris #2 Steak House	\$154.57	"G.T.P. Parking \$7" [PAID BY CREELY]
06/22/99	Ruth's Chris #1 Steak House	\$98.06	"Tom Porteous Parking \$3"
06/29/99	Red Maple Restaurant	\$52.48	"GTP" [PAID BY CREELY]

⁷⁴ See HP Ex. 50 (Pacer Docket Report at pp. 39-41), *supra* note 55.

⁷⁵ See HP Ex. 50 (Pacer Docket Report at p. 44 (Docket Nos. 471-72)), *supra* note 55.

⁷⁶ Amato Task Force at 103-04.

⁷⁷ See HP Ex. 21(b) (Jacob Amato calendars, 1999-2001); HP Ex. 21(c) (Jacob Amato credit card records).

Date	Restaurant	Amount	Calendar Notes
07/29/99	Sal and Sam's Metairie	\$37.50	"GTP"
08/02/99	Omni Hotels	\$45.82	"G.T.P. - \$4 Parking"
08/12/99	Crescent City Brewhouse (3 separate charges)	\$242.03, \$29.64, \$30.46	"G.T.P Parking \$8"
09/13/99	Metro Bistro	\$44.00	"GTP - Parking \$5"
10/04/99	Andrea's Restaurant	\$244.78	"GTP - Parking \$15"
12/06/99	Ruth's Chris #1 Steak House	\$299.41	"GTP Parking \$10"
12/28- 29/99	Canon's Restaurant	\$80.24	"G.T.P" [Calendar entry unclear as to which date]
01/12/00	Beef Connection	\$206.68	"G.T.P."
01/25/00	Dickie Brennan Steak	\$233.50	"G.T.P.- Parking \$4"
02/09/00	Bruning's Restaurant	\$60.61	"Porteous"
03/01/00	Dickie Brennan Steak	\$124.29	"G.T.P. \$5"
03/29/00	Red Maple	\$160.83	GTP
04/05/00	[no corresponding restaurant charge in New Orleans]		"GTP & Crew \$145"
04/17/00	Beef Connection	\$101.37	"G.T.P" [PAID BY CREELY]

2. May 1999 - Creely's Payments for Judge Porteous in Las Vegas

In May 1999, while the Liljeberg case was pending his decision, Judge Porteous went on a trip to Las Vegas, Nevada with several friends, including Creely and Gardner, for his son's bachelor party. Creely paid for Judge Porteous's hotel room and some incidental room charges. He also paid for a portion of Timothy Porteous's bachelor party dinner at the Golden Steer. These payments amounted to more than \$1,100. During that trip, Creely accompanied Judge

Porteous and others to a strip club, where Creely gave a club employee \$200 to pay for a lap dance for Judge Porteous and a courthouse employee.⁷⁸

Judge Porteous admitted in his Fifth Circuit testimony that Creely paid for his hotel room and a portion of the dinner on the May 1999 Las Vegas trip.⁷⁹

3. June 1999 – Judge Porteous Solicits and Receives
Approximately \$2000 from Amato

On June 29, 1999 – prior to Judge Porteous issuing his decision in Liljeberg – Judge Porteous solicited approximately \$2,000 to \$2,500 from Amato while the two men were on a fishing trip. Amato described the incident as follows:

We were standing on the front of Mitch Martin's boat, his rather large boat, and we were both drinking, the judge was not hysterical, but he was very upset that his son's wedding was coming up soon and that he didn't have enough money to put the kind of wedding on that he thought he should. I don't know if he was – for the – half the rehearsal party or whatever. But he had some – some wedding-related reason why he needed some cash to go farther with the wedding plans.⁸⁰

⁷⁸ See Creely SITC at 289:23 – 290:2, 289:17-22, 354:1-10, 291:7-18. See also HP Ex. 377 (Caesars Palace Record reflecting that Creely signed for Judge Porteous's room charges); HP Ex. 378 (consisting of: (1) Caesars Palace records including Judge Porteous's room charges of \$86.11, \$86.11 and \$378.70, and (2) the Amato & Creely corporate American Express statement for May 1999 showing charges for \$86.11, \$86.11, and \$378.70 – from Judge Porteous's hotel room at Caesars Palace – and for \$560.58 – from Creely's payment at the Golden Steer bachelor party dinner – for a total in excess of \$1,100). At the SITC trial, Creely expressed confusion at separating out Judge Porteous's charges on his credit card statement from other charges he incurred on that trip, but those charges are readily identifiable by reference to Judge Porteous's room statement, which is part of HP Ex. 378, and the charges clearly total more than \$1,100.

⁷⁹ Porteous 5th Cir. at 140 (“It appears Mr. Creely paid for [my room].”).

⁸⁰ Amato SITC at 141:5-14. See also Amato Task Force at 104–05 (“It was a weekday, and a friend of mine has a fairly large boat . . . So we went fishing that night. Judge Porteous was drinking. We were standing on the front of the boat, the two of us, and he was—I don't know how to put it. He was really upset. He was—had a few drinks. He said, ‘My son's wedding was more than I anticipated. The girl's family can't afford it. I invited too many guests.’ Would I lend him, give him, provide him, however you want to call it, something, like \$2,500, to pay for part of the wedding or the after-rehearsal party of something?”); Amato 5th Cir. at 240; HP Ex. 283 (Amato's June 1999 calendar showing the name “Mitch Martin” written in the box for June 29, 1999).

Amato subsequently obtained approximately half that amount (\$1,000) from Creely, and gave Judge Porteous \$2,000 in cash in an envelope.⁸¹

Creely recalled the incident in similar terms as Amato. Creely testified:

- A. There was a fishing trip that I wouldn't go on, didn't want to go on. And Judge Porteous and Amato went on this fishing trip. In general - I don't remember word for word how it went. It was 11 years ago. But the judge and he ended up in some sort of a conversation, either on the front or the back of the boat where the judge became - loss of words, became emotional about not being able to satisfy or pay for the obligation that he needed money for and asked Jake Amato to help him out. And that was what was related to me. . . .
- Q And both of you decided that if you were going to give money to the judge, it was going to come from you both equally?
- A. Yeah. That's what Mr. Amato decided, that we would give half the money to the judge, and I eventually did it.⁸²

Judge Porteous, testifying in the Fifth Circuit hearing, confirmed the essence of Amato's recollections of events surrounding the request for money on the fishing trip. Judge Porteous admitted that he received cash from Amato for the purposes Amato described, and that cash was received in an envelope.

- Q. Do you recall in 1999, in the summer, May, June, receiving \$2,000 for [sic: should be "from"] them?
- A. I've read Amato's grand jury testimony. It says we were fishing and I made some representation that I was having difficulties and that he loaned me some money or gave me some money.
- Q. You don't - you're not denying it; you just don't remember it?
- A. I just don't have any recollection of it, but that would have fallen in the category of a loan from a friend. That's all.

* * *

⁸¹ See Amato SITC at 141:23-24.

⁸² Creely SITC at 294:4-22.

- Q. [W]hether or not you recall asking Amato for money during this fishing trip, do you recall getting an envelope with \$2,000 shortly thereafter?
- A. Yeah. Something seems to suggest that there may have been an envelope. I don't remember the size of an envelope, how I got the envelope, or anything about it.

* * *

- Q. Wait a second. Is it the nature of the envelope you're disputing?
- A. No. Money was received in [an] envelope.
- Q. And had cash in it?
- A. Yes, sir.
- Q. And it was from Creely and/or -
- A. Amato.
- Q. Amato?
- A. Yes.
- Q. And it was used to pay for your son's wedding.
- A. To help defray the cost, yeah.
- Q. And was used -
- A. They loaned - my impression was it was a loan.
- Q. And would you dispute that the amount was \$2,000?
- A. I don't have any basis to dispute it.
- Q. Your impression was that it was a loan was what you just said, correct?
- A. Yes.
- Q. Did you ever pay back the loan?
- A. No, I didn't. I declared bankruptcy in 2001; and, of course, I didn't list it.⁸³

⁸³ Porteous 5th Cir. at 121, 136-38. Judge Porteous's Fifth Circuit testimony, that he considered the \$2,000 a "loan," is obviously not true. In the entire history of the relationship

At the time of Judge Porteous's request of Amato for money, Judge Porteous had the Liljeberg case under advisement, with his decision in that case still to be rendered. Depending on how Judge Porteous chose to rule, Amato and his firm could receive up to a million dollars – or get nothing.⁸⁴ The case was exceptionally important to Amato, who had put his practice on hold for almost two years to handle this demanding contingency case. The leverage that Judge Porteous had over Amato at the time of this request – where Judge Porteous had the power to enrich Amato many times over the amount that he was requesting of Amato – was apparent. Amato was blunt that Judge Porteous's role as a judge, with the Liljeberg case pending before him, was a factor that influenced Amato's willingness to give Judge Porteous cash.

Q. Let me ask you now, Amato, did the fact that you stood to make a lot of money enter your head when he asked you for the cash?

A. It did, yes, it did.⁸⁵

between Judge Porteous and attorneys Amato and Creely, there is no evidence whatsoever that any of the cash they gave Judge Porteous was ever considered or treated as a loan, or that Judge Porteous ever repaid anything to them.

Notwithstanding that Judge Porteous swore under oath before the Fifth Circuit that this transaction was "a loan," Judge Porteous, through his attorneys, came up with an entirely different explanation for this transaction at the SITC trial, during which the payment was described as a "wedding gift": "It was a gift, a wedding gift from long-standing friends." Jonathan Turley SITC Opening Statement at 76. This description of the transaction is equally far-fetched and disingenuous. The payment of \$2,000 from Amato and Creely to Judge Porteous bore no semblance whatsoever to a common understanding of the term "wedding gift." For one, the cash was provided to the father of the groom – not the groom; for another, it was provided not as a result of any charitable impulse but in response to a specific request for cash. If those reasons were not enough to render the "wedding gift" explanation fictive, both Amato and Creely specifically denied that the cash was intended to constitute such a gift. *See* Amato SITC at 231:3-22 (Amato gave the groom a different wedding present); Creely SITC at 359:25 – 360:8 ("It wasn't a wedding present."). It is inferable that Judge Porteous and his attorneys have resorted to "false exculpatory" explanations for the conduct because the truth is so truly damning and reveals what was, in substance, Judge Porteous's shakedown of Amato for cash.

⁸⁴ *See* Amato SITC at 132:22 – 133:11.

⁸⁵ Amato SITC at 142:23 – 143:1.

* * *

Q. So you understood that this was something of critical importance to him?

A. Yes.

Q. Now, you testified on cross that you gave him the money, but influencing the judgment was not the primary reason; is that right?

A. Yes, that's correct, it wasn't the primary reason, a moving reason. It was because of my friendship, and I really felt sad for him. Now, I did consider that, you know, I had a case in front of him.

Q. In the House I think I asked you to break down –

A. Yes.

Q. -- how you weighted this, how much of your motivation to give him the money was based on your friendship and how much was based on the fact that this was a federal judge sitting on a case worth a potential half million to a million to you. How did you break that down?

A. 20 percent because he was a federal judge, the rest because of friendship and because I really felt sorry for him. I know what it's like to raise a bunch of kids, you know?

Q. But 20 percent was because he had a case worth a fortune to you, wasn't it?

A. Yes, and I – biggest mistake I ever made.

Q. You didn't believe it would influence the judge's decision necessarily, but you weren't willing to take the risk that it might?

A. That's correct.⁸⁶

The shakedown quality to Judge Porteous's request is obvious and was perceived as such by Amato. It was inconceivable that with the case pending, Amato would "take the risk" of turning down Judge Porteous's request for cash where the matter was of "critical importance" to the judge.⁸⁷ Thus, the evidence established beyond a doubt that in the midst of presiding over a

⁸⁶ Amato SITC at 232:20 – 233:25 (emphasis added).

⁸⁷ *Id.* at 232:20-22.

case, at a critical stage where he had the case under advisement, Judge Porteous solicited and received cash from one of the attorneys for one of the parties. Judge Porteous's solicitation of cash from Amato demonstrates Judge Porteous's egregious misuse of his judicial power to enrich himself. A judge who engages in such conduct is unfit to continue to hold the office of United States District Judge.

4. Other – Amato's and Creely's Payment for Five Year Anniversary Party

In late 1999, still while Judge Porteous had the Liljeberg case under advisement, Amato and Creely paid for a party for Judge Porteous to celebrate his fifth year on the federal bench, at the French Quarter Restaurant and Bar, to which his present and former clerks and other attorneys were invited. Amato estimated they paid between \$1,000 and \$1,500.⁸⁸

F. Procedural History of the Liljeberg Case – 1997 to 2002

Notwithstanding Judge Porteous's statement at the October 16, 1996 recusal hearing that: "I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off," he did not notify Mole of any of his post-recusal hearing and post-trial contacts with Amato or Creely which would have provided Mole the opportunity to renew his motion to recuse.⁸⁹ Specifically, Judge Porteous did not inform attorney Mole of the meals, the payments of expenses in Las Vegas, the \$2,000 cash payment, or Amato and Creely's payment towards Judge Porteous's fifth year anniversary party.

⁸⁸ See *id.* at 145:12-21; Danos SITC at 871:17-24; Amato Task Force at 105 (estimating \$1,700).

⁸⁹ See Mole SITC at 399:2-19; Mole 5th Cir. at 193 (testifying that he would have been "very alarmed to find out that Jake was giving money to the judge during the case as being under submission for decision by Judge Porteous"); Mole Task Force at 145 ("All of those things were the things I—sort of things I feared were happening or would happen, but had-I had no knowledge of:").

On April 26, 2000, Judge Porteous issued a written opinion in the Liljeberg case. By that time, Judge Porteous's financial situation was desperate. He had nearly depleted his IRA account, had over \$100,000 in credit card debt, and was just weeks away from meeting with a bankruptcy attorney. He knew that he had turned to Amato and Creely as sources of financial support in the past, and there is every reason to conclude that he would have expected such a relationship to continue in the future. Judge Porteous – who had taken judicial actions in the past so as to enrich himself – had powerful financial motives not to burn his bridges with Amato and Creely and, instead, to curry their favor and stoke their generosity.

Thus, Judge Porteous ruled in all major aspects for Amato's and Levenson's clients, the Liljebergs. According to Lifemark's counsel, this was a "resounding loss" for Lifemark,⁹⁰ and Lifemark appealed Judge Porteous's decision to the Fifth Circuit Court of Appeals.⁹¹

In August of 2002, the Fifth Circuit Court of Appeals reversed Judge Porteous's decision in most significant aspects. In doing so, the Fifth Circuit characterized various aspects of Judge Porteous's ruling as "inexplicable," "a chimera," "constructed entirely out of whole cloth," "absurd," "close to being nonsensical," and "not supported by law."⁹²

After the case was reversed by the Fifth Circuit and remanded back to Judge Porteous, the parties settled because Mole's client did not want to go back before Judge Porteous.⁹³

⁹⁰ Mole SITC at 400:17-18. Such a verdict was consistent with Judge Porteous's reputation of awarding verdicts to his friends. See Bodenheimer SITC at 1308:16 – 1309:1.

⁹¹ See Mole SITC at 401:5-7.

⁹² HP Ex. 63 (Fifth Cir. *Liljeberg* Opinion at 428–29, 431–32), *supra* note 54.

⁹³ See Mole SITC at 404:6-11.

**G. Judge Porteous Should Be Convicted and Removed from Office for
Engaging in the Conduct Set Forth in Article I**

The House has clearly proved the allegations set forth in Article I. That conduct constitutes a “high Crime and Misdemeanor” warranting Judge Porteous’s conviction and removal from the office of United States District Judge.

The conduct at issue warrants conviction and removal for several independent reasons. First, at its core, the conduct demonstrates Judge Porteous’s breach of the public trust by his abuse of his judicial office for personal gain. He did so while a state judge by assigning Creely curatorships in order to enrich himself; he did so as a federal judge by dishonestly conducting a recusal hearing for personal purposes, the effect of which was that he would control a case vital to his close friend and financial benefactor; he did so by soliciting cash of Amato at a time when he had enormous economic leverage and power over Amato; and ultimately, he did so by issuing an unsupported, result-oriented decision that would have greatly enriched Amato and Creely.

Second, the conduct at issue demonstrates Judge Porteous’s utter lack of integrity and lack of fitness to hold the office. This is apparent from the blatant corruption at the heart of the curatorship kickback scheme. It is also manifested by the dishonest way Judge Porteous handled the recusal hearing. He denied a fair hearing to Lifemark; he denied Lifemark a fair record on which they could base their appeal; and he prevented the Court of Appeals from having a fair record on which it could consider the appeal. Judge Porteous’s conduct was a total and knowing corruption of the judicial process.

Third, the conduct at issue brings disrepute to the federal judiciary and undermines public confidence in it. No one could possibly conclude that the verdict in the Liljeberg case was fair and impartial given the undisclosed relationship between Judge Porteous and the lawyers for the Liljebergs, including Judge Porteous’s solicitation of cash during the pendency of the case.

Further, the damage to public confidence in the judiciary going forward is immense: Judge Porteous's handling of the Liljeberg case sends the clear message that to prevail in his courtroom, it is necessary to give him things, or to hire attorneys who have given him things, and that the actual merits of the case are not determinative to a just outcome.⁹⁴ Judge Porteous so warped and corrupted the judicial process that both parties in the Liljeberg case felt it necessary (and who, unknown to the parties, had provided Judge Porteous with cash) to hire attorneys who were his friends, and, after the case was reversed and remanded on appeal, Lifemark decided to settle rather than go back to such a biased judge.

Thus, applying all the recognized and established grounds for conviction and removal – “abuse of position of trust,” “lack of integrity,” and “bringing disrepute to the judiciary and undermining public confidence in it” – Judge Porteous's conduct requires conviction and removal.

IV. ARTICLE II

A. Introduction

Starting in the early 1990s (while he was a state court judge), and continuing while on the federal bench, Judge Porteous maintained a corrupt relationship with bail bondsman Louis Marcotte. While on the state court, Judge Porteous solicited and accepted things of value from Marcotte (and from Louis Marcotte's sister, Lori Marcotte), and took a series of judicial actions – both in the nature of setting bonds as they requested (at amounts they recommended) and in setting aside and expunging felony convictions of two of their employees – that benefited the

⁹⁴ Creely and Amato each turned in their law licenses rather than face disciplinary proceedings for their conduct in connection with Judge Porteous. See Amato SITC at 150:7-13; Creely SITC at 294:23 – 295:6.

Marcottes. Judge Porteous's conduct was willfully corrupt, and was the same sort of conduct for which other state judges were ultimately convicted and imprisoned.

Even after he became a federal judge and could no longer set bonds for the Marcottes, Judge Porteous continued to maintain a corrupt relationship with them. He continued to accept expensive lunches from them, and, in particular, would go out to lunch with them when the Marcottes sought to impress and recruit others to their corrupt scheme. He willingly vouched for the bond practices of the Marcottes to state judges, knowing full well that the Marcottes were corrupt. By virtue of his influential position as a federal judge, Judge Porteous was particularly instrumental in the case of former state judge Ronald Bodenheimer, who kept his distance from Louis Marcotte until Judge Porteous spoke to him on Marcotte's behalf. Bodenheimer thereafter entered into a corrupt relationship with the Marcottes that was comparable to that of Judge Porteous when he was a state judge, and which ultimately resulted in Bodenheimer's guilty plea and incarceration.

Judge Porteous's conduct *vis-à-vis* the Marcottes constituted an abuse of his position of public trust and demonstrates Judge Porteous's lack of integrity. Further, Judge Porteous disgraces the federal judiciary as he continues to wear the robe of a federal judge after he has been exposed for having engaged in the same conduct which resulted in other state judges being sent to jail.

B. Overview – The Role of Louisiana State Judges in the Bail Bonds Business

In the 24th Judicial District Court (the "24th JDC"), where Judge Porteous presided as a state judge until October 1994, the bond-setting practices of the state judges had enormous financial impact on Louis Marcotte's bail bond business. If a judge were to set a bond so high that the prisoner could not afford to pay the premium to the bondsman (typically 10% of the bond), Marcotte would make nothing and the prisoner would remain in jail. If the bond was set

too low or if the prisoner was released on his personal promise to reappear, Marcotte would also make little or no money.⁹⁵ Thus, Marcotte wanted bonds to be set at the highest amount for which the individual who was arrested could afford to pay the premium – even if a lower bond was sufficient to secure their appearance in court. If, for example, the most money a prisoner could come up with to pay a premium was \$10,000, then Louis Marcotte wanted bond set at \$100,000.

When a person was arrested, the Marcottes (or their employees or agents) would interview him or her in jail, find out identifying information, the nature of the crime, and the prisoner's record. The Marcottes would also locate relatives or persons capable of posting the bond, run credit reports, and ultimately determine the maximum premium the prisoner could pay. The Marcottes would use that information in making a recommendation to one of the judges in the 24th JDC as to the amount of bond that the judge should set.⁹⁶ However, a judge's purpose in setting a bond amount should be to secure the defendant's presence in court, not necessarily to exhaust a defendant's (or his family's) resources – and certainly not to maximize a bail bondsman's profits.

Although the procedures in the 24th JDC during the early 1990s called for bond to be initially set by a sitting magistrate assigned to that duty, any judge in the courthouse could set bond. Accordingly, if the Marcottes thought that the sitting magistrate would set the bond “too high” or “too low” – something other than the “profit-maximizing” level – they would seek out a judge to set the bond at their recommended level. As Louis Marcotte explained: “[I]f the

⁹⁵ See Louis Marcotte Senate Impeachment Trial Committee Hearing Testimony (“Louis Marcotte SITC”) at 506:22 – 507:3.

⁹⁶ *Id.* at 504:20 – 505:3, 523:9-14. See also Louis Marcotte House Impeachment Task Force Hearing Testimony (“Louis Marcotte Task Force”) at 42.

magistrate wasn't favorable, we would start calling the judges at home, you know, real early before the magistrate got there. And then, if we couldn't get in touch with them, we would go shopping in the courthouse before the magistrate set the bond."⁹⁷ Every time a judge set bond at the Marcottes' request, the Marcottes maximized their profits.⁹⁸

C. The Relationship Between Judge Porteous and the Marcottes

In order to maximize his profits, Louis Marcotte needed judges who would be receptive to his bond requests. Judge Porteous, with expensive habits (alcohol and gambling), needed financial support. Each of these men quickly understood what the other could do for him, and they formed a mutually beneficial, corrupt relationship.

1. Meals

The Marcottes started to develop a relationship with Judge Porteous in the early 1990s. They met him through Adam Barnett, another bondsman who on occasion worked with the Marcottes. Barnett was close to Judge Porteous, and the Marcottes initially used Barnett to approach Judge Porteous to set bonds.⁹⁹ After the Marcottes got to know Judge Porteous, they dealt with him directly, and began to take Judge Porteous to lunch, along with his secretary, Rhonda Danos. The meals were expensive and involved "lots of drinking" by Judge Porteous.¹⁰⁰

⁹⁷ Louis Marcotte Task Force at 43. *See also* Lori Marcotte Senate Deposition ("Lori Marcotte Sen. Dep.") at 49:2-4 ("[Sometimes] we didn't even call the magistrate if we knew it was someone that wouldn't help us."); Louis Marcotte Senate Deposition ("Louis Marcotte Sen. Dep.") at 139:22 – 140:11 (Louis went to Judge Porteous if he thought he could do better with Judge Porteous than the Magistrate, not just if the Magistrate were unavailable).

⁹⁸ *See* Louis Marcotte SITC at 523:2-5, 524:11-16, 508:25 – 509:3.

⁹⁹ *Id.* at 509:7-20, 560:12 – 561:10. *See also* Lori Marcotte Sen. Dep. at 10:14-18; Louis Marcotte Sen. Dep. at 18:12-18, 23:2-4.

¹⁰⁰ *See* Louis Marcotte SITC at 509:21-25, 510:16-25, 511:1-7, 512:1-7 ("lots of drinking"); Jeffery Duhon Senate Impeachment Trial Committee Hearing Testimony ("Duhon SITC") at

The best evidence suggests that the Marcotte lunches with Judge Porteous started in or around 1992.¹⁰¹

Louis Marcotte estimated that the lunches with Judge Porteous occurred “around once a week and sometimes twice a week” and identified the restaurants as including the Beef Connection, Ruth’s Chris Steak House, and other “high-end restaurants.”¹⁰² To arrange these lunches, Louis Marcotte would sometimes call Judge Porteous, and Judge Porteous would sometimes call Louis Marcotte. On some occasions, the Marcottes would call Judge Porteous’s secretary Danos and she would set up the lunch.¹⁰³

661:12-16, 663:18-25; Danos SITC at 892:12-20 (“a few times a month”); Lori Marcotte Sen. Dep. at 22:1-3.

¹⁰¹ See Lori Marcotte Sen. Dep. at 15:23 – 16:25, 60:16-25. It should be noted that former state judge Alan Green was elected as a 24th JDC judge in October of 1992, and Lori Marcotte specifically recalled a lunch with Green soon after he was elected. See PORT Ex. 1007 (list of judges who served on the 24th JDC). In questioning Lori Marcotte during the SITC trial, Judge Porteous’s attorney represented that Green was elected in November 1993. In response, Lori Marcotte testified: “I thought it was sooner.” See Lori Marcotte SITC at 646:15-19. That colloquy confirms not only the specificity and certainty of Lori Marcotte’s recollection as to dates that the Marcottes’ relationship with Judge Porteous and the lunches began, but the accuracy of her recollection that they started in 1992, especially in the face of a mistaken representation of fact by counsel for Judge Porteous. Judge Porteous has sought through questioning to suggest that his relationship with the Marcottes did not begin until after a derogatory newspaper article appeared in fall 1993.

¹⁰² Louis Marcotte SITC at 512:8-17. See also Louis Marcotte Task Force at 44; Lori Marcotte Sen. Dep. at 66:13 – 67:6 (Ruth’s Chris Steak House, the Beef Connection, and the Red Maple).

¹⁰³ See Louis Marcotte SITC at 510:11-15; Louis Marcotte Task Force at 44 (“It started out with me calling him for lunch. And then, as we got closer and developed a relationship, he would call and then I would call.”)

Louis Marcotte paid for the lunches with Judge Porteous through his company, Bail Bonds Unlimited (“BBU”). Judge Porteous never paid for a lunch that he attended with the Marcottes.¹⁰⁴

The Marcottes wanted there to be a lot of people at the lunches they hosted for several reasons. First, Judge Porteous liked to have people around him, and the Marcottes wanted him to have a good time. They allowed Judge Porteous to bring whomever he wanted to the lunches. In addition, it helped the Marcottes for other judges who were guests at their lunches to see them with Judge Porteous, because it made Louis Marcotte “look like a businessman instead of a bondsman.”¹⁰⁵ However, no matter how many people were in attendance at the lunches, the Marcottes viewed the monies they spent on the lunches as money spent on and for the benefit of Judge Porteous, and, of course, to benefit their business.¹⁰⁶ For Marcotte, these lunches were business, not pleasure. He often preferred to be working at his office rather than sitting around drinking in the middle of the day, but these lunches were his investment to make money.¹⁰⁷

Lori Marcotte, in her Task Force testimony, specifically described one of the Judge Porteous lunches at which then newly elected state judge Alan Green was in attendance, as follows:

¹⁰⁴ See Louis Marcotte SITC at 514:7-16 (“none,” “never”); Louis Marcotte Task Force at 45 (Of a hundred lunches that Judge Porteous may have attended with Louis Marcotte, Judge Porteous “didn’t pay for any”).

¹⁰⁵ Louis Marcotte SITC at 511:8-18. See also Lori Marcotte Sen. Dep. at 61:4-11, 61:22 – 62:2, 62:15-20 (describing how a lunch would come about: “As soon as a judge gets elected, let’s try to get him at the table. Let’s try to train him. And that was an opportunity for Judge Porteous to have an entourage with him too. Let’s invite two or three judges and their staff and the table would be big like this.”).

¹⁰⁶ See Louis Marcotte SITC at 514:17-20; Lori Marcotte Sen. Dep. at 122:13 – 123:1.

¹⁰⁷ See Louis Marcotte Sen. Dep. at 38:5 – 39:1, 137:14-21 (Louis became tired of drinking in the middle of the day when he needed to work at his business).

I remember setting up a lunch with some other judges and some attorneys and Judge Porteous and Rhonda, and we had - they had invited or we had invited Judge Green who was newly elected. And, I mean, it is pretty clear because that was really the first lunch where Judge Porteous had explained the concept of splitting bonds. That was kind of like the stage for everything else that would happen.¹⁰⁸

Green was ultimately convicted of a federal corruption offense and incarcerated as a result of his relationship with the Marcottes.

2. Car Repairs

When Louis Marcotte was first dealing with Judge Porteous through Adam Barnett and did not have direct contact with the judge, Barnett would ask Louis Marcotte to share the expenses associated with taking care of Judge Porteous's cars. On occasion, there was a kickback quality to these requests, as a portion of the bond premium for a bond set by Judge Porteous for Barnett and the Marcottes would be used to pay for car repairs.¹⁰⁹ Louis Marcotte ultimately "edge[d] Adam [Barnett] out" of the relationship with Judge Porteous, and began to deal with Judge Porteous directly,¹¹⁰ so he could be sure that he was getting credit with Judge Porteous for the repairs. Louis Marcotte described his involvement in taking care of Judge Porteous's cars as follows:

- Q. Okay. And let me turn now to the subject of automobiles. Did you have anything to do with Judge Porteous's cars in the time period prior to 1994?
- A. You know, it's hard to say, the time frame, was it '92, '92, yes. What I can say is I fixed cars for he and his family.
- Q. And what do you mean by that, fixing cars?

¹⁰⁸ Lori Marcotte Task Force at 57. *See also* Lori Marcotte Sen. Dep. at 58:15-21.

¹⁰⁹ *See* Louis Marcotte SITC at 515:12-20; Louis Marcotte Sen. Dep. at 23:23 – 24:4, 95:4-12, 34:3-20, 45:4-12, 134:12-20 ("Adam and I would share the costs of the car but Porteous didn't know it was coming from me. He just thought Adam was doing it.").

¹¹⁰ Louis Marcotte SITC at 515:12-20.

- A. Tires, radios, transmissions, body work. Every time I took one of his cars, I filled it up with gas and washed it as well.
- Q. All right.
- A. I mean, I really wanted to make a statement, you know, when I did something for him.¹¹¹

Louis Marcotte would make repairs to Judge Porteous's cars – which he described as “old and kind of beat up” – “once a month or once every three months.”¹¹² Marcotte would have his employees, Jeff Duhon and Aubry Wallace, pick up the cars for repairs and servicing. On occasion, Duhon would go to Judge Porteous's chambers to pick up the keys so he could take care of the cars.¹¹³ Judge Porteous gave Aubry Wallace the security code to the courthouse parking lot, and Wallace would get the keys to Judge Porteous's car from under the floor mat.¹¹⁴ In addition to the more significant repairs, Louis Marcotte (mainly through Wallace) would regularly pick up Judge Porteous's car to have it washed, detailed and filled up with gas.¹¹⁵ Louis Marcotte, through BBU, paid for all Judge Porteous's car repairs. Judge Porteous never reimbursed him.¹¹⁶ On several occasions when Wallace returned the car to Judge Porteous, the

¹¹¹ *Id.* at 514:23 – 515:10.

¹¹² *Id.* at 516:13-15. *See also* Duhon SITC at 658:10-16; Lori Marcotte Sen. Dep. at 60:20-24 (“His car was broken a lot.”).

¹¹³ *See* Duhon SITC at 657:19-20; Darcy Griffin Senate Impeachment Trial Committee Hearing Testimony (“Griffin SITC”) at 1842:7-19 (“I know [the Marcottes] were coming to get the keys” to do something with Judge Porteous's cars).

¹¹⁴ *See* Aubry Wallace Senate Impeachment Trial Committee Hearing Testimony (“Wallace SITC”) at 682:14-19.

¹¹⁵ *See* Louis Marcotte SITC at 515:4-7, 516:4-11; Duhon SITC at 657:10-17 (“brakes, air conditioning, transmission and things like that”); Louis Marcotte Task Force at 45-46; Lori Marcotte Sen. Dep. at 85:11-16.

¹¹⁶ *See* Louis Marcotte SITC at 517:25 – 18:3.

Marcottes would leave presents in the car for Judge Porteous, such as liquor and coolers of shrimp.¹¹⁷

3. Trip to Las Vegas with Judge Giacobbe and Other Attorneys

In or about 1992, Lori Marcotte took Rhonda Danos to Las Vegas. Judge Porteous did not attend this trip.¹¹⁸ Thereafter, in approximately 1993 or 1994, Louis Marcotte took Judge Porteous on a trip to Las Vegas. Also in attendance was another state judge, George Giacobbe. Louis Marcotte also included some attorneys on the trip because he knew that bail bondsmen do not enjoy a great reputation and it would not look good for Judge Porteous to be going to Las Vegas only with him.¹¹⁹

Louis Marcotte and Lori Marcotte split the costs of Judge Porteous's trip with the attorneys and gave Rhonda Danos cash in Judge Porteous's chambers to reimburse her for the cost of the trip.¹²⁰ Lori Marcotte recalled "standing in [Danos's] office, with another attorney, handing her the money."¹²¹ The Marcottes paid for the trip in cash "to hide it from the world."¹²²

4. Home Repairs

In or about 1994 – while Judge Porteous was still a state judge – Judge Porteous told Louis Marcotte that a storm blew down an 85 foot section of his wooden fence. Marcotte sent

¹¹⁷ See Wallace SITC at 685:23 – 686:11.

¹¹⁸ See Lori Marcotte SITC at 610:7-17.

¹¹⁹ See Louis Marcotte SITC at 518:21 – 520:5; Lori Marcotte SITC at 610:16 – 611:2; Louis Marcotte Task Force at 46.

¹²⁰ See Lori Marcotte SITC at 611:5-14.

¹²¹ Lori Marcotte Task Force at 56. See also Danos SITC at 876:20-21 (recalling being reimbursed by Marcottes for a trip, but not recalling if it was Louis or Lori who reimbursed her, or whether the reimbursement was by check or cash).

¹²² Louis Marcotte SITC at 520:6-17.

Duhon and Wallace to do repairs on the fence at Judge Porteous's house. Duhon purchased the necessary materials, consisting of poles, concrete, two by fours, and boards. Louis Marcotte paid for the materials, and Duhon estimated that the project took about three days.¹²³

5. Other – Taking Rhonda Danos to Las Vegas

The Marcottes also invited and paid for Rhonda Danos to go on trips with them to Las Vegas, and paid for her entertainment on those trips, both when Judge Porteous was a state judge and when he was a federal judge. They did so because she was the “gatekeeper” to Judge Porteous and because she herself handled matters associated with the bond setting process. The Marcottes would never have paid for those trips but for Ms. Danos's status as Judge Porteous's secretary. Judge Porteous knew that the Marcottes were paying for Ms. Danos's trips.¹²⁴

D. Judge Porteous's Bond Setting for the Marcottes

The Marcottes gave Judge Porteous things of value so that they would have access to him to set bonds as they requested.¹²⁵ The Marcottes would go to Judge Porteous to reduce bonds in cases where the bonds were set too high, or when the bonds had not been set at all and they needed him to set bond as an initial matter.¹²⁶ They would produce a “worksheet” that would

¹²³ See Louis Marcotte SITC at 18:4-8; Duhon SITC at 660:17-20, 660:24-25, 659:19 – 660:6; Wallace SITC at 686:12 – 687:3; Louis Marcotte Task Force at 46.

¹²⁴ See Danos SITC 895:19 – 896:18; Lori Marcotte Sen. Dep. at 22:4-22, 26:17-21 (“[W]e wanted to spend money to make her happy.”), 110:4-24 (1992 Las Vegas trip with Danos during which they flew over the Grand Canyon), 111:21 – 112:15 (provided Danos things of value because she controlled access to Judge Porteous, was the “gatekeeper,” and because she helped them with bond matters). See also HP Ex. 371 (containing, among other records, Lori Marcotte's credit card statement containing charges for air travel to Las Vegas purchased for Danos in 1998, Lori Marcotte's credit card statement containing charges for air travel to Las Vegas purchased for Danos in 1996, and the Golden Nugget Casino room statement for Danos for February 1996 (charged to the BBU address)).

¹²⁵ See Louis Marcotte SITC at 520:21 – 521:1.

¹²⁶ *Id.* at 521:9-18; Louis Marcotte Sen. Dep. at 74:4-8.

reflect what the defendant could afford, and they would ask Judge Porteous to approve the worksheet. The conversations often involved specific references to what prisoners could afford to pay, rather than what was necessary to secure their presence in court.¹²⁷

As a general matter, only the Marcottes (and their employees) and Judge Porteous were present during these conversations. Typically, no defense attorney or representative from the District Attorney's Office was involved.¹²⁸ The testimony of the John Mamoulides, the District Attorney for Jefferson Parish at that time, could not be more clear: "[M]y office didn't participate in the setting of bonds and all." "[W]e stayed away. We wouldn't recommend bond . . . [Bond setting] was always done without a DA there. That could be in the middle of the night or whatever." "[W]e didn't recommend bonds unless we were specifically asked by the sheriff's office or somebody on a flight problem or whatever. It was done without us being there before we even got a charge. And I didn't want my people participating in that."¹²⁹

In contrast to Judge Porteous's willingness to deal directly with the Marcottes – who would walk back to his chambers with Duhon or Wallace in tow – there were other judges of the 24th JDC who would not deal with the Marcottes.¹³⁰

¹²⁷ Louis Marcotte SITC at 521:19-24 ("We would get the bond set to the amount the defendant could make."), 523:2-7, 524:17 – 525:1; Duhon SITC at 662:11-21.

¹²⁸ See Louis Marcotte SITC at 508:22-24. Judge Porteous's counsel represented in his opening statement that Judge Porteous would consult with the District Attorney's Office before setting bond. See Turley SITC Opening Statement at 88:21-25.

¹²⁹ John Mamoulides Senate Impeachment Trial Committee Hearing Testimony ("Mamoulides SITC") 1768:22-23, 1800:8-11, 1802:15-20. See also Lori Marcotte Sen. Dep. at 113:9 – 114:4 (no District Attorney involvement in the "vast, vast, majority of the bonds that Judge Porteous set"); Louis Marcotte Sen. Dep. at 14:7-14.

¹³⁰ See Griffin SITC at 1844:16 – 1845:7 (mentioning three judges in particular among others who would "work with the lawyers rather than the bondsmen."). Similarly, former District Attorney Mamoulides's testimony reflects his understanding that bond matters were

Judge Porteous thus took numerous actions in his judicial capacity that he knew were calculated to maximize the financial benefit to the Marcottes in their business – after all, that’s why they were there asking him to set or reduce bonds.¹³¹ Judge Porteous would make himself available to set bonds, and the Marcottes enjoyed easy access to him (whereas there were numerous judges who did not want to deal with bond matters at all, or did not want to deal with the Marcottes directly, preferring instead to deal with attorneys for those who were arrested). The Marcottes would go by his chambers, would drop off paperwork with Rhonda Danos, or call at his house.¹³² Judge Porteous would set bonds for the Marcottes that other judges did not want to handle.¹³³ He would devote extra effort to figure out ways to set or reduce bonds and exercise his discretion in ways to set bonds that would be of financial value to the Marcottes. He would be inventive and take political risks in “splitting bonds.”¹³⁴

An inevitable consequence of Judge Porteous’s willingness to set bonds at levels requested by the Marcottes was the financial squeezing of families, who, as a result of the conspiratorial relationship, paid more than they otherwise would have paid to secure the liberty of the arrestee pending trial. Thus, for example, if the Marcottes anticipated that a given prisoner would be released by the magistrate with no commercial bond, the Marcottes would go to Judge Porteous to set a commercial bond, permitting the Marcottes to earn some money in the form of a

typically handled by defense attorneys looking out for the best interests of their clients, not by the bail bondsmen seeking to maximize profits. *See Mamoulides SITC* at 1777:11-17.

¹³¹ *See Louis Marcotte SITC* at 525:2-5.

¹³² *Id.* at 521:25 – 522:5; *Duhon SITC* at 661:21 – 662:10; *Wallace SITC* at 682:2-6 (Judge Porteous “was a judge that Mr. Marcotte would frequently interact with bonds”)

¹³³ *See Louis Marcotte SITC* at 525:9 – 526:2.

¹³⁴ *See Lori Marcotte SITC* at 650:10-19; *Lori Marcotte Sen. Dep.* at 53:5-10, 57:3-19, 114:25 – 115:14.

premium, rather than nothing at all. Senator Risch accurately described the corrupt and insidious nature of the Judge Porteous-Marcotte relationship in the following observations when former State Judge Bodenheimer was on the stand:

[I]t appears to me the bail bondsmen came to you, they had already interviewed the family, they knew what they could get out of the family. And according to the indictment, you and the bail bondsman conspired to see that the family would have to pay the maximum you could possibly soak out of them. That's what I get out of this.¹³⁵

E. August 1994 – Louis Marcotte's Statements to the FBI in Connection with the FBI's Background Check of Judge Porteous

The corrupt relationship between Louis Marcotte and Judge Porteous played out further in the summer of 1994, when Judge Porteous was undergoing his background check investigation in connection with his potential nomination to be a federal judge. At that time, Louis Marcotte was interviewed by the FBI, and lied, not only to help Judge Porteous become a federal judge, but to protect Judge Porteous (and himself) from the exposure of their corrupt relationship.

On August 1, 1994, Louis Marcotte was interviewed by the FBI for the first time as part of the background check of Judge Porteous. Judge Porteous told him that the FBI was going to be coming to interview him.¹³⁶ As to Judge Porteous's drinking and financial situation, the FBI write-up of that interview reports:

He [MARCOTTE] advised that the candidate will have a beer or two at lunch, but has never seen him drunk. He has no knowledge of the candidate's financial situation.¹³⁷

¹³⁵ Bodenheimer SITC (questioning by Senator Risch) at 1323:2-16.

¹³⁶ See Louis Marcotte SITC at 532:10-15; HP Ex. 69(b) at PORT 503-04 (FBI Background Check of Judge Porteous).

¹³⁷ HP Ex. 69(b) at PORT 504 (FBI Background Check of Judge Porteous).

And, as to Judge Porteous's general integrity, the FBI write-up reports:

He is not aware of anything in the candidate's background that might be the basis of attempted influence, pressure, coercion or compromise or that would impact negatively on the candidate's character, reputation, judgement or discretion.¹³⁸

Louis Marcotte's statement that Judge Porteous "will have a beer or two at lunch" was false. In truth and in fact, Louis Marcotte had seen Judge Porteous drink "five, six, seven Absolut [vodka] straight up." Marcotte testified that he deliberately lied to the FBI to help Judge Porteous.¹³⁹

Louis Marcotte's statement to the FBI that he had no knowledge of the candidate's financial situation was also false. Marcotte knew that Judge Porteous was having financial problems. Marcotte drew that conclusion from Judge Porteous's beat up cars that Judge Porteous asked him to repair, and his knowledge of Judge Porteous's costly lifestyle, including the fact that Judge Porteous gambled and drank.¹⁴⁰

Finally, Louis Marcotte's statement that he was "not aware of anything in [Judge Porteous's] background that might be the basis of attempted influence, pressure, coercion, compromise, or that would impact negatively on [Judge Porteous's] character, reputation, judgement, or discretion" was also false. First and foremost, Louis Marcotte was aware of his own relationship with Judge Porteous, and knew it was improper. He knew he was in a position

¹³⁸ *Id.*

¹³⁹ See Louis Marcotte SITC at 531:16 – 532:16; Louis Marcotte Task Force at 49; Louis Marcotte Sen. Dep. at 39:16-21 (four or five Absolut Vodkas), 139:3-5 (Louis Marcotte had never seen anybody drink as much as Judge Porteous at the lunches).

¹⁴⁰ See Louis Marcotte SITC at 532:23 – 533:8; Louis Marcotte Task Force at 49 ("[B]y looking at the surroundings and the problems with the drinking and the cars and asking people for repairs and stuff like that, you know, one would think that, hey this guy is struggling. And by looking at the cars, you could see that he was struggling.").

to “destroy Judge Porteous.”¹⁴¹ Nonetheless, Louis Marcotte lied to the FBI to protect Judge Porteous and help him get his lifetime appointment, because Judge Porteous had been good to him, and because Marcotte wanted to protect himself.¹⁴²

Louis Marcotte’s false statements to the FBI on Judge Porteous’s behalf were part of the corrupt relationship between Marcotte and Judge Porteous, characterized by Marcotte doing things for Judge Porteous and Judge Porteous doing things for Marcotte. Louis Marcotte met with Judge Porteous soon after the FBI interviews and told Judge Porteous, in substance, “thumb’s up” or that he (Marcotte) had given Judge Porteous “a clean bill of health.”¹⁴³

F. Judge Porteous’s October 1994 Set-Aside of Aubrey Wallace’s Felony Conviction

1. Background – Judge Porteous’s 1993 Expungement of Jeffery Duhon’s Conviction.

In 1993, at Marcotte’s request, Judge Porteous expunged the burglary conviction of Jeffery Duhon, a Marcotte employee who was also married to Louis’s other sister (and who also did personal services for Judge Porteous). Louis Marcotte wanted Duhon to obtain a bail bondsman’s license, but Duhon was not eligible because of the burglary conviction. Marcotte approached Judge Porteous and asked him to expunge the conviction – “To be honest with you, I rode hard on him, you know, for maybe a couple months, hey, when are you going to do it, when

¹⁴¹ Louis Marcotte SITC at 533:14 – 534:2, 603:12-17. *See also* Louis Marcotte Task Force at 50 (acknowledging that he “was lying” not only because of his knowledge of Judge Porteous’s “actions with the gambling, the drinking” but because of Louis Marcotte’s knowledge of his own relationship with Judge Porteous, which gave him leverage over Judge Porteous).

¹⁴² *See* Louis Marcotte SITC at 532:16-22, 533:9-13.

¹⁴³ Louis Marcotte SITC at 535:13-22. *See also* Louis Marcotte Task Force at 51, 64 (shortly after the FBI interview, Marcotte met with Judge Porteous and “told him [Judge Porteous] everything that they asked about” and that he had given Judge Porteous “a clean bill of health.”).

are you going to do it, when are you going to do it, and at some point he did it.”¹⁴⁴ Pursuant to Louis Marcotte’s request, Judge Porteous expunged the conviction.¹⁴⁵ Judge Porteous’s action in expunging Duhon’s conviction was particularly noteworthy because Duhon had been sentenced by Judge E. V. Richards, not Judge Porteous, “[s]o what [Judge Porteous] did was he took the conviction out of another section and brought it in his section and then expunged the record.”¹⁴⁶

2. Judge Porteous’s Set-Aside of Aubrey Wallace’s Burglary Conviction

At around the time of Judge Porteous’s nomination to be a federal judge, in late summer 1994, Louis Marcotte asked Judge Porteous to set aside the felony burglary conviction of Aubrey Wallace, one of his employees.¹⁴⁷ Wallace had provided personal services to Judge Porteous – taking care of Judge Porteous’s cars and doing repairs at his house – at Louis Marcotte’s direction. Louis Marcotte asked Judge Porteous, in substance, “could you get this guy’s record expunged so he can become a licensed bail agent,” and pressed Judge Porteous to set aside

¹⁴⁴ Louis Marcotte SITC at 530:4-5.

¹⁴⁵ *Id.* at 530:8-10.

¹⁴⁶ *Id.* at 528:10 – 530:20. *See also* Duhon SITC at 655:10-15; Louis Marcotte Task Force at 48; Lori Marcotte Sen. Dep. at 100:12-18 (“My brother was the hound, keep going, let’s get it done, let’s get it done, let’s get it done.”).

Duhon had nothing to do with getting the expungement done or paying the lawyer who handled the paperwork. Louis Marcotte told Duhon that he (Marcotte) had taken care of it. Duhon had no recollection of a lawyer filing papers on his behalf. *See* Duhon SITC at 665:22 – 666:16, 670:4-8. The fact that a different Judge may have set aside the conviction prior to Judge Porteous expunging it does not materially impact the fundamental fact that upon Louis Marcotte’s request, Judge Porteous took a judicial action. For whatever reasons, Judge Richards, to whom Duhon’s case was assigned, had not expunged or would not expunge the conviction, so Judge Porteous – at Marcotte’s request – took that judicial action. Further, though the terms “setting aside” and “expunging” are used to describe judicial acts which have some similarity, expunging a conviction is certainly a qualitatively different act, as it results in even the arrest records being destroyed.

¹⁴⁷ *See* Louis Marcotte SITC at 535:23 – 536:6. This incident is also discussed in Section VI of this brief, which addresses Article IV of the Articles of Impeachment.

Wallace's conviction.¹⁴⁸ Judge Porteous agreed to do so but only after he was confirmed by the Senate, because he did not want to jeopardize his "lifetime appointment."¹⁴⁹ Marcotte testified:

Q. And do you recall Judge Porteous's response [to Marcotte's request to set aside Wallace's conviction]?

A. He kind of put me off and put me off. And he said look, Louis, I'm not going to let anything stand in the way of me being confirmed and my lifetime appointment, so after that's done I will do it.

In fact, that is what Judge Porteous did. He set aside Wallace's conviction on October 14, 2001, only after he had been confirmed by the Senate but prior to being sworn in as a federal judge.¹⁵⁰

The proof that Judge Porteous undertook this judicial action at Louis Marcotte's request is supported by overwhelming evidence, including the testimony of Louis Marcotte, Wallace, and Wallace's attorney.¹⁵¹ Louis Marcotte's testimony that Judge Porteous told him that he (Judge Porteous) would set aside Wallace's conviction after Judge Porteous was confirmed is corroborated by the very fact that Judge Porteous did in fact set aside the conviction only after confirmation. Further, the understanding of Judge Porteous's judicial action as arising from his corrupt conspiratorial relationship with Louis Marcotte is underscored by the fact that the set-aside was unsupported as a matter of law, nor defensible as an act of discretion. The facts and

¹⁴⁸ Louis Marcotte SITC at 536:4-7.

¹⁴⁹ The significance of the timing of the set-aside is further discussed later in this brief, in connection with the discussion of Article IV and Judge Porteous's concealing material facts from the Executive Branch and the Senate in connection with his nomination and confirmation.

¹⁵⁰ See Louis Marcotte SITC at 536:8-12. This incident is discussed in Section VI, dealing with Article IV.

¹⁵¹ See Wallace SITC at 690:1-6, 690:11-23; Robert Rees Senate Impeachment Trial Committee Hearing Testimony ("Rees SITC") at 1975:3-8, 1975:22-25 (agreeing that Marcotte had discussed Wallace's set-aside with Judge Porteous).

circumstances of this set-aside illustrate the nature and extent that Judge Porteous was beholden to Louis Marcotte.

The most significant aspect of the set-aside is that it reflects Judge Porteous's undertaking a judicial action at the request of Louis Marcotte during his last days as a state judge. However, a consideration of the laws and facts further demonstrates Judge Porteous's judicial action in setting aside Wallace's conviction was an ill-motivated, corrupt judicial act, that violated the law and was not justified by any sound considerations of policy.

Judge Porteous's set-aside of Wallace's conviction was unlawful for two reasons. First, in order to set aside the conviction, Judge Porteous had to amend the underlying sentence, from a sentence that did not authorize the set-aside to one that did. However, over four years had elapsed since Judge Porteous sentenced Wallace in 1990, and the Louisiana sentencing laws imposed strict time limits that prohibited Judge Porteous from amending the sentence. The pertinent sentencing laws ("Article 881") permitted a judge to amend a sentence only prior to its execution.¹⁵² Judge Porteous not only did not amend Wallace's sentence prior to its execution,

¹⁵² Article 881, entitled "Amendment of sentence," provided: "Although the sentence imposed is legal in every respect, the court may amend or change the sentence, within the legal limits of its discretion, prior to the beginning of execution of the sentence." See HP Ex. 69(d) at PORT 672 (LOUISIANA CODE OF CRIMINAL PROCEDURE, Art. 881A (1994 ed.)) (emphasis added).

The Notes that accompany that provision make it clear that the law operates as a strict time limit on when a judge may amend a sentence. The "Official Revision Comment" states that the Louisiana district judges were "strongly against any provision, such as [Rule 35 of the Federal Rules of Criminal Procedure], which authorized reduction of a sentence after the beginning of its execution. Such a procedure can subject the sentencing judge to continuous harassment by the defendant's relatives, friends and attorneys, and would virtually constitute the judge a 'one man pardon board' as several of the judges aptly point out." By limiting the power of judges to amend sentences prior to their execution, the provision permits some reconsideration in exceptional cases, without subjecting the sentencing judge to a substantial period of harassment and pressures. See also Mamoulides SITC at 1814:23-24 ("I don't think you can change a sentence after they started serving the sentence under Louisiana law.").

he amended it after Wallace had completed the sentence.¹⁵³ Thus, notwithstanding that he had no power to do so, Judge Porteous amended the sentence so that Wallace was purportedly eligible to have his conviction set aside.

Second, Wallace did not meet the standards for set aside even under the amended sentence. Article 893E of the pertinent sentencing laws – pursuant to which Wallace’s sentence purported to comply after it was amended – permitted the sentencing judge to set aside a conviction only if the defendant completed probation satisfactorily.¹⁵⁴ However, Wallace had not completed probation satisfactorily. To the contrary, Judge Porteous had terminated Wallace’s probation unsatisfactorily due to Wallace’s conviction and incarceration on unrelated drug charges.¹⁵⁵ Thus, the set-aside was unlawful even under the amended sentence. The degree

¹⁵³ Wallace was arrested on burglary charges on May 8, 1989; he pleaded guilty to the felony charge of simple burglary on June 26, 1990; he was sentenced by Judge Porteous the same day to a suspended sentence of three years incarceration and placed on probation for two years. At the time of his May 1989 burglary arrest, Wallace was under indictment for felony drug charges (PCP and cocaine) – an offense alleged to have occurred on December 15, 1988. At the time of his burglary guilty plea and sentencing, the drug charges were outstanding. Judge Porteous did not sentence Wallace under the Article 893E of the Louisiana Code of Criminal Procedure that would permit the sentence to be set aside if Wallace successfully completed probation. The fact that Wallace had an outstanding drug case at the time of the burglary sentence may explain why Judge Porteous did not want to give Wallace the benefit of an 893E sentence. *See* Mamoulides SITC at 1814:11-17.

¹⁵⁴ Article 893E provided, in pertinent part: “When the imposition of a sentence has been suspended by the court for the first conviction only, as authorized by this Article, and the court finds at the conclusion of the probationary period that the probation has been satisfactory, the court may set the conviction aside and dismiss the prosecution.” *See* HP Ex. 69(d) at PORT 676 (LOUISIANA CODE OF CRIMINAL PROCEDURE, Art. 893E (1994 ed.)) (emphasis added).

¹⁵⁵ On February 26, 1991, while he was on probation for the burglary conviction, Wallace pleaded guilty to the felony drug charges of possession of over 28 grams of cocaine and possession of PCP and was sentenced to five years incarceration. As a result of Wallace’s incarceration on the drug charges, Judge Porteous entered an order dated December 11, 1991:

IT IS HEREBY ORDERED BY THE COURT that the subject’s probation is hereby terminated unsatisfactorily.

that Judge Porteous had to ignore state law underscores his willingness to take judicial actions for the benefit of Louis Marcotte.

At the time Judge Porteous set aside Wallace's conviction, the evidence is overwhelming that Judge Porteous undertook this action at Louis Marcotte's insistence, at a time when Marcotte had leverage over Judge Porteous by virtue of Marcotte's knowledge of their corrupt relationship, and at a time when Judge Porteous was indebted to Marcotte as a result of Marcotte's lies on Judge Porteous's behalf during the background check process. In short, Judge Porteous's judicial action in setting aside Wallace's conviction was a corruptly motivated judicial act that violated the law and was not justified by any sound considerations of policy.¹⁵⁶

G. November 1994 – Judge Porteous's Interview by the Metropolitan Crime Commission

In October of 1994, Mike Reynolds, the prosecutor in the courtroom in connection with the Wallace set-aside proceedings, complained to the Metropolitan Crime Commission (MCC) – a citizen's watchdog group – that Judge Porteous had illegally set aside the conviction of Aubry

See HP Ex. 81 (*State v. Wallace*, Case No. 89-001 (case file for drug case)); HP Ex. 82 (*State v. Wallace*, Case No. 89-2360 (case file for burglary case)).

The defense has argued that Judge Porteous had to make subtle rulings against a complex landscape. There is no legal ambiguity in the provisions of law at issue, and, as discussed in the next Section, Judge Porteous admitted that he acted unlawfully as to the timing of his act in amending the sentence. There is no evidence in any of the proceedings that Judge Porteous made the subtle rulings that the defense now claims were at issue.

¹⁵⁶ See Louis Marcotte SITC at 547:6-9; Wallace SITC at 690:11 – 691:18, 714:4-7; Louis Marcotte Task Force at 51) ("Q. Was there any question in your mind that he set aside the conviction as a favor to you? A. Yes, he did it for me.").

Wallace.¹⁵⁷ After receiving the allegation, Rafael Goyeneche, the President of the MCC, researched the procedural and legal background of the Wallace case.¹⁵⁸

On November 8, 1994, eleven days after Judge Porteous was sworn in as a federal judge, Goyeneche, along with a colleague, interviewed Judge Porteous in his chambers in the federal court building.¹⁵⁹ Goyeneche reduced that interview to a memorandum shortly after the interview took place.¹⁶⁰

At the outset of the interview, Judge Porteous stated: “[L]ets not sugar coat anything, in other words you guys think I’m dirty.”¹⁶¹ Judge Porteous thereafter falsely denied having “frequent” lunches with the Marcottes, falsely denied that the Marcottes paid his way to Las Vegas, and falsely and “vehemently” denied that he amended Wallace’s sentence out of friendship or at the request of Louis Marcotte. Those portions of the interview were memorialized as follows:

The Judge freely admitted that he has known Mr. Marcotte for a number of years and considers him to be a friend. We asked the Judge if he frequently ate lunch with Mr. Marcotte and provided him with the name of the two restaurants they frequent. He admitted that he has had several lunches with Mr. Marcotte, but he didn’t know if he would term his lunches with Marcotte as “frequent.” Additionally, we asked if he had traveled to Las Vegas with Mr. Marcotte and he confirmed that he had. The Judge stated that six or seven people went as a group to Vegas and Marcotte was a member of the group. The Judge when asked did

¹⁵⁷ See Rafael Goyeneche Senate Impeachment Trial Committee Hearing Testimony (“Goyeneche SITC”) at 719:6-14.

¹⁵⁸ See *id.* at 721:17 – 722:14.

¹⁵⁹ See *id.* at 727:6-22. See also HP Ex. 69(b) at PORT 594–597 (FBI Background Check of Judge Porteous).

¹⁶⁰ See Goyeneche SITC at 727:24 – 728:5, 728:24 – 729:13, 730:5-15.

¹⁶¹ See Goyeneche SITC at 728:9-18; HP Ex. 69(d) at PORT 594 (MCC Intelligence Report).

Marcotte pay his way, quickly changed the subject. Porteous when asked a second time advised that Marcotte did not pay his way to Vegas.

* * *

The Judge vehemently denied that he amended the sentence out of friendship for or at the request of Louis Marcotte.¹⁶²

Goyeneche specifically raised the issue of the lawfulness of the set-aside. Goyeneche informed Judge Porteous that he (Goyeneche) believed that Judge Porteous's action in amending Wallace's sentence was unlawful and not permitted under the Louisiana sentencing laws (Article 881), which provided authority for a Judge to amend a sentence only before the sentence was executed, and in this instance Judge Porteous amended Wallace's sentence after it was completed.¹⁶³ In response, "[Judge Porteous] admitted that his actions were contrary to Article 881 but defended his actions by stating that the assistant district attorney who was present in the Court should have objected to the amendment of Wallace's sentence."¹⁶⁴ The judge made this claim notwithstanding the District Attorney's policy of not interfering in a judge's sentencing decision.¹⁶⁵

Judge Porteous ended the interview by telling Goyeneche to "do what you think you have to do."¹⁶⁶

¹⁶² HP Ex. 69(d) at PORT 594-597 (MCC Intelligence Report). *See also* Goyeneche SITC at 731:13 – 732:10.

¹⁶³ *See* Goyeneche SITC at 735:4-23; HP Ex. 69(d) at PORT 672 (Sentencing Laws).

¹⁶⁴ HP Ex. 69(d) at PORT 597 (MCC Intelligence Report). *See also* Goyeneche SITC at 736:5-16.

¹⁶⁵ *See* Mamoulides SITC at 1815:11-22.

¹⁶⁶ HP Ex. 69(d) at PORT 597 (MCC Intelligence Report). *See also* *See* Goyeneche SITC at 737:7-11.

The events surrounding the Wallace set aside were reported in the New Orleans Times-Picayune in a March 19, 1995 article:

U.S. District Judge Thomas Porteous, while serving his final weeks on the state bench in Jefferson Parish, illegally amended a convicted drug offender's burglary sentence and then removed it from the man's record, according to the Metropolitan Crime Commission.¹⁶⁷

H. Judge Porteous's Relationship with Louis Marcotte and Lori Marcotte While He Was a Federal Judge

1. Continuation of the Relationship

Though the Marcottes' relationship with Judge Porteous changed when he became a federal judge, it did not come to an end.¹⁶⁸ The Marcottes continued to maintain an association with Judge Porteous, and continued to take him to lunch, although not at the same frequency as when he was a state judge.

In particular, the Marcottes would bring Judge Porteous to lunch with them when they sought to recruit other state judicial officers to take his place in a similar corrupt scheme, or to impress business executives. On these occasions, Judge Porteous "brought strength to the table" by his presence and his assistance. As Louis Marcotte explained: "It would make people respect me because, you know, I am sitting with a Federal judge."¹⁶⁹ As Lori Marcotte described: "So

¹⁶⁷ See HP Ex. 119(a) (Times-Picayune article: "Amending Sentence Questioned, Federal Judge Defends Actions").

¹⁶⁸ See Louis Marcotte SITC at 537:21 – 538:20.

¹⁶⁹ Louis Marcotte Task Force at 52. In his Task Force hearing testimony, Marcotte was asked why he wanted to maintain a relationship with Judge Porteous after he became a federal judge:

Mr. MARCOTTE. Because, number one, he was a Federal judge. Right there, that brings strength to the table whenever he sits down with me.

* * *

going to lunch with Judge Porteous as a federal judge, other judges in the 24th Judicial Court would view us as trusted people because we were hanging around with a federal judge.”¹⁷⁰

2. Actions by Judge Porteous for the Marcottes

a. Judge Porteous Assists the Marcottes with State Judge Ronald Bodenheimer

Judge Porteous had direct, first-hand knowledge that the Marcottes dealt with judges in a corrupt manner. Nevertheless, he used the power and prestige of his office as a federal judge to help the Marcottes by vouching for their honesty, vouching for their practices, and helping to recruit his successor.¹⁷¹

In 1999, Louis Marcotte asked Judge Porteous to speak to newly elected state judge Ronald Bodenheimer on the Marcottes’ behalf so that Bodenheimer could “step into [Judge Porteous’s] shoes.”¹⁷² He told Judge Porteous: “Judge, tell this guy [Bodenheimer] I am a good

Mr. MARCOTTE. It would make people respect me because, you know, I am sitting with a Federal judge.

* * *

Mr. DUBESTER. And were there people who you deliberately wanted to have Judge Porteous at the table with when you had a lunch or a meeting with?

Mr. MARCOTTE. Yes, I wanted to try to get as many people to the table with Porteous when I was there, because, again, he brought strength to the table. And I also wanted him to groom the people that I was at the table with. I wanted those guys to do bonds, as well.

Id.

¹⁷⁰ Lori Marcotte SITC at 611:25–612:10.

¹⁷¹ Judge Porteous could not report to law enforcement his knowledge that racketeering activity was rampant at the 24th JDC without incriminating himself. So, for years, while a federal judge, Judge Porteous remained silent as to his knowledge, thus permitting the Marcottes to operate corruptly in that courthouse without law enforcement interference.

¹⁷² Louis Marcotte SITC at 538:24 – 539:12.

guy. Tell him that commercial bonds is the best thing for the criminal justice system and that – ask him would he take – ask him would he take your spot when – because you left now and I needed somebody to step in to Porteous’s shoes so I can get the same things done that I got done when Porteous was there.”¹⁷³

At Louis Marcotte’s request, Judge Porteous spoke to Judge Bodenheimer. Prior to that conversation, Bodenheimer “kind of stayed away from Louis Marcotte intentionally” because, at that time, according to Bodenheimer, “the rumor was that [Marcotte] was doing drugs.” During his conversation with Bodenheimer, Judge Porteous spoke highly of Louis Marcotte’s honesty in the bond business. Bodenheimer took Judge Porteous’s statements seriously. As a result of that conversation, Bodenheimer began to set bonds for the Marcottes.¹⁷⁴

The Marcottes and Bodenheimer gradually developed a relationship that took on the characteristics of the relationship that had previously existed between Judge Porteous and the Marcottes. The Marcottes began providing Bodenheimer meals, house repairs, and a trip to the Beau Rivage casino, and Bodenheimer “became helpful to the Marcottes in setting bonds.”¹⁷⁵

Bodenheimer pleaded guilty in March of 2003 to a federal corruption count arising from his corrupt relationship with the Marcottes. The charges in the Information, and the facts admitted as part of the factual proffer, describe criminal conduct committed by Bodenheimer that was comparable in material respects to that committed by Judge Porteous in his dealing with the Marcottes. Among the overt acts charged in the Information was that Bodenheimer:

¹⁷³ Louis Marcotte Task Force at 53.

¹⁷⁴ See Bodenheimer SITC at 1255:7 – 1256:6, 1257:24 – 1258:1, 1260:7-10.

¹⁷⁵ Louis Marcotte SITC at 539:25 – 540:10. See also Louis Marcotte Task Force at 53; Lori Marcotte Sen. Dep. at 74:13-16) (“some repairs on his house”); Louis Marcotte Sen. Dep. at 86:5-8, 115:21 - 116:5.

regularly set, reduced, and split bonds underwritten by a Jefferson Parish bail bonding company in criminal cases pending before him and other judges, irrespective of whether he was scheduled for “magistrate duty”. . . . BODENHEIMER routinely set the bonds at a level requested by the bail bonding company in a manner which would tend to maximize the company’s profits; that is, by securing the maximum amount of premium money available from the criminal defendant and his family.¹⁷⁶

The factual proffer signed by Bodenheimer stated that he “enriched[ed] himself by setting, reducing, and splitting bonds in various criminal matters pending before him as well as other judges on terms most advantageous to the bail bonding company in exchange for things of value, including meals, trips to resorts, campaign contributions, home improvements, and other things of value.”¹⁷⁷

On April 28, 2004, Bodenheimer was sentenced to 46 months incarceration on the corruption count, to run concurrently with two other felony offenses to which he pleaded guilty.¹⁷⁸

¹⁷⁶ HP Ex. 88(d) (*United States v. Bodenheimer*, Case No. 02-219, Superseding Bill of Information at 3). See also Bodenheimer SITC at 1296:4-19.

¹⁷⁷ HP Ex. 88(f) (*United States v. Bodenheimer*, Case No. 02-219, Factual Basis at 10). See also Bodenheimer SITC 1298:12 - 1299:8.

¹⁷⁸ See HP Ex. 88(h) (*United States v. Bodenheimer*, Case No. 02-219, Judgment and Probation/Commitment Order).

Similarly, Judge Alan Green was convicted on charges arising from his corrupt relationship with the Marcottes. See, e.g., Mamoulides SITC at 1779:19-1780:3. As discussed, Judge Porteous (as he did with Bodenheimer and at the request of the Marcottes) played an instrumental role in assisting the Marcottes in forming a relationship with Green when he was a state judge. Judge Green’s conduct on behalf of Marcottes was no different from that of Judge Porteous of former Judge Bodenheimer. As Lori Marcotte testified:

Q. And in your mind, is Judge Porteous’ conduct any different, than you know, than that of Judge Bodenheimer or Judge Green, in terms of the quality and quantity of what you gave and what he did for you?

A. [Lori Marcotte]. It was no different.

*b. Justice of the Peace Kerner, Justice of the Peace Centanni,
and Insurance Company Representative Stotts*

Judge Porteous's help with Bodenheimer – which proved to be a boon for the Marcottes – was similar to the actions he took on their behalf with others.

The Marcottes sought to get close to Justice of the Peace Charlie Kerner, and they set up a lunch with Kerner and Judge Porteous at the Beef Connection in 1997. At that lunch, Judge Porteous vouched for the Marcottes, telling Justice of the Peace Kerner that he could trust the Marcottes and that the Marcottes were good people. At that luncheon, Louis Marcotte took out a Louisiana law book and started telling Kerner how he could set bonds. Kerner was uncomfortable in the relationship Judge Porteous was encouraging him to form with the Marcottes and decided that he had no interest in pursuing that relationship and “got up at that lunch and left.”¹⁷⁹

Similarly, Judge Porteous also attended a lunch with Justice of the Peace Kevin Centanni and Lori Marcotte. However, Centanni was not interested in setting commercial bonds and nothing resulted from that lunch.¹⁸⁰

Lori Marcotte Sen. Dep. at 125:23-126:3. *See also* HP Ex. 71(a) (United States v. Marcotte, Case No. 4-061, Bill of Information at 4 (March 3, 2004)) (charging, as part of the Racketeering Conspiracy, that: “in return for things of value, certain judges would make themselves available to BBU; quickly respond to the requests of BBU; and set, reduce, increase, and split bonds to maximize BBU's profits, minimize BBU's liability, and hinder BBU's competition”).

¹⁷⁹ Lori Marcotte SITC at 612:11 – 613:8. *See also* Lori Marcotte Sen. Dep. at 117:12-25); Louis Marcotte Sen. Dep. at 110:12 – 111:1, 112:24 – 113:1; Lori Marcotte Task Force at 56-57 (“We had Rhonda set up a lunch and had Judge Porteous attend. And we went to the Beef Connection and we showed up. My brother had the law book in his hand, and we had instructed Judge Porteous to explain about the power of the Justice of the Peace being able to set bonds. And he did.”).

¹⁸⁰ *See* Lori Marcotte Sen. Dep. at 118:9-15.

The Marcottes also took Judge Porteous out to several lunches with Norman Stotts, who was the Marcottes' "boss" at the insurance company on behalf of which the Marcottes wrote bonds. Stotts had the responsibility and authority to decide what type of bond writing authority the Marcottes were allowed to have, and was thus critical to the Marcottes' business. The Marcottes brought Judge Porteous to meals with Stotts "to develop trust, reputation, stability on our part, that was a good way for the insurance company to give us a high writing level." As Lori Marcotte described: having Judge Porteous present "made us look important."¹⁸¹

3. Meals and Other Hospitality Provided by the Marcottes to Judge Porteous After He Became a Federal Judge

As part of its investigation of the Marcottes, the Department of Justice obtained records from the "Beef Connection" starting in 1997 and obtained some work calendars of the Marcottes starting in the 1999 time frame. The following chart reflects lunches at the Beef Connection, at which Judge Porteous was in attendance, in the period for which records exist and were obtained.¹⁸²

¹⁸¹ Lori Marcotte SITC at 613:9 – 614:11.

¹⁸² See HP Ex. 372(a) (August 6, 1997); HP Ex. 372(b) (August 25, 1997); HP Ex. 372(c) (November 19, 1997); HP Ex. 372(d) (August 5, 1998). The exhibits for the last two dates also include the pertinent pages from a BBU calendar that contain a reference to Judge Porteous on the given date. See HP Ex. 373(c) (February 1, 2000); HP Ex. 373(d) (November 7, 2001). The exhibits supporting the first four dates include, for each date, a copy of the meal check from the Beef Connection and the pertinent page from Lori Marcotte's American Express Card monthly statement. The meal checks reflect the purchase of "Abs" or "Abso" – short for "Absolut" – Judge Porteous's drink of choice.

Date	Calendar Entry	Restaurant	Credit Card	Amount
8/6/97	No calendars located	Beef Connection	Lori Marcotte American Express	\$287.03
8/25/97	No calendars located	Beef Connection	Lori Marcotte American Express	\$352.42
11/19/97	No calendars located	Beef Connection	Lori Marcotte American Express	\$395.77
8/5/98	No calendars located	Beef Connection	Lori Marcotte American Express	\$268.84
2/1/00	"Lunch w/Portious [sic] @ Beef Connection"	Beef Connection	Lori Marcotte American Express	\$328.94
11/7/01	"12:00 - Giacobbe & Porteous @ Beef Connection"	Beef Connection	Norman Bowley (BBU employee)	\$635.85

The Marcottes were also instrumental in arranging for Judge Porteous to be a speaker at the Professional Bail Agents of the United States ("PBUS") Conventions. In July 1996, the PBUS held its annual convention at the Hotel Sonesta in New Orleans, at which the Marcottes arranged for Judge Porteous to be a speaker. The convention was hosted by the Marcottes, who paid for many of the expenses of that convention, including food and drinks for Judge Porteous.¹⁸³ In July 1999, the PBUS held its annual convention at the Beau Rivage resort in Biloxi, Mississippi. Again, the Marcottes arranged for Judge Porteous to attend and be a speaker at that convention and paid for some of the events and entertainment at that convention.¹⁸⁴

¹⁸³ See Lori Marcotte SITC at 614:12-25; HP Ex. 90(a) (Professional Bail Agents of the United States ("PBUS") Mid-Year Conference Program).

¹⁸⁴ See Lori Marcotte SITC at 615:1-12; HP Ex. 90(b) (Professional Bail Agents of the United States Mid-Year Conference Program).

Judge Porteous did not disclose the fact that the PBUS paid for his hotel or any other reimbursement in connection with the July 1999 PBUS convention in his Financial Disclosure Report for calendar year 1999. In contrast, Judge Porteous *did* disclose on his 1999 Financial Disclosure Report the following comparable events for which he was reimbursed: (1) "Jefferson

4. Louis Marcotte's April 2003 Affidavit for Judge Porteous

On April 17, 2003, one month after Bodenheimer pleaded guilty, Louis Marcotte signed an affidavit prepared by Judge Porteous's attorney, and at the lawyer's request, which was designed to exculpate Judge Porteous. That affidavit stated, in pertinent part:

At no time have I ever given money or anything of value to Judge Porteous for reducing or altering any bond.¹⁸⁵

Louis Marcotte believed that the affidavit was "completely false" "[b]ecause all of the meals and the cars and the wining and dining, the trips, all that was for him to do bonds."¹⁸⁶ Louis Marcotte knowingly signed the false affidavit to protect and help Judge Porteous.¹⁸⁷ Indeed, that affidavit, which ended up in the hands of the FBI, was really no different in substance that Louis Marcotte's false statements to the FBI in 1994 – motivated by Marcotte's desire to conceal from law enforcement Judge Porteous's corrupt conspiratorial relationship with Louis Marcotte. Each set of false statements had their own pernicious consequences – the 1994 false statements helped Judge Porteous become a federal judge; this 2003 false affidavit was part of an effort to obstruct justice at the behest of Judge Porteous (or his agent) and was designed to permit Judge Porteous to evade prosecution, and, presumably, to permit him to maintain his

Bar Association, 4/15/99, Speaker CLE Seminar, Biloxi, Mississippi (Hotel);" (2) "Louisiana State Bar Association, 6/9–6/12/99, Speaker CLE Seminar, Destin Fla. (Hotel, Food and Mileage);" and, (3) "LSU Trial Advocacy Program, 8/9–8/11/99, Faculty Member, Baton Rouge, La (Hotel, Food and Mileage)." HP Ex. 105(a) (1999 Financial Disclosure Form). *See also* Agreed Stipulation of Fact 160. Judge Porteous makes much of the fact that he was an expert in bond matters. There would have been no reason not to disclose the fact that he spoke at this convention other than the fact that it would bring attention to his on-going relationship with the Marcottes.

¹⁸⁵ HP Ex. 280 (Louis Marcotte Affidavit). *See also* Louis Marcotte SITC at 544:2 – 545:2.

¹⁸⁶ Louis Marcotte SITC at 545:3-6.

¹⁸⁷ *See* Louis Marcotte SITC at 545:7-20.

position as a federal judge. In both instances, nearly a decade apart, the acts of Marcotte in making false statements to the FBI constitute conduct fairly attributable to Judge Porteous – who knew that Marcotte was lying on his behalf in furtherance of their ongoing corrupt conspiratorial relationship.

I. Summary

Louis Marcotte needed a judge to set bonds as he requested and a judge who would legitimize Louis Marcotte's role and burnish his reputation – a need that Judge Porteous could and did satisfy. In return, Judge Porteous sought a lifestyle he could not afford, and Louis Marcotte provided him with food and drink, car repairs, home repairs, and travel (to Las Vegas) – cash substitutes that Louis Marcotte would and did willingly provide. Thus, the relationship between the things solicited and received by Judge Porteous and his judicial acts in setting bonds for the Marcottes, and expunging and setting aside convictions, was a classic “on the take” corruption scheme.

When John Mamoulides became the District Attorney in the same judicial district, he and his assistants had the power to set bonds. At some point after he became the District Attorney, Mamoulides received a gift certificate from a local bail bondsman, Rock Hebert. He returned it and instituted a policy that prohibited his assistants from accepting things of value from bail bondsmen. Mamoulides did not want the assistants beholden to the bail bondsmen and thought there was something potentially corrupting in the bondsmen giving gifts to public officials who could set bail.¹⁸⁸

Such a conclusion is obvious, and it does not take a District Attorney to spell out the reasons why. Moreover, these concerns with a bond-setting official receiving things from the

¹⁸⁸ See Mamoulides SITC 1795:10 – 1798:1.

bail bondsman applies to the same or even greater extent when that official is a judicial officer who has routine, daily and familiar interactions with the bail bondsman. If Mamoulides had been informed that Judge Porteous was taking judicial actions to benefit the Marcottes, who were doing him favors, he would have told Judge Porteous that it was wrong.¹⁸⁹

Indeed, there can be little pretense that the Judge Porteous–Louis Marcotte relationship was anything other than a corrupt business relationship. They were not friends as that term would have been understood – they had little or nothing in common other than their financial needs. The only reason the Marcottes took him to lunch, took him to Las Vegas, fixed his cars, or fixed his house was because he was assisting them in setting bonds and using the prestige of his office to recruit other judges to the same corrupt scheme.¹⁹⁰ Louis Marcotte described the relationship for what it was, that he gave Judge Porteous things of value because: “I wanted service, I wanted access, and I wanted to make money.” As Louis starkly put it: “He would do more when we would do more for him.”¹⁹¹ and described that after the Marcottes took Judge Porteous to lunch or took care of his car, Judge Porteous would be “more apt to do things” for them.¹⁹²

This conspiratorial relationship encompassed not only the things that Marcotte gave Judge Porteous and the bonds that Judge Porteous set while he was a state judge, but the full range of acts they took for each other, spanning Judge Porteous’s tenure on the federal bench.

¹⁸⁹ *Id.* at 1806:17 – 1807:6.

¹⁹⁰ *See* Louis Marcotte SITC at 537:12-20.

¹⁹¹ Louis Marcotte Task Force at 47. *See also* Louis Marcotte Sen. Dep. at 62:20-21, 123:10-25.

¹⁹² Louis Marcotte SITC at 528:8-10, 603:3-7. *See also* Lori Marcotte Sen. Dep. at 123:2-6 (agreeing that “because of those things [the Marcottes] were doing, Judge Porteous took the extra step every time he could exercise discretion in [their] behalf”).

This included statements that Marcotte made for Judge Porteous to help him become a federal judge, statements Marcotte made for Judge Porteous to help him stay a federal judge (and avoid prosecution), the continued actions by Marcotte to take Judge Porteous to expensive lunches, and the continued public vouching by Judge Porteous for his co-conspirator. Indeed, Judge Porteous could hardly refrain from vouching for Marcotte – he could not tell the truth, because to do so would incriminate himself.

J. Louis Marcotte's and Lori Marcotte's Guilty Pleas

In March 2004, Louis Marcotte pleaded guilty to a racketeering conspiracy that commenced prior to 1991. The temporal scope of the scheme is consistent with the inception of the corrupt relationship between the Marcottes and Judge Porteous and encompassing that relationship while he was on the 24th JDC. The Information's elaboration of the acts of the judicial conspirators describes the actions of Judge Porteous. The Information described the racketeering conspiracy, in pertinent part, as follows:

3. It was a further part of the conspiracy that, in return for things of value, certain judges would make themselves available to BBU; quickly respond to the requests of BBU; and set, reduce, increase, and split bonds to maximize BBU's profits, minimize BBU's liability, and hinder BBU's competition.
4. It was a further part of the conspiracy that, to allow BBU to maximize profits, the conspirator judges would engage in the practice of "bond splitting". . . . At BBU's request, the conspirator judge would set the commercial portion of the bond at an amount the defendant could afford and would set the balance in some other manner. BBU would then post the commercial portion of the bond and collect a percentage of that bond as commission. This practice allowed BBU to maximize its profit and minimize its liability.¹⁹³

¹⁹³ HP Ex. 71(a) (*United States v. Marcotte*, Case No. 4-061, Bill of Information at 4 (March 3, 2004)).

Louis Marcotte was sentenced August 28, 2006 to 38 months incarceration, followed by three years of supervised release.¹⁹⁴ Lori Marcotte pleaded guilty at the same time as Louis Marcotte to conspiracy to commit mail fraud.¹⁹⁵ She was sentenced August 28, 2006 to three years probation, including six months of home detention.¹⁹⁶

Louis Marcotte described Judge Porteous's overall impact on the Marcottes' business as follows:

- Q. Was there any judge in the courthouse who was more helpful to you in your bail bonds business than Judge Porteous?
- A. I would think for the duration of the time, it would be Porteous, then it would be Green and Bodenheimer. Bodenheimer and Green were running pretty close neck and neck.
- Q. And Bodenheimer and Green, did they both end up going to jail?
- A. Yes they did.¹⁹⁷

**K. Judge Porteous Should Be Convicted and Removed from Office
Based on the Allegations and Proof of Conduct Charged in Article II**

1. The Conduct Constitutes "High Crimes and Misdemeanors"

The corruption and the abuse of the judicial position at the heart of the Judge Porteous–Marcotte relationship demonstrate that Judge Porteous is not fit to be a judge. He repeatedly accepted things of value from Louis Marcotte and took a series of judicial actions (setting bonds, expunging and setting aside convictions) that benefited the Marcottes. The relationship resulted

¹⁹⁴ See HP Ex. 71(e) (*United States v. Marcotte*, Case No. 4-061, Judgment in a Criminal Case (Sept. 8, 2006)).

¹⁹⁵ See HP Ex. 71(a) (*United States v. Marcotte*, Case No. 4-061, Bill of Information at 14–15 (March 3, 2004)).

¹⁹⁶ See HP Ex. 73(d) (*United States v. Marcotte*, Case No. 4-061, Judgment in a Criminal Case (Aug. 28, 2006)).

¹⁹⁷ Louis Marcotte Sen. Dep. at 120:24 – 121:11.

in Marcotte, on two occasions (in 1994 and 2003), lying for his co-conspirator to the FBI, and in Judge Porteous, among other things, setting aside or expunging the convictions of two Marcotte employees who were doing home and car repairs for Judge Porteous. Moreover, Judge Porteous had economic power over the Marcottes – he could sign or reject their bond requests; he could make himself available or unavailable; he could use his influence and leadership to help them with other judges or to exercise a leadership role in refusing to deal with them. On every occasion, he used his judicial power to curry their favor, encourage their generosity, enrich himself and support his vices.

In critical ways this relationship did not end when Judge Porteous moved to the federal bench. He helped the Marcottes where he could, especially in the recruitment of new conspirators, like Judge Bodenheimer. And he maintained his silence as to his knowledge of their corrupt activities. Similarly, while Judge Porteous was a federal judge, the Marcottes continued to wine and dine him and maintained their silence as to his corrupt activities, to the point that Louis Marcotte even signed a false affidavit on his behalf at the request of Judge Porteous's attorney – in effect obstructing justice as part of their conspiratorial relationship.

Judge Porteous's conduct with the Marcottes has brought profound disrepute to the federal bench. The record is clear that Judge Porteous was the most significant of the state judges who had corrupt relationships with the Marcottes. But, instead of being criminally prosecuted – as happened to former state judges Green and Bodenheimer – Judge Porteous occupies a place on the federal bench.¹⁹⁸ Judge Porteous's continued presence on the federal

¹⁹⁸ Judge Porteous's attorney has attempted to blunt the conclusion that Judge Porteous engaged in criminal misconduct with Louis Marcotte by stressing that he was never prosecuted for it by the Department of Justice. In his opening statement, counsel stated: "[D]espite the fact that Judge Porteous waived the statute of limitations on crimes, no indictment was ever brought against him, after years of inquiry." See Turley SITC Opening Statement 67:5-8. Counsel's statement flatly misstates the terms of the waiver signed by Judge Porteous.

bench, now that his corruption has been revealed, brings a stain to the judiciary that can be been cleansed only by his removal from office.

2. Judge Porteous Should Be Convicted and Removed from Office.
The Fact That Some Portion of the Conduct Alleged in Article II
Occurred Prior to Judge Porteous Becoming a Federal Judge Is Irrelevant.

a. Introduction

Judge Porteous, through his counsel, has argued on several occasions, including his opening statement before the SITC, that since some portion of the conduct alleged and proven in Article II occurred while he was a state judge (“pre-federal bench conduct”), such conduct cannot constitute a basis for conviction and removal.

This argument fails for several reasons. First and foremost, the conspiratorial relationship encompassed Judge Porteous’s conduct while a federal judge and included “overt acts” by the two men while Judge Porteous was a federal judge. Also, Judge Porteous’s contention that pre-federal bench conduct – no matter how serious – cannot support

Judge Porteous’s statute of limitations waiver did nothing more than toll the running of the statute of limitations for any offenses as to which the statute of limitations had not already run as of April 5, 2006. The waiver did not revive the ability of the Department of Justice to prosecute offenses – including corrupt conduct while he was a state judge – as to which the statute of limitations had long since run and for which prosecution was therefore barred. The scope of the waiver was explicit: “[N]othing herein has the effect of extending or reviving any such period of limitations that has already expired prior to April 5, 2006.” *See* PORT Exhibit 1003 (Statute of Limitations Waiver). *See also* Title 18, United States Code, Section 3292 (five year statute of limitations for criminal offenses). Whether intentional or inadvertent, counsel’s suggestion that Judge Porteous’s waiver opened the door for the Department to prosecute him for any state court conduct was simply wrong and misstates the plain terms of the waiver.

The Department has formally represented that the statute of limitations was in fact an obstacle to its bringing charges against Judge Porteous, stating: “Although the investigation developed evidence that might warrant charging Judge Porteous with violations of criminal law relating to judicial corruption, many of those incidents took place in the 1990’s and would be precluded by the relevant statutes of limitations.” *See* HP Ex. 4 (Letter from John C. Keeney, Deputy Assistant Attorney General, U.S. Department of Justice, to Hon. Edith H. Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, Re: Complaint of Judicial Misconduct Concerning the Honorable G. Thomas Porteous, Jr. at 1 (May 18, 2007)).

impeachment, does not survive scrutiny. No reading of the Constitution or any other legal authority supports Judge Porteous's argument. To the contrary, pre-federal bench conduct as a basis for impeachment finds support in three distinct places: (1) the Constitution; (2) the impeachment proceedings involving Judge Robert W. Archbald; and (3) the history of judges who were either prevented from or dissuaded from ascending to the federal bench because of corrupt pre-federal bench conduct.

b. The Constitution, in Providing for Impeachment for Treason, Bribery and High Crimes or Other Misdemeanors, Provides No Time Limit as to When Impeachable Conduct Must Occur

Nothing in the text of the Constitution supports Judge Porteous's position that pre-federal bench conduct cannot be a basis for impeachment and removal from office. As noted in the House Report accompanying the Articles, the Constitution describes certain types of conduct for which impeachment is warranted ("Treason, Bribery, or other high Crimes and Misdemeanors"); it does not say when the misconduct must have been committed, and it certainly does not require that such conduct occur during the tenure of the federal office from which impeachment is sought.¹⁹⁹ The ultimate "fitness for office" decision by the Senate as to whether the conduct rises to the level of "high Crimes or Misdemeanors" and warrants the judge's removal does not turn on when that conduct occurred, but instead on whether that conduct so undermines the public trust that the judge must be removed from office.

Further, there is no policy justification for a blanket prohibition on considering pre-federal bench conduct as a ground for impeachment and removal. The logic of Judge Porteous's position is that even if a federal judge were later found to have committed espionage or murder prior to taking the federal bench, he could not be removed from his lifetime appointment as a

¹⁹⁹ See H.R. Rep. No. 111-427, Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, *Report of the Committee on the Judiciary to Accompany H. Res. 1031* ("Porteous Impeachment Report"), 111th Cong., 2d Sess. at 19 (2010).

federal judge, notwithstanding that proof of such conviction would clearly demonstrate his unfitness for the job and would result in incalculable injury to the reputation of the federal judiciary.

Take but one obvious example: say, for instance, that the offence was murder—it is as serious a crime as any, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process.

A similar conclusion would pertain in the case of a person who bribed his way into office. By definition, the bribery occurred prior to the commencement of office holding. But surely that fact cannot immunize the bribery from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.

Because impeachment is about the interests of the public, and not primarily about punishing wrongdoing, it is appropriate that a judgment of unfitness may be based on conduct that took place before an office-holder's appointment. Wrongdoing before one enters office can demonstrate serious untrustworthiness just as can wrongdoing while in office, and the ultimate touchstone in impeachment is whether the people can trust the office-holder. Thus, a quid pro quo arrangement with bail bondsmen is the kind of corruption that fairly may be characterized as a violation of the public trust. It makes no difference if it occurred prior to Judge Porteous taking the federal bench.

Professor Gerhardt, in his definitive treatise on impeachment, addresses the particular circumstance of impeachment and removal for wrongdoing committed before one assumes

office. He sets this up as a “on the one hand and on the other” discussion, in which he summarizes the arguments against impeachment – i.e., those advanced by Judge Porteous – and then explains why those arguments are not persuasive. Thus, Professor Gerhardt stated that:

Congress’s failure to impeach someone for something they did prior to entering federal office is not surprising, especially when one considers that this situation is likely to be quite rare Indeed, if Congress’s failure to bring certain kinds of impeachments permanently precluded their initiation, then Congress could never impeach someone on grounds that any reasonable person would accept as legitimate, such as an impeachable official’s commission of a murder while in office.²⁰⁰

*c. The Archbald Conviction on the “Omnibus” Count
Supports the Impeachment and Removal of Judge Porteous*

The impeachment of Judge Robert W. Archbald raised the issue of whether prior conduct could serve as the basis for impeachment and removal from office.²⁰¹ Thirteen Articles of Impeachment were brought against Archbald. Six Articles accused him of misconduct on the

²⁰⁰ See GERHARDT, *supra* note 7, at 108.

²⁰¹ Judge Archbald was, at the time of his impeachment, a Judge on the Third Circuit Court of Appeals assigned to the Commerce Court. In considering whether to impeach Judge Archbald, the House carefully considered the propriety of bringing pre-Commerce Court charges. The House ultimately concluded that such charges were proper, and in its Report accompanying the Articles, set forth its reasoning for doing so in terms that are particularly apt in considering the conduct of Judge Porteous in this case:

It is indeed anomalous if the Congress is powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments.

See H.R. Rep. No. 946, Impeachment of Robert W. Archbald, Judge of the United States Commerce Court, Report of the Committee on the Judiciary (hereinafter “Archbald Impeachment Report”), reprinted in IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess. at 175 (1973), as reprinted in, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess. at 11311 (1998).

Commerce Court where he was then assigned at the time of his impeachment and trial; six Articles accused him of misconduct on the district court – his prior judicial appointment. Article XIII set forth allegations that involved his conduct on both courts, and thus is similar to Articles I and II against Judge Portcous, in that the articles refer to conduct which occurred both before and after the judge in question assumed the current judicial position. The Senate convicted Judge Archbald on Article XIII.

Because debate was closed during the floor vote in the Archbald impeachment, there was no formal debate or discussion about the Senate's jurisdiction to convict based upon conduct occurring prior to holding the office in question.²⁰² The Senators were not required to state their reasons for their votes, but a small number of Senators did so, and divided equally on the issue of whether prior conduct could be the basis for removal, with approximately six expressing the view one way and approximately six the other. For example, Senator Owen stated:

Mr. Owen: Impeachment is the exercise of political power and not the exercise of mere judicial authority under a criminal code. Impeachment is the only mode of removing from office those persons proven to be unfit because of treason or high crime[s] or misdemeanors.

Whether these crimes be committed during the holding of a present office or a preceding office is immaterial if such crimes demonstrate the gross unfitness of such official to hold the great offices and dignities of the people.

A wise public policy forbids the precedent to be set that promotion in office of a criminal precludes his impeachment on the ground of his discovered high crimes and misdemeanors in a previous office from which he has just been promoted.

For these reasons it is my judgment that articles 7, 8, 9, etc., in so far as they charge crimes committed by Robert W. Archbald while United State district

²⁰² See Proceedings of the U.S. Senate and the House of Representatives in the Trial of Impeachment of Robert W. Archbald, 62d Cong., Sen. Doc. 1140, at 1620–78 (1913).

judge, comprise impeachable offense and may be alleged against him as judge of the Commerce Court.²⁰³

Though some Senators argued against impeachment on the district court counts, the fact that the Senate ultimately acquitted on those counts means little because the proof on those counts was apparently very weak. One Senator specifically noted that he was voting not guilty on all but one of the district court counts, but that his vote should not be misinterpreted as suggesting that charging prior conduct was improper. Senator Cullom stated:

I have voted "not guilty" on articles 4, 6, 7, 8, 10, 11 and 12, believing that they do not constitute the offense of high crimes and misdemeanors, and not because the acts were committed while the respondent was a judge of the district court. In my opinion the Senate would have jurisdiction to try respondent if the articles should warrant such action.²⁰⁴

Although it is impossible to determine what motivated the votes of a majority of Senators in the Archbald case, one conclusion is beyond question: the Senate voted to convict Archbald

²⁰³ *Id.* at 1647. Several other Senators made similar statements. Senator Poindexter stated that:

[A]lthough the offenses were committed while the respondent was a district judge and before he was appointed circuit judge, yet, since the penalty for impeachable offenses is not only forfeiture of office, but disqualification to hold office thereafter, I am of [the] opinion that the offense charged in these articles, although committed before respondent's appointment as circuit judge, nevertheless disqualify him, on impeachment therefor [sic], from holding office as such circuit judge or as a Judge of the Commerce Court. There is no statute of limitations nor law of limitations in impeachment proceedings.

Id. at 1648. Senator Elihu Root stated: "I have no doubt that respondent is liable to impeachment for acts done while he was a judge of the district court and that the Senate has jurisdiction to try him for such acts." *Id.* at 1650. Senator Gronna stated: "While Judge Archbald was not at the time of the impeachment holding the identical office which he did when the offenses referred to were committed, the office is closely linked to the one he previously held, and the duties he was called on to perform were of the same general nature." *Id.* at 1653.

²⁰⁴ *Id.* at 1663.

on the one count that most closely resembles Articles I and II against Judge Porteous in that it alleges conduct both prior to and during his tenure in the current office.

*d. Corrupt Pre-Federal Bench Conduct Has Prevented or Dissuaded Judges
Throughout History from Ascending to the Federal Bench
And Caused Others to Resign Rather Than Be Impeached*

It is hardly surprising that impeachments typically have involved conduct during the course of the judicial tenure. As a general matter, persons of dubious integrity are not considered for federal judgeships, and there have only been fifteen judicial impeachments in this nation's history. Moreover, those individuals who are selected have to survive an FBI background check – a process that is intended to weed out applicants with significant misconduct in their backgrounds. In addition, applicants with material derogatory information in their backgrounds are likely to self-select out of the process to avoid an inquiry or examination, which may expose wrongdoing they wish to keep concealed, and to avoid having to answer forms falsely under oath or make false statements in order to secure the position of federal judge.²⁰⁵

In two instances where it has been discovered that a federal judge has taken the bench with previously unknown corrupt behavior in his background, the judge has resigned, thus eliminating the need for Congress to consider whether that misconduct warranted impeachment. A consideration of the facts associated with those two instances demonstrates that impeachment would have been warranted, and indeed inevitable, if they had not resigned.

One example of a judge who voluntarily resigned to avoid impeachment is Judge Otto Kerner. After Kerner became a judge on the Seventh Circuit Court of Appeals, he was prosecuted, convicted, and sentenced to jail for his conduct in accepting bribes as the Governor of Illinois, well before he assumed the federal bench. Upon his conviction, Members of

²⁰⁵ See discussion in Section VI, dealing with Article IV.

Congress and the press called for him to resign or be impeached.²⁰⁶ Those calls for resignation or impeachment reflect a commonsense recognition that a judge who committed egregious ethical misconduct before he assumed the bench, in this case involving bribery, must be removed from the bench. The point in time when that conduct occurred was not important. As one author bluntly stated: “[J]udge Otto Kerner, Jr., of the United States Court of Appeals for the Seventh Circuit resigned before inevitable impeachment after he was convicted for conduct that preceded his service.”²⁰⁷

Another example is that of Judge Hebert Fogel of the Eastern District of Pennsylvania, who resigned as a way of avoiding scrutiny for pre-federal bench conduct. As described in one law review article:

[J]udge Hebert Fogel of the Eastern District of Pennsylvania remained in office for more than a year after he was investigated in 1976 by the Justice Department for business irregularities occurring before he ascended to the bench. Judge Fogel invoked the Fifth Amendment when questioned before a grand jury about his role in a questionable government contract deal involving his uncle. The New York Times reported in November of 1976 that “deputy Attorney General Harold R. Tyler, Jr. has let it be known to Judge Fogel that it would be best for the reputation of the federal judiciary if he left the bench voluntarily.” Judge Fogel resigned about a year later and returned to private practice.”²⁰⁸

The possibility that Judge Fogel, if he had in fact engaged in corrupt government contract deals prior to taking the bench, would henceforth be beyond the reach of impeachment was not suggested or considered

²⁰⁶ Although some small portion of the counts of conviction involved post-Federal bench actions (perjury or false statements), the calls for resignation or impeachment did not focus on that conduct.

²⁰⁷ See Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, *supra* note 15, at 67 (footnote omitted) (emphasis added).

²⁰⁸ See Emily Field Van Tassel, *Resignation and Removals: A History of Federal Judicial Service – and Disservice – 1789–1992*, 142 U. PA. L. REV. 333, 385 (1993).

Because it would be a rare situation in which serious pre-federal bench misconduct would come to light after confirmation, this issue would, by definition, seldom arise. Judge Porteous's case constitutes precisely that rare situation.

By concealing critical information (discussed further in connection with the discussion of Article IV), Judge Porteous sneaked through the background investigation process. His pre-federal bench misconduct in Article II only emerged as a result of FBI inquiries into the misconduct of other state judges several years after Judge Porteous had left the state court bench. Unlike Judges Kerner and Fogel, he has not resigned, but claims that no matter how egregious his pre-federal bench conduct, and no matter if his conduct brings the federal courts into disrepute, Congress lacks the power to remove him. Though this is an unusual circumstance, it is not one that is beyond Congress's Constitutional impeachment and removal power to address and remedy.

e. The Constitution's "Good Behavior" Language Does Not Set Forth a Substantive Standard of Conduct, But Instead Was Intended to Provide for Life Tenure for Federal Judges

The Constitution's "good behavior" clause does not provide a substantive standard of conduct. Article III, Section 1, of the Constitution provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior

This provision means only that federal judges shall have life tenure – unless impeached. It does not set forth a separate standard for behavior, or in any way limit Congress's ability to impeach and remove for high crimes and misdemeanors – no matter when they occurred.

First, it would be incongruous for the Constitution to set forth specific grounds for impeachment in Article I (treason, bribery, and high crimes and misdemeanors), while at the

same time providing for a separate and far more vague standard for removal in Article III (failing to engage in “good behavior”).

Second, there is no basis in constitutional history or in the plain reading of the Constitution itself that suggests that the “good behavior” clause was intended to limit Congress in considering when conduct must take place to warrant impeachment. If that were the Framers’ intent, then the constitutional definition of impeachable conduct could have provided that such conduct must occur while the judge is in the office from which impeachment is sought. Or, the temporal limitation as to impeachable conduct that Judge Porteous contends is provided by the “good behavior” clause would have been found in Article I (which defined impeachable conduct), and not in Article III (which establishes the judiciary). Judge Porteous’s interpretation of the reach of the good behavior clause would not permit impeachment for treason or bribery that was not disclosed prior to a judge’s appointment to the bench. It is an untenable position and should be rejected by the Senate.

In explaining why the “good behavior clause” should be understood as meaning only “that federal judges shall hold tenure for life unless impeached,”²⁰⁹ Professor Michael Gerhardt stressed two points. He noted that the Framers “included the phrase ‘during good behavior’ in the Constitution to contrast the unlimited term of federal judges with the fixed terms for the president, vice-president and members of Congress.”²¹⁰ Second, he noted that the “good behavior” language is a lesser standard of conduct than the grounds for impeachment set forth in Article I, and that the Framers had rejected “maladministration” as a ground for removal because it was so vague. Thus, it would conflict with the structure of the Constitution and the Framers’

²⁰⁹ GERHARDT, *supra* note 7, at 83.

²¹⁰ *Id.*

desire for an independent federal judiciary designed to protect citizens from potential overreaching of the federal government if so vague a standard as “good behavior” (in Article III) were read to make it easier to remove federal judges than the “high crimes and misdemeanor” standard in Article I.²¹¹ As Gerhardt concluded: “It defies common sense for the framers to have taken great pains to have purposefully designed such an awkward system for remedying judicial misconduct but then implicitly left Congress and the president free to remove judges on identical or more lenient grounds through some other, nonspecified, more efficient devices.”²¹² Accordingly, no article of impeachment against any judge has ever stated that the allegedly impeachable conduct failed to constitute “good behavior” and thus warranted the judge’s removal from office.

Applying all the recognized and established grounds for conviction and removal – abuse of position of trust, lack of integrity, and bringing disrepute to the judiciary and undermining public confidence in it – Judge Porteous’s conduct warrants conviction and removal for the conduct alleged in Article II and which was established by the evidence.

V. ARTICLE III

A. Introduction

In the late 1990s, Judge Porteous’s credit card debt soared and he began to draw down on his Individual Retirement Account (“IRA”). As discussed above, in the summer of 1999, he solicited and received \$2,000 from Amato; by the end of 1999, he owed over \$100,000 in credit card debt. In the summer of 2000, Judge Porteous consulted with a bankruptcy attorney. In March of 2001, he filed for Chapter 13 bankruptcy.

²¹¹ *Id.* at 84.

²¹² *Id.* at 85.

Judge Porteous's handling of his bankruptcy is characterized by repeated acts of calculated and premeditated dishonesty, reflecting contempt for the judicial process from the very outset. He filed his initial bankruptcy petition under a false name – "G. T. Ortous" – and used a Post Office Box as his home address. He signed this petition in two places: once over penalty of perjury, the other over the typed name "G.T. Ortous."

Further, Judge Porteous dishonestly concealed his gambling activities from the bankruptcy court on the various forms and schedules that he signed under oath, which unambiguously called for disclosure of financial activities encompassing his gambling. Judge Porteous also lied on the various bankruptcy forms in order to conceal income, assets, and accounts from the bankruptcy court so that he would have the means to gamble while in bankruptcy. He also incurred gambling debts while in bankruptcy in violation of the clear order of the bankruptcy court that he not do so. As the House stated at the outset of the trial: "The single organizing principle that arranges this pattern of false statements is Judge Porteous's desire to conceal assets and to conceal his gambling so that he could gamble while in bankruptcy without interference from the court or the creditors or even his lawyer."²¹³

The actual documents that were filed were physically prepared by Judge Porteous's attorney, Claude Lightfoot. Some of the false statements in the bankruptcy were part of a joint scheme between Judge Porteous and his counsel, such as filing in a false name. In other areas, such as his gambling, Judge Porteous deliberately kept his attorney in the dark.

Judge Porteous's conduct in bankruptcy (as with his conduct with Creely and Amato and the Marcottes) reflects a willingness to be dishonest and to lie when it was to his advantage. The fact that he was a federal judge at the time of his bankruptcy, and behaved dishonestly in a

²¹³ Congressman Bob Goodlatte Senate Impeachment Trial Committee Opening Statement at 54:11-16.

federal judicial proceeding, compounds the wrongfulness of his conduct and works a separate injury to the federal judiciary.

B. Judge Porteous's Financial Circumstances: 1996-2000

From 1996 through 2000, Judge Porteous's financial circumstances deteriorated substantially. During this time, his outstanding credit card balances increased steadily and exceeded \$180,000 by year-end 2000.²¹⁴

The evidence reflects that a major reason for Judge Porteous's financial problems was his gambling. By the time Judge Porteous took the federal bench in October 1994, he had a history of gambling and was a "rated player" at the Grand Casino Gulfport in Gulfport, Mississippi, where he held a \$2,000 line of credit (allowing him to take out \$2,000 worth of markers at the casino). After becoming a federal judge, and prior to filing for bankruptcy in March 2001, Judge Porteous became a rated player and opened up lines of credit at 7 other casinos.²¹⁵ Casino records and witness testimony reflect regular gambling activities from the time Judge Porteous

²¹⁴ See, e.g., HP Ex. 38 (Porteous IRA records); HP Ex. 127 (*In the Matter of Porteous*, Case No. 01-12363, Porteous Bankruptcy Schedules and Statement of Financial Affairs at SC0092 (Bankr. E.D. La. Apr. 9, 2001) ("Bankruptcy Schedules and Statement of Financial Affairs")) (showing Judge Porteous's liabilities owed to unsecured creditors to be \$198,246.73).

²¹⁵ The casinos where he was a "rated player" were: (1) Beau Rivage Casino in Biloxi, Mississippi, (2) Caesar's Palace in Las Vegas, Nevada, (3) Caesar's Tahoe, in Lake Tahoe, Nevada, (4) Casino Magic in Bay St. Louis, Mississippi, (5) Grand Casino Biloxi in Biloxi, Mississippi, (6) Isle of Capri in Biloxi, Mississippi, and (7) Treasure Chest Casino in Kenner, Louisiana. His credit limits ranged from \$2,000 to \$5,000. See HP Ex. 326 (Porteous Central Credit Inc. Gaming Report).

An "established player" or "rated player" at a casino is a player who has filled out a credit application with the casino in order to open up a line of credit. Casinos will thereafter rate that player, "meaning they will keep track of how much he bets, how much he wins, how much he loses." Rated players are thereafter able to draw on their line of credit at the casino to gamble and are also provided with "comps" from the casinos, in the form of complimentary or reduced rates on hotel rooms, or free meals and drinks. See FBI Agent Wayne Horner Senate Impeachment Trial Committee Hearing Testimony ("Horner SITC") at 999:4-25; FBI Agent Wayne Horner House Impeachment Task Force Hearing Testimony ("Horner Task Force") at 23.

was a state judge and up to and including 2001–2002, when, now on the federal bench, Judge Porteous was in Chapter 13 bankruptcy.²¹⁶ In reviewing Judge Porteous's financial records, the FBI identified over \$66,000 in cash withdrawals at casinos drawn on his credit card accounts and over \$27,000 in checks to and cash withdrawals at casinos from his checking account from July 1996 through July 2000.²¹⁷

Not only did his debts increase, but during the 1997–2000 time frame, Judge Porteous made a series of withdrawals from his IRA, causing his IRA account balance, which was approximately \$59,000 at year-end 1996, to drop to approximately \$9,000 by the time he filed for bankruptcy in March 2001. On several occasions, Judge Porteous used the funds he withdrew from his IRA to pay gambling debts by depositing the IRA funds into a Fidelity money market account and writing checks on that account to casinos.²¹⁸

C. Concealment of Liabilities on Financial Disclosure Reports

From 1997 to 2000, Judge Porteous signed and filed on an annual basis false Financial Disclosure Reports with the Administrative Office of the United States Courts.²¹⁹ Although

²¹⁶ See Horner SITC at 999:25 – 1000:17; Horner Task Force at 8–9. See also e.g., HP Exs. 302–323 (various casino records of Judge Porteous between March 2, 2001 and July 4, 2002); HP Ex. 326 (Central Credit Inc. Gaming Report); HP Ex. 337 (FBI Chart of Porteous Gaming Losses (03/28/2000 – 03/28/2001)).

²¹⁷ See Horner Task Force at 9–12. Horner further testified that this was an incomplete list, and that there were “probably some additional credit cards that were not included.” *Id.* at 9.

²¹⁸ See Horner SITC at 996:9 – 997:6; HP Ex. 383 (Porteous IRA records); HP Ex. 529 (House Chart 16 (“Judge Porteous’s Use of Fidelity Account Pre-Bankruptcy to Pay Gambling Debts”)). That chart sets forth six pre-bankruptcy checks from 1998 to 2000 to casinos, written from Judge Porteous’s Fidelity account.

²¹⁹ Under the Ethics in Government Act of 1978, federal judges are required by law to file annual public reports with the Judicial Conference of the United States, disclosing certain personal financial information. See 5 U.S.C. app. §§ 101(a), 101(b), and 101(f)(11)–(12). Public financial disclosure was intended to “deter some persons who should not be entering public service from doing so,” and to subject a judge’s financial circumstances to “public scrutiny.”

these reports required Judge Porteous to disclose his liabilities, in filing the forms he concealed his increasing credit card debts.²²⁰ By year-end 1999, for example, Judge Porteous had over \$100,000 in credit card debt on five credit cards, but only reported having two credit cards, with a maximum debt of \$30,000 total. Judge Porteous personally instructed his secretary, Rhonda Danos, as to how that portion of the form (Part VI – “Liabilities”) should be filled out. She testified: “He’d fill out the portion and I’d just copy it. . . . I’d just put exactly [on the Report] what was given to me.”²²¹

The following chart sets forth the liabilities actually disclosed by Judge Porteous by letter code – “J” (signifying liabilities less than \$15,000) and “K” (signifying liabilities between \$15,000 to \$50,000) – as well his actual liabilities along with what he should have reported if he had filed a truthful form.²²²

See S. Rpt. 95–170, Senate Committee on Governmental Affairs, Report to Accompany S. 555, “Public Officials Integrity Act of 1977,” 95th Cong. 1st Sess. 21–22 (1977). (This Act became the “Ethics in Government Act” in its final form.)

²²⁰ Part VI of the Financial Disclosure Report required Judge Porteous to report liabilities by means of a letter code, the pertinent categories being “J” for liabilities of \$15,000 or less, and “K” for amounts between \$15,001 and \$50,000. He was required to list all liabilities to credit card companies where the balance exceeded \$10,000 at any point in the year, and to list those liabilities as of the close of the calendar year for which the Report was filed. *See Horner SITC* at 969:1 – 971:7. *See also, e.g.,* HP Ex. 103(b) (“Filing Instructions for Judicial Officers and Employees”); House Chart 34 (“Instructions as to the Reporting of Liabilities on the Financial Disclosure Forms”).

²²¹ *See Danos SITC* at 879:23 – 880:8.

²²² *See Horner SITC* at 971:11 – 977:3; HP Exs. 102(a), 103(a), 104(a) and 105(a) (Judge Porteous’s Financial Disclosure Reports for 1996, 1997, 1998 and 1999, respectively); HP Exs. 167, 168, 159 and 170 (credit card statements for year end 1996, 1997, 1998 and 1999 respectively showing balances due); House Charts 30–33 (re: Judge Porteous’s non-disclosure of credit card debts on his Financial Disclosure Forms).

Year	Actually Disclosed	Not Disclosed (December Balance)
1996	Box Checked: "None (No reportable liabilities)"	1) Citibank account, 0426 (\$14,846.47) – J [less than \$15,000]
1997	Box Checked: "None (No reportable liabilities)"	1) MBNA MasterCard 0877 (\$15,569.25) – K [between \$15,001 and \$50,000] 2) MBNA MasterCard 1290 (\$18,146.85) – K 3) Travelers 0642 (\$11,477.44) – J
1998	1) MBNA – J 2) Citibank – J	1) MBNA MasterCard 0877 (\$16,550.08) – K 2) MBNA MasterCard 1290 (\$17,155.76) – K
1999	1) MBNA – J 2) Citibank – J	1) MBNA MasterCard 0877 (\$24,953.65) – K 2) MBNA MasterCard 1290 (\$25,755.84) – K 3) Citibank 0426 (\$22,412.15) – K 4) Citibank 9138 (\$20,051.95) – K 5) Travelers 0642 (\$15,467.29) – K

The Financial Disclosure Reports were signed by Judge Porteous on a signature line directly below the following certification:

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Below Judge Porteous's signature is the following additional warning in capital letters:

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY
FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO
CIVIL AND CRIMINAL SANCTIONS²²³

Judge Porteous's conduct in filing false financial disclosure forms is significant for two reasons. First, it demonstrates that his false statements to the bankruptcy court (discussed below) that concealed his gambling were not by inadvertence, accident or mistake, but rather were part of his common plan or scheme to conceal gambling-related financial information. Second, it

²²³ See e.g., HP Ex. 105(a) (Judge Porteous's Financial Disclosure Report (calendar year 1998), filed May 13, 1999).

reflects Judge Porteous's intent – he would lie on financial forms to protect his ability to gamble without interference.

**D. Judge Porteous's Financial Activities and Relationship with Lightfoot
June 2000 – March of 2001**

In the summer of 2000, Judge Porteous retained attorney Claude Lightfoot as his bankruptcy counsel. Lightfoot had never met Judge Porteous prior to representing him.²²⁴

Lightfoot compiled information and documentation regarding the Porteouses' assets and debts for the purpose of developing a "workout" proposal for their creditors, in an effort to avoid a bankruptcy filing.²²⁵ The workout plan would have entailed a partial payment to all creditors.²²⁶ Lightfoot gave Judge Porteous worksheets to fill out. Lightfoot's worksheets sought information that would ultimately be contained in a bankruptcy filing.²²⁷ Among the documents that Judge Porteous provided Lightfoot in the summer of 2000 was a pay stub from May 2000 that showed Judge Porteous's net monthly income to be \$7,531.52.²²⁸

Lightfoot told Judge Porteous, as he told all his clients, not to incur any new debts, because, in Lightfoot's view, "it is not good faith for such a person [considering bankruptcy] to continue making debt."²²⁹ Nonetheless, Judge Porteous had overriding personal objectives that he did not share with Lightfoot, namely, to continue to gamble, both in the "workout" period and

²²⁴ See Claude Lightfoot Senate Impeachment Trial Committee Hearing Testimony ("Lightfoot SITC") at 1072:24 – 1073:1; Claude Lightfoot House Impeachment Task Force Hearing Testimony ("Lightfoot Task Force") at 41.

²²⁵ See Lightfoot SITC at 1073:21-23; Lightfoot Task Force at 42.

²²⁶ See Lightfoot SITC at 1071:22 – 1072:23, 1073:18 – 1075:10.

²²⁷ See Lightfoot SITC at 1073:21-23, 1074:22-24, 1076:4-7; Lightfoot Task Force at 42.

²²⁸ See Lightfoot SITC at 1073:23-24, 1087:23 - 1088:6.

²²⁹ Lightfoot Task Force at 42–43.

then while in bankruptcy. That goal trumped any considerations of candor toward the Bankruptcy Court.

Judge Porteous knew that if his gambling were made known to the bankruptcy court, his ability to gamble in the future would be threatened. As Lightfoot testified, if he had known that Judge Porteous gambled, he would have asked Judge Porteous many more questions about that topic because “[i]f there are gambling debts, they have to be listed, and you must tell me about them. If you have markers that haven’t been redeemed, you could have a bad check problem when they try to pass the marker through as a bad check. So it gives me an opportunity to have a conversation about all those concerns of mine.”²³⁰

Accordingly, during the entire course of their attorney-client relationship, Judge Porteous concealed not only from the court, but from his own attorney the pervasive and ongoing nature of his gambling activities. Lightfoot’s testimony on this point was clear:

Q. [Mr. Goodlatte] [D]id he [Judge Porteous] ever tell you that he gambled or had any gambling debts?

A. [Lightfoot] No, sir.²³¹

Lightfoot’s SITC testimony is consistent with his prior testimony on this issue. At the Fifth Circuit Hearing, in response to questioning by Chief Judge Jones, Lightfoot testified that he had no knowledge of Judge Porteous’s gambling:

Q. [Chief Judge Jones] And you’re telling us, as his counsel, in whom he confided for months and months before the time that he was - that he filed this petition, when he continued to gamble almost every week before and after he filed bankruptcy, that you had no earthly idea that this was because of gambling?

²³⁰ Lightfoot SITC at 1173:13-19. *See also* Lightfoot Task Force at 64.

²³¹ Lightfoot SITC at 1074:25 – 1075:2. *See also id.* at 1076:21 - 1077:2, 1091:17-19; Lightfoot Task Force at 42-43, 65 (“I didn’t know [Judge Porteous] gambled . . . whatsoever.”)

A. [Lightfoot] I didn't. I never knew him before, and I - I really didn't know that gambling was an issue with the judge.²³²

Thus, during the "workout" period, even though Judge Porteous regularly updated Lightfoot on his various credit card debts, so that Lightfoot would have up to date information in dealing with Judge Porteous's creditors,²³³ Judge Porteous failed to disclose to Lightfoot that he continued to gamble, that he had taken out debt from casinos, or that he repaid those debts in full.²³⁴ Judge Porteous also failed to disclose to Lightfoot the existence of his Fidelity money market account, which he used to pay significant casino debts (including debts in this workout period).²³⁵

On December 21, 2000, Lightfoot sent Judge Porteous a copy of the workout letters that had been sent to all but one of Judge Porteous's unsecured creditors. The workout letters listed thirteen debts owed to ten different creditors, totaling \$182,330.23, and offered to pay them

²³² Claude Lightfoot 5th Circuit Special Committee Hearing Testimony ("Lightfoot 5th Cir.") at 453.

²³³ See Lightfoot SITC at 1105:14-18; Lightfoot Task Force at 43.

²³⁴ In August of 2000, shortly after Judge Porteous began consulting with Lightfoot for the purpose of attempting a workout of Judge Porteous's debts, Judge Porteous requested a credit limit increase at the Treasure Chest Casino from \$2,500 to \$3,000. See HP Ex. 326 (Porteous Central Credit Inc. Gaming Report). On September 28, 2000, Judge Porteous wrote a check drawn on his Fidelity money market account in the amount of \$490 to Casino Magic. See Horner SITC at 996:12 – 997:1; HP Ex. 529 (checks written to casinos from Judge Porteous's Fidelity account); House Chart 16 ("Judge Porteous's Use of Fidelity Account Pre-Bankruptcy to Pay Gambling Debts"). On November 30, 2000, Judge Porteous wrote a check drawn on his Fidelity money market account in the amount of \$1,600 to pay the Treasure Chest Casino. To fund that check, Judge Porteous withdrew \$3,000 (paying a 20% penalty) from his IRA and deposited the proceeds of the IRA withdrawal – a \$2,400 check – into his Fidelity account. See Horner SITC at 996:12 – 997:6; HP Ex. 383 (Porteous IRA records).

²³⁵ See Lightfoot 5th Cir. at 436, 448.

approximately 20% of what they were then owed, unlike casinos which Judge Porteous paid in full.²³⁶

At the same time that Lightfoot was working to have the creditors accept 20 cents on the dollar that Judge Porteous owed them from years of accumulated debt, Judge Porteous was in fact incurring new debt from casinos that he repaid in full.²³⁷ Indeed, on December 26, 2000 – five days after Lightfoot sent Judge Porteous a copy of the workout letters – Judge Porteous traveled to Caesars Lake Tahoe and took out a \$3,000 gambling marker. Judge Porteous did not tell Lightfoot about this gambling trip or the \$3,000 extension of credit. Instead, he made a conscious choice to favor casinos over his other creditors as meriting repayment in full.²³⁸

**E. Judge Porteous's Conduct in the Weeks Immediately Preceding His
March 28, 2001 Filing of His Initial Petition**

In or about late February to early March 2001, Lightfoot concluded that he would be unable to accomplish a workout. He and Judge Porteous decided that Judge Porteous would file for Chapter 13 bankruptcy.²³⁹

²³⁶ See HP Ex. 146 (December 21, 2000 Letter from Lightfoot to the Porteouses).

²³⁷ See HP Ex. 380 (Caesars Lake Tahoe Records).

²³⁸ It is inconceivable that a creditor would have accepted Lightfoot's proposal had it known that it was receiving 20% of what Judge Porteous owed, while casinos which had extended credit to Judge Porteous had received repayment in full.

²³⁹ See Lightfoot SITC at 1075:21-25; Lightfoot Task Force at 43.

Chapter 13 bankruptcies are sometimes described as "wage earner's plans," in that they are only available to individuals who are receiving a monthly income. There is no liquidation in a Chapter 13, and a debtor is therefore allowed to keep his property. In exchange for that opportunity, debtors must provide the bankruptcy trustee "with at least as much in value as they would have received had it been a liquidating Chapter 7 bankruptcy." See The Honorable Duncan Keir Senate Impeachment Trial Committee Hearing Testimony ("Keir SITC") at 1184:7-12; the Honorable Duncan Keir House Impeachment Task Force Hearing Testimony ("Keir Task Force") at 68.

Once the decision to file for bankruptcy was made, in the period from approximately February 27 through March 27, 2001, Judge Porteous engaged in a series of actions to arrange his financial affairs with the following goals: (1) to pay casinos any outstanding indebtedness so he would not have to list them as unsecured creditors; and (2) to structure certain other financial affairs in anticipation of filing for bankruptcy so as to preserve ways and means of gambling after he filed his petition. The conduct culminated in Judge Porteous's filing for bankruptcy under a false name on March 28, 2001, and filing a series of false financial schedules and a statement of financial affairs (concealing these transactions, his gambling activities and other assets) on April 9, 2001.

1. Judge Porteous's Motives to Conceal Gambling Activities

Casinos have their own credit systems and share credit information with each other. Casinos will run a "central credit report" which is "a credit report specifically aimed at gamblers and casinos and it tracks gaming activity of the casino's customers. With the central credit report a casino can determine whether or not a gambler has a good credit history at the casinos or a bad credit history at casinos."²⁴⁰ Judge Porteous had gambled at casinos for years, had filled out numerous applications at casinos, had taken out credit at casinos, and had casinos run his credit history. Judge Porteous understood that it would impact his ability to obtain credit from casinos in the future, and thereby impact his ability to gamble, if he were to default on any casino debts or if the casinos were to know that he had filed for bankruptcy.²⁴¹ Accordingly, Judge Porteous's conduct prior to and while in Chapter 13 bankruptcy reflects his concern that every casino debt be paid in full.

²⁴⁰ Horner Task Force at 25-26.

²⁴¹ See *id.* at 19 ("[I]f a gambler gets a negative history on his central credit report, what happens is the other casinos generally cut him off.").

2. Incurring and Paying off Gambling Debt – Grand Casino Gulfport

On February 27, 2001, Judge Porteous gambled at the Grand Casino Gulfport (“Grand Casino”) and took out two \$1,000 markers.²⁴²

On March 27, 2001 – the day before he filed for bankruptcy and while the \$2,000 in Grand Casino markers was still outstanding – Judge Porteous deposited \$2,000 into his personal Bank One checking account. That account otherwise would not have had sufficient funds to have paid the markers at that time. Judge Porteous made sure the deposit was exactly \$2,000 – the amount of the outstanding markers – by including a \$40 check drawn on his Fidelity account along with a \$1,960 cash deposit.²⁴³

The Grand Casino Gulfport markers cleared Judge Porteous’s Bank One account on April 5 and 6, 2001, a week after he filed for bankruptcy.²⁴⁴ Thus, Grand Casino Gulfport was an

²⁴² See Horner SITC at 983:22 – 984:1; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report).

²⁴³ See Horner SITC at 983:22 – 986:16, 1003:19 – 1005:7; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report); HP Ex. 144 (Porteous Bank One Records); HP Ex. 143 (Fidelity Money Market Statement, including \$40 check); House Chart 6 (“Undisclosed Creditor (Grand Casino Gulfport)”).

Grand Casino records reflect that the casino deposited the markers for collection at some point prior to March 24, 2001, and that Judge Porteous’s balance as of March 24, 2001 was \$0. However, the markers were returned as “uncollected,” and the Grand Casino records reflected \$2,000 due and owing as of April 3, 2001. FBI Agent Horner determined that there was a problem with Judge Porteous’s bank account number on the markers. Notwithstanding the ambiguity in the casino records that suggested a \$0 balance on March 28, 2001, Judge Porteous in fact owed, and knew that he owed, the casino \$2,000 when he filed for bankruptcy on March 28, 2001. As discussed in the text, Judge Porteous deposited \$2,000 into his Bank One account on March 27, 2001 – a transaction that (1) can only be explained by a desire to make sure that there were funds in the account sufficient to pay the markers and (2) reflects his knowledge of the existence of that debt on March 27, 2001.

²⁴⁴ See Horner SITC at 985:6-7, 1003:19 – 1004:13; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report); HP Ex. 144 (Porteous Bank One Records); HP Ex. 143 (Fidelity Money Market Statement, including \$40 check); House Chart 6 (“Undisclosed Creditor (Grand Casino Gulfport)”).

unsecured creditor on March 28, 2001, when he filed for bankruptcy. Unlike other creditors, Grand Casino was paid in full.

3. Incurring and Paying off Gambling Debt – Treasure Chest Casino

On March 2, 2001, Judge Porteous gambled at Treasure Chest and took out seven \$500 markers. He repaid four markers in chips that same day and left the casino owing \$1,500.²⁴⁵ (This was in addition to the \$2,000 he owed Grand Casino at that time.)

On March 27, 2001, Judge Porteous paid \$1,500 in cash to the Treasure Chest Casino to pay off his outstanding indebtedness.²⁴⁶ This transaction occurred the same day as Judge Porteous's \$2,000 deposit into his Bank One checking account to cover the Grand Casino markers.²⁴⁷ Thus, Treasure Chest was a preferred creditor which, as will be discussed, should have been disclosed by Judge Porteous in his bankruptcy filings.

4. Filing for an Income Tax Return

On March 23, 2001, the Porteouses signed their income tax return for the year 2000 and claimed a tax refund in the amount of \$4,143.72.²⁴⁸ This was an asset that was specifically required to be disclosed on his bankruptcy filings. It was not disclosed.

²⁴⁵ See Horner SITC at 986:18 – 987:6; HP Ex. 302 (Treasure Chest Customer Transaction Inquiry); House Chart 2 (“Undisclosed Payments to Creditors Within 90 Days of Bankruptcy - Treasure Chest Casino”).

²⁴⁶ See Horner SITC at 987:6-8; HP Ex. 302 (Treasure Chest Customer Transaction Inquiry); House Chart 2 (“Undisclosed Payments to Creditors within 90 Days of Bankruptcy - Treasure Chest Casino”).

²⁴⁷ One troubling aspect of this flurry of activities to pay off gambling debts is that it reflects Judge Porteous's ready access to cash when he needed it, notwithstanding that he was filing for bankruptcy the next day. It is unknown where he got the cash.

²⁴⁸ See HP Ex. 141 (Judge Porteous's 2000 Tax Return); Horner SITC at 990:2-25; House Chart 3 (“Judge Porteous's Undisclosed Tax Refund”).

5. Paying Fleet Credit Card in Full

On March 23, 2001, Judge Porteous asked his secretary, Rhonda Danos, to write a check out of her personal checking account, in the amount of \$1,088.41, to pay his wife's Fleet credit card bill in full. Judge Porteous never disclosed to Ms. Danos that he was filing for bankruptcy; she only discovered this information after it was disclosed in the local newspaper.²⁴⁹

The March 23, 2001 credit card payment to Fleet was handled by Judge Porteous in a manner that was inconsistent with the payments in prior months. The Porteouses had paid but a portion of the amounts owing to Fleet on their January and February statements, had made those payments from their personal checking account, and had made the payments several weeks after the statements had been issued. In contrast, Judge Porteous paid the March statement in full, out of Danos's account, four days after it was issued. It is reasonable to infer that he did this so that it would be paid prior to filing for bankruptcy in order to avoid disclosing Fleet as an unsecured creditor.²⁵⁰ This payment to Fleet, like his payment, to Treasure Chest, made Fleet a "preferred creditor" that should have been disclosed. That payment was not disclosed.

F. March 28, 2001 – Judge Porteous Files His Initial Voluntary Bankruptcy Petition Under the False Name "G.T. Ortous" Using a Post Office Box Address

On March 28, 2001, Judge Porteous filed a Petition for Chapter 13 bankruptcy (the "Initial Petition") in the United States Bankruptcy Court for the Eastern District of Louisiana.²⁵¹

²⁴⁹ See Danos SITC at 877:14 – 878:10.

²⁵⁰ See Horner SITC at 992:3 – 994:17; HP Ex. 140 (Fleet credit card statements); HP Ex. 144 (Bank One records); HP Ex. 329 (Fleet credit card statement, with accompanying check written by Rhonda Danos).

²⁵¹ See HP Ex. 125 (*In the Matter of Porteous*, Case No. 01-12363, Voluntary Petition (Bankr. E.D. La. March 28, 2001) ("Initial Petition")).

At some point shortly prior to filing for bankruptcy, Judge Porteous and his counsel agreed on a scheme to file under a false name.²⁵² Lightfoot explained that the local newspaper published the names of people who file bankruptcy and that this way they could keep Judge Porteous's name out of the paper.²⁵³

Judge Porteous willingly agreed to the scheme and did not protest in any way, nor did he suggest that it would be wrong for a federal judge to file an official court document, signed under penalty of perjury, with a false name.²⁵⁴

As part of his effort to conceal his identity, on March 20, 2001, Judge Porteous opened a post office box. The purpose of opening the post office box was to use that address in his bankruptcy filing.²⁵⁵

Judge Porteous's Initial Petition was filed with the false names "G.T. Ortous" and "C.A. Ortous" as the debtors and also listed the P.O. Box address instead of Judge Porteous's actual residential address. Judge Porteous signed the petition twice – once over the typed name "G.T. Ortous" and the other "under penalty of perjury that the information provided in this petition is true and correct."²⁵⁶ Judge Porteous admitted at the Fifth Circuit Hearing that the names used in the Initial Petition were false.²⁵⁷

²⁵² See Lightfoot SITC at 1079:22 – 1080:7; Lightfoot Task Force at 44; Lightfoot 5th Cir. at 435.

²⁵³ See Lightfoot SITC at 1080:2-13; Lightfoot Task Force at 44.

²⁵⁴ See Lightfoot SITC at 1080:20 – 1081:10.

²⁵⁵ *Id.* at 1082:9-21. See also HP Ex. 145 (Porteous P.O. Box Application).

²⁵⁶ See HP Ex. 125 (Initial Petition), *supra* note 251; Lightfoot Task Force at 44.

²⁵⁷ Porteous 5th Cir. at 55.

Though Judge Porteous has sought to blame Lightfoot for this chain of events, Lightfoot's actions neither excuse nor mitigate the wrongfulness of Judge Porteous's conduct. Judge Porteous's filing for bankruptcy in a false name constituted perjury for which "advice of counsel" is simply no defense. There is never an excuse for knowingly lying on a document that is being signed under penalty of perjury in a bankruptcy proceeding.²⁵⁸ As an attorney, and, as a federal judge, Judge Porteous is not in the same position *vis-à-vis* his attorney as a lay client being advised about arcane procedures of bankruptcy law. Finally, as a purely factual matter, Judge Porteous had his own agenda throughout the bankruptcy process and was making strategic decisions, including concealing material facts from the Bankruptcy Court, independent of his attorney's advice or knowledge, to conceal his gambling. The fact that his attorney was a willing participant in this fraudulent filing does not absolve Judge Porteous of responsibility. Even if his attorney was willing to subvert his own legal and ethical obligations, that does not mitigate the wrongfulness of Judge Porteous's conduct. This was collusion with counsel, not advice of counsel.²⁵⁹

Federal Rule of Bankruptcy 1005 requires that the caption of a bankruptcy petition include the name of the debtor and "all other names used by the debtor within six years before filing the petition." FED. R. BR. P. 1005 (1975).

²⁵⁸ See Keir SITC at 1186:7-13, 1187:19 – 1188:3; Henry Hildebrand Senate Impeachment Trial Committee Hearing Testimony ("Hildebrand SITC") at 1883:14-17.

²⁵⁹ Lightfoot testified that he is under scrutiny by the Louisiana State Bar for his actions on behalf of Judge Porteous. See Lightfoot SITC at 1180:3-20.

**G. April 9, 2001 – Judge Porteous Files His Amended Petition,
Accompanying Schedules, and Statement of Financial Affairs**

1. The Amended Petition

Judge Porteous amended his Initial Petition on April 9, 2001, two weeks after it was filed, replacing the false names and listing his actual residential address.²⁶⁰

2. The Bankruptcy Schedules and Statement of Financial Affairs

Along with the Amended Petition, Judge Porteous filed his Bankruptcy Schedules and his Statement of Financial Affairs on April 9, 2001. Judge Porteous's Bankruptcy Schedules required him to set forth such items as assets, debts, income, and other miscellaneous financial matters. Judge Porteous's Statement of Financial Affairs consisted of a series of questions requiring disclosure of specific financial activities. Judge Porteous signed each document under penalty of perjury. Though they were filed April 9, 2001, these forms should have disclosed Judge Porteous's financial affairs as they existed on the date of the Initial Petition – March 28, 2001.²⁶¹

Prior to filing the Bankruptcy Schedules and Statement of Financial Affairs, Lightfoot provided Judge Porteous with draft copies and specifically reviewed them with Judge Porteous “at least twice” and “at length.” Judge Porteous then signed both his Bankruptcy Schedules and

²⁶⁰ See HP Ex. 126 (*In the Matter of Porteous*, Case No. 01-12363, Amended Petition (Bankr. E.D. La. Apr. 9, 2001) (“Amended Petition”)). Mr. Lightfoot told the bankruptcy trustee, S.J. Beaulieu, that the false name on the Initial Petition was a typographical error. See S.J. Beaulieu Senate Impeachment Trial Committee Hearing Testimony (“Beaulieu SITC”) at 1524:8-22.

²⁶¹ See HP Ex. 127 (Bankruptcy Schedules and Statement of Financial Affairs), *supra* note 214; HP Ex. 345 (2001 Instructions for Completing Bankruptcy Schedules at p. 45).

his Statement of Financial Affairs under penalty of perjury, declaring that the documents were true and correct.²⁶²

Judge Porteous nevertheless failed to disclose the various transactions described above involving the Grand Casino Gulfport, the Treasure Chest Casino, and Fleet credit card, nor did Judge Porteous disclose filing for a tax refund, notwithstanding the fact these disclosures were clearly required by those forms. He also failed to disclose other assets and gambling activities in response to specific questions on the forms requiring their disclosure.

3. False Representations on the Bankruptcy Schedules

a. Failure to Disclose the March 23, 2001 Claim for a Tax Refund

Judge Porteous failed to disclose his claim for a tax refund. The Bankruptcy Schedules required Judge Porteous to disclose “other liquidated debts owing debtor including tax refunds.” (emphasis added). Notwithstanding the fact that Judge Porteous had filed for a \$4,143.72 federal income tax refund on March 23, 2001 – five days before filing his Initial Petition – the box “none” was marked with an “X” in response to the question about tax refunds. Judge Porteous signed that form under penalty of perjury.²⁶³

During his Fifth Circuit testimony, Judge Porteous acknowledged that the “none” box was checked.²⁶⁴ When confronted with the fact that the Schedule did not disclose the pending refund, Judge Porteous responded: “When that was listed, you’re right.”²⁶⁵

²⁶² Lightfoot SITC at 1084:21 – 1086:2. *See also* Lightfoot Task Force at 46; HP Ex. 127 (Bankruptcy Schedules), *supra* note 214, at SC00111, SC00116.

²⁶³ *See* HP Ex. 127 (Bankruptcy Schedules), *supra* note 214, at SC00096, SC00116. The Section at issues is Category 17 on Schedule B (“Personal Property”).

²⁶⁴ Porteous 5th Cir. at 80.

²⁶⁵ *Id.* at 82.

The form is unambiguous in requiring the suggested tax refund to be reported. Further, according to Lightfoot, the tax refund should have been disclosed, and if he had known of the pending refund, he would have disclosed it.²⁶⁶ Lightfoot also would have filed an amended schedule to disclose the refund if he had found out about it after the initial schedules were filed: “I would have amended this schedule to list it, had it been absent, and probably informed the trustee, particularly if the meeting of creditors hadn’t been held yet. I would have mentioned it.”²⁶⁷

On April 13, 2001 – just four days after the Bankruptcy Schedules were filed – Judge Porteous received his entire \$4,143.72 federal tax refund by way of a direct deposit into his Bank One checking account. Judge Porteous acknowledged during his Fifth Circuit testimony that the \$4,143.72 tax refund was deposited into his Bank One checking account on April 13, 2001.²⁶⁸

This tax refund was not only significant because it involved over \$4,000 that could have potentially gone to creditors. In addition, S. J. Beaulieu, the Chapter 13 trustee who was assigned to Judge Porteous’s case, stated that he would have considered the refund in deciding whether to approve the proposed Chapter 13 plan, and the size of the refund suggested that Judge Porteous was over-withholding and had access to disposable income that should have gone to the creditors. In response to questioning from Senator Whitehouse, Beaulieu explained:

²⁶⁶ See Lightfoot SITC at 1086:18 – 1087:7; Lightfoot Task Force at 46; Lightfoot 5th Cir. at 447.

²⁶⁷ Lightfoot SITC at 1087:8-19. See also Lightfoot Task Force at 47. The instructions for completing Category 17 on Schedule B are clear: “Item 17 request [sic] the debtor to list all monies owed to the debtor . . . and specifically, any expected tax refunds.” HP Ex. 345 (2001 Instructions for Completing Bankruptcy Schedules at 62) (emphasis added).

²⁶⁸ Porteous 5th Cir. at 83. See also HP Ex. 141 (2000 Porteous Federal Tax Return); HP Ex. 144 (Porteous Bank One records).

Q. [Sen. Whitehouse.] Now, my question to you is would it have made any difference to the plan that you approved if you had known of the tax return and the other preferences. . . . Basically I'm trying to sort out did it, did it make a difference to anybody that these expenses or assets weren't properly listed since this was a Chapter 13?

A. [Beaulieu] \$4000 [for the tax refund] means about \$300 swing a month; \$3600, or \$4000 a [year]. So now you're talking about \$12,000 going into the kitty.

Q. So that information [the undisclosed tax return] would have made a difference in the plan that you approved?

A. That and I - basically when you get a tax return with [that] dollar amount, . . . that means that the debtor is overdeducting from his paycheck, so that means the paycheck I'm reviewing is down \$300 from the get-go.

So I would have to look at that and say, well, your income should be actually \$300 more per month. So that's in a three-year period about \$10,000, which in this case would be about a 10 percent turnaround

Q. And that's something you have taken into account in your decisions about the plan?

A. Yes sir.²⁶⁹

In his Fifth Circuit testimony, Judge Porteous claimed that he called Lightfoot when he received the refund, and that they discussed what he should do with it.²⁷⁰ Lightfoot specifically

²⁶⁹ Beaulieu SITC at 1549:4 – 1550:21. Chief Bankruptcy Judge Keir, who testified as an expert witness for the House, also made the point that the undisclosed tax refund had significance going forward in determining Judge Porteous's disposable income: "Not only was it an asset that should have come in . . . but in effect it affects the calculation of what is disposable income. If you claim no dependents, no deductions, and have them take out extra money, you can lower that take-home pay. All you are doing is putting it in your own savings account, if you are allowed to do that. Therefore, your monthly payment is also going to be less under this plan calculation." Keir Task Force at 77.

Judge Porteous's bankruptcy case was assigned to Bankruptcy Judge William Greendyke from Texas. Judge Greendyke's trustee, William Heitkamp, testified similarly to Beaulieu as to the significance of the tax refund, namely, that they were to be treated as "part of the Chapter 13 debtor's disposable income," which was "required to be committed to payments in Chapter 13 cases." *See* William Heitkamp 5th Circuit Special Committee Hearing Testimony ("Heitkamp 5th Cir.") at 397.

²⁷⁰ *See* Porteous 5th Cir. at 83–84.

denied that such a call occurred. Rather, Lightfoot recalled a “conversation with the judge about a tax return for a later year, and not that particular year” where the issue was whether the tax refund had to have been turned over pursuant to Judge Greendyke’s order.²⁷¹

b. Omitted and Undervalued Financial Accounts

Judge Porteous also failed to provide truthful information about his Bank One checking account and his Fidelity money market account.

1. The Bank One checking account. The Bankruptcy Schedules (Question 2 on Schedule B (“Personal Property”)) required Judge Porteous to list, among other assets, “checking, savings or other financial accounts” and their value. In response, Judge Porteous disclosed the current market value of his Bank One Checking Account – into which his monthly salary was deposited – as \$100.

This “\$100” answer was false, and the evidence establishes that Judge Porteous knew that it was false. First, the day prior to filing his Initial Petition (March 27, 2001), Judge Porteous deposited \$2,000 into the account – the amount he owed on the Grand Casino markers – so he knew that the account held at least \$2,000 – not the \$100 he reported. Moreover, the opening balance in Judge Porteous’s Bank One account for the period March 23, 2001 to April 23, 2001 (covering the time period of his bank statements) was \$559.07, and the closing balance for the same time period was \$5,493.91. At no time during that month did Judge Porteous’s balance drop to as low as \$100.²⁷²

²⁷¹ Lightfoot SITC at 1141:15-17. *See also id.* at 1142:13-20 (Lightfoot recalled needing to “look to the confirmation order” since it was not a typical order issued in New Orleans); Lightfoot 5th Cir. at 437.

²⁷² *See* Horner SITC at 994:18 – 995:14; HP Ex. 127 (Bankruptcy Schedules), *supra* note 214, at SC00095; HP Ex. 144 (Porteous Bank One records); House Chart 5 (“Undisclosed Account Balance (Bank One Account)”; Porteous 5th Cir. Hrg. at 79–80 (acknowledging during

2. The Fidelity money market account. At the time of his bankruptcy filing, Judge Porteous also had a Fidelity money market account that he used regularly. As noted, he had paid gambling debts to casinos from that account (and did so in the fall of 2000). In the days immediately prior to filing for bankruptcy, Judge Porteous wrote numerous checks drawn on the Fidelity account, including a check the day before he filed his Initial Petition.²⁷³

Judge Porteous did not disclose his Fidelity money market account as required in response to the question concerning his accounts. Judge Porteous never told Lightfoot about this account, and he did not include it on the worksheets that he filled out and gave to Lightfoot in the summer of 2000.²⁷⁴ Although there were but a few hundred dollars in the account at the time he filed for bankruptcy, Judge Porteous clearly did not overlook the account. He deliberately failed to report it, and it should have been disclosed. His reason for hiding the amount became clear after his Chapter 13 bankruptcy plan was approved. Judge Porteous thereafter secretly used this account to accumulate cash and pay gambling debts.²⁷⁵

his Fifth Circuit testimony that he listed his Bank One checking account under Schedule B as having a balance of \$100).

²⁷³ See Horner SITC at 995:15 – 997:20; HP Ex. 529 (Fidelity checks); HP Ex. 143 (Fidelity money market statements); House Chart 16 (“Judge Porteous’s Use of Fidelity Account Pre-Bankruptcy to Pay Gambling Debts”); House Chart 4 (“Judge Porteous’s Undisclosed Fidelity Money Market Account”).

²⁷⁴ See Horner SITC at 997:21-25; HP Ex. 127 (Bankruptcy Schedules), *supra* note 214, at SC00095; Lightfoot 5th Cir. at 436, 448; Porteous 5th Cir. at 85–87 (acknowledging in his Fifth Circuit testimony the existence of his Fidelity money market account, and acknowledging that it was omitted from his Schedule B).

²⁷⁵ Counsel misconstrues the significance of this omission, and the collective falsehoods, in his opening statement: “[Judge Porteous] had \$283.42 [in that account]. So let’s round it upwards, shall we? Let’s say it’s \$300. Is that going to be relied on for the removal of a federal judge after 16 years of service?” See Turley SITC Opening Statement at 103:13-18.

c. Understated Income

Judge Porteous did not disclose his true net income. The Schedule requiring disclosure of “Current Income” listed his monthly net income as \$7,531.52 – the amount that was reflected on the pay stub Judge Porteous gave Lightfoot in the summer of 2000. That pay stub was attached to the Schedule. Judge Porteous never disclosed to Lightfoot that his judicial salary had increased in 2001 to \$7,705.51 per month (take home). Therefore, Judge Porteous understated his net income by \$173.99 a month, or \$2,087.88 annually, or over \$6,000 for the three year life of the proposed Chapter 13 Plan.²⁷⁶

Judge Porteous also had social security taxes withheld from his salary on a monthly basis until he reached a statutorily defined annual gross salary – referred to as the social security “wage base.” He typically reached that income level in July or August of a calendar year, at which point, he was no longer subject to social security tax withholding, and his net monthly salary would increase substantially. In the summer of 2001, Judge Porteous’s monthly net salary increased from about \$7,705 per month to about \$8,500 for the rest of the year – an amount roughly \$1,000 per month more than he reported on his bankruptcy filing, or over \$5,000 more for that year.²⁷⁷ Because he received salary increases in 2002 and 2003, the difference between what he had reported to the bankruptcy court in 2001 as his net salary and what he actually received after the social security withholding stopped is even more pronounced. In 2002, after

²⁷⁶ Schedule I of the Bankruptcy Schedules, “Current Income of Individual Debtor(s),” required Judge Porteous to list his “current monthly gross wages, salary, and commissions (pro rate if not paid monthly).” See HP Ex. 127 (Bankruptcy Schedules), *supra* note 214, at SC00108-09; HP Ex. 144 (Porteous Bank One records); Lightfoot Task Force at 47.

²⁷⁷ See Horner SITC at 1013:21 – 1014:12; HP Ex. 451 (Porteous Bank One records for Aug.-Sept. of 2001, 2002, and 2003); Horner Task Force at 26 (testifying that from “August through December [2001], the pay that is deposited in his account every month is about \$8,500”).

the social security withholding stopped, Judge Porteous received in excess of \$8,600 per month (or over \$1,000 more per month than what he reported on his Bankruptcy Schedule). In 2003 he received in excess of \$9,000 per month after the social security withholding stopped. In total, Judge Porteous received thousands of dollars in disposable income for his own use that he never reported and that the creditors never saw.²⁷⁸

d. Schedule of Unsecured Creditors

Judge Porteous failed to disclose Grand Casino Gulfport among his unsecured creditors. As noted, Judge Porteous owed \$2,000 to the Grand Casino Gulfport on March 28, 2001. The markers he had outstanding did not clear Judge Porteous's account until April 5-6, 2001. Though he listed numerous creditors on Schedule F -- "Creditors Holding Unsecured Nonpriority Claims" -- the Grand Casino Gulfport debt was not included.²⁷⁹ For reasons already discussed, Judge Porteous sought and planned for that creditor to receive payment in full, while other creditors to whom he owed money on March 28, 2001 received only a fraction of what they were owed. Judge Porteous could not afford to be in default to any casino if he wanted to continue gambling.

²⁷⁸ See HP Ex. 451 (Porteous Bank One records for Aug.-Sept. of 2001, 2002, and 2003). Judge Porteous, through his attorney, has suggested that he paid even more than required to the trustee. Counsel for Judge Porteous stated in his opening statement: "[J]udge Porteous -- and I want to emphasize this -- paid more than he was scheduled to pay in bankruptcy. He paid more than what originally he was scheduled to pay his creditors." Turley SITC Opening Statement at 95:14-18. To the contrary, the absence of good faith reflected by Judge Porteous's receipt of thousands of dollars of income in excess of what he reported on his schedules and which were not known to the trustee or accounted for in his payment plan, is manifest. Judge Porteous's attorney asserted, in questioning Agent Horner, that the amounts at issue were "a few hundred dollars a month." See Horner SITC at 1054:11. That amount materially understates the impact of the "FICA effect."

²⁷⁹ See Horner SITC at 983:22 -- 984:16, 985:6-8, 1003:19 -- 1005; HP Ex. 127 (Bankruptcy Schedules), *supra* note 214, at Schedule F at SC00102-105; HP Ex. 301(a) (Grand Casino Gulfport Patron Transaction Report); House Chart 6 ("Undisclosed Creditor (Grand Casino Gulfport)").

e. Signed Declaration

At the end of Judge Porteous's Bankruptcy Schedules, he signed a "declaration under penalty of perjury by individual debtor," which stated:

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 18 sheets plus the summary page, and that they are true and correct to the best of my knowledge, information, and belief.²⁸⁰

In fact, the Schedules were not "true and correct to the best of [Judge Porteous's] knowledge, information and belief." They were false because they failed to report his pending tax refund, the true value of his Bank One checking account, the existence of his Fidelity money market account, his true net salary, and the existence of a casino as one of his creditors.

4. False Representations in the Statement of Financial Affairs

*a. Undisclosed Payments to Preferred Creditors (Fleet and the Casinos)
Within 90 Days of Filing for Bankruptcy*

One of the questions on the Statement of Financial Affairs (Question 3) required Judge Porteous to "[l]ist all payments on loans, installment purchases of goods or services, and other debts, aggregating more than \$600 to any creditor, made within 90 days immediately preceding the commencement of this case."²⁸¹ The reasons for such an inquiry are obvious – to ensure that the debtor is not picking and choosing whom to pay when he knows he is going into bankruptcy, thereby paying some creditors in full while other creditors receive a fraction of what they are owed. This, of course, is exactly what Judge Porteous had done by paying Treasure Chest and Fleet in full in the weeks prior to filing for bankruptcy.

²⁸⁰ See HP Ex. 127 (Bankruptcy Schedules), *supra* note 214, at SC00111.

²⁸¹ See HP Ex. 127 (Statement of Financial Affairs) *supra* note 214, at SC00112. The question thus seeks to inquire as to whether the debtor has favored or preferred some creditors over others, by paying some creditors in full to the detriment of others.

Relying on the information that Judge Porteous had provided, Lightfoot entered the answer: “normal installments” in response to Question 3— a term that “was intended to cover the normal installments on his two leased cars and his two home mortgages.”²⁸² That answer — “normal installments” — was false, as a result of Judge Porteous’s actions in the weeks and days immediately preceding filing for bankruptcy.

First, the Schedule failed to disclose Judge Porteous’s payment to Treasure Chest. As noted, on March 2, 2001, Judge Porteous gambled at Treasure Chest and took out seven \$500 markers, for a total extension of credit of \$3,500. He repaid \$2,000 with chips on March 3, 2001, but he did not repay the balance until March 27, 2001 (the day before his Initial Petition was filed), when he made a \$1,500 cash payment to the casino — that is, he made a payment on a debt “aggregating more than \$600 to any creditor, made within 90 days immediately preceding the commencement of this case.” Repayment of the markers to Treasure Chest should have been reported but, as with all of Judge Porteous’s gambling activities, Lightfoot did not include it because he did not know about it.²⁸³

²⁸² See HP Ex. 127 (Statement of Financial Affairs), *supra* note 214, at SC00112; Lightfoot Task Force at 48.

²⁸³ See HP Ex. 127 (Statement of Financial Affairs), *supra* note 214, at SC00112; HP Ex. 302 (Porteous Treasure Chest Customer Transaction Inquiry); Horner SITC at 986:18 – 988:19; Lightfoot SITC at 1090:1 – 1091:2; Lightfoot Task Force at 48); House Chart 2 (“Undisclosed Payments to Creditors within 90 Days of Bankruptcy - Treasure Chest Casino”).

Additionally, as discussed above, on February 26, 2001, Judge Porteous took out \$2,000 in markers at the Grand Casino, which were in fact outstanding as of the date he filed for bankruptcy (March 28, 2001) and were not reported on the Schedule of Unsecured Creditors. However, if Judge Porteous believed that the markers had in fact been repaid prior to filing for bankruptcy (presumably on March 27, 2001, when he deposited cash for that purpose), that payment should have been disclosed in response to Question 3 on his Statement of Financial Affairs. Again, Lightfoot was unaware of the Grand Casino Gulfport markers.

Second, Judge Porteous also failed to disclose that on March 23, 2001, he had his secretary, Rhonda Danos, pay off his wife's Fleet credit card balance of \$1,088.41.²⁸⁴

Trustee Beaulieu explained that though he could attempt to collect the preferred payments, doing so would "cost us money. I'd have to weigh the cost of going after the preferences."²⁸⁵ Because it is unlikely that Beaulieu would have recovered these preferred payments, Judge Porteous has implied that his dishonesty in failing to disclose them has no significance. That argument is not defensible, nor does it excuse his not providing accurate information. The fact that Beaulieu concluded it was not worth his time to file a civil law suit on behalf of the creditors to collect the preferred payments does not render Judge Porteous's statements any less false or any less fraudulent; it just means that there was no practical remedy to cure the effect of the fraudulent misrepresentations.

b. Gambling Losses

Judge Porteous also lied in response to a specific question concerning his gambling. The Statement of Financial Affairs required Judge Porteous to "[l]ist all losses from . . . gambling

²⁸⁴ Judge Porteous's March 23, 2001 payment to Fleet (by way of the Danos check) was credited by Fleet on March 29, 2001. Because this check was not received by Fleet until the day after Judge Porteous initially filed for bankruptcy, Judge Porteous could claim that the payment to Fleet was not in fact made within the 90 days preceding his bankruptcy filing, and thus it was not required to be reported on the Statement of Financial Affairs. However, if this were the case, then Judge Porteous should have listed Fleet as an unsecured creditor, which he did not. See HP Ex. 127 (Bankruptcy Schedules and Statement of Financial Affairs), *supra* note 214, at Schedule F at SC00102-105 and at Statement of Financial Affairs at SC00112; HP Ex. 140 (Fleet credit card statements); HP Ex. 329 (Fleet credit card statement and check written by Danos); Horner SITC at 993:25 – 994:17; House Chart 1 ("Undisclosed Payments to Creditors within 90 Days of Bankruptcy - Fleet Credit Card").

²⁸⁵ Beaulieu SITC 1549:24 – 1550:1. Judge Keir testified that if Judge Porteous had disclosed the preferred payments to creditors on his Statement of Financial Affairs, he would have run the risk that the trustee would have sought to void those transfers and bring those payments back into the bankruptcy estate. The casinos would thus be treated the same as other unsecured creditors, and would have received less than full payment on the markers. See Keir Task Force at 71–72.

within one year immediately preceding the commencement of this case or since the commencement of this case.” In response, the box for “none” was checked.²⁸⁶ However, an analysis by the FBI of Judge Porteous’s gambling activities reflecting his “rated play” in the year prior to his bankruptcy filing revealed that Judge Porteous had gross losses of \$12,700 and net losses of \$6,233.20.²⁸⁷

During his Fifth Circuit testimony, Judge Porteous admitted that his response of “none” to the question concerning gambling losses was incorrect:

- Q. Judge Porteous, do you recall that in the - that your gambling losses exceeded \$12,700 during the preceding year?
- A. I was not aware of it at the time, but now I see your documentation and that - and that’s what it reflects.
- Q. So you - you don’t dispute that?
- A. I don’t dispute that.
- Q. Therefore, the answer “no” was incorrect, correct?
- A. Apparently, yes.
- Q. Even though this was signed under oath, under penalty of perjury, correct?
- A. Right.²⁸⁸

²⁸⁶ See HP Ex. 127 (Statement of Financial Affairs), *supra* note 214, at SC00113.

²⁸⁷ See Horner SITC at 1000:1-14, 1001:5-12; HP Ex. 337 (FBI Gaming Losses Chart).

²⁸⁸ Porteous 5th Cir. at 99. There is no significance to the “net”/“gross” distinction in any event. The question calls for disclosure of “all losses.” As Senator Risch observed, in questioning Agent Horner:

You know, it seems to me, as I read that, that there’s good reasons why that question is asked on the bankruptcy form, and it seems to me that they don’t ask about a net gain or loss, it just says have they had losses. So if he won and he lost, regardless of what the net result is, the answer to that question should have been yes.

Horner SITC at 1066:3-11.

Though the “gambling” question would not necessarily result in additional money to Judge Porteous’s creditors, a truthful answer to the question would have put the creditors and the court on notice of activities that could threaten the bankruptcy plan. As Lightfoot testified, that question “prompts many other questions for a trustee to ask in the examination of the case.”²⁸⁹

c. Declaration

At the end of his Statement of Financial Affairs, Judge Porteous signed a declaration which stated:

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.²⁹⁰

Again, Judge Porteous’s answers were not “true and correct.” Judge Porteous concealed his payments to Treasure Chest (by cash) and Fleet (through Danos), and failed to disclose his gambling losses notwithstanding questions specifically calling for that information.

H. Judge Porteous’s Post-Filing Activities and the Bankruptcy Creditors Meeting

1. Post-Filing Activities between March 28, 2001 and the Creditors Meeting on May 9, 2001

a. Beau Rivage and Repayment through Danos

Judge Porteous continued to gamble after filing for bankruptcy. On April 6, 2001 – subsequent to filing his Initial Petition (on March 28, 2001) and prior to filing his schedules and forms on April 9, 2001 – Judge Porteous gambled and incurred debt at Beau Rivage Casino.

Judge Porteous repaid the Beau Rivage debt by withdrawing funds from his IRA (in the form of a check), endorsing that IRA check to Danos and having her write a check to the casino. By repaying Beau Rivage in this matter, the payment to Beau Rivage avoided Judge Porteous’s

²⁸⁹ Lightfoot SITC at I092:3-4. Judge Porteous would have well understood that the bankruptcy court and his attorney would have focused on gambling in the context of approving his Chapter 13 plan.

²⁹⁰ See HP Ex. 127 (Statement of Financial Affairs), *supra* note 214, at SC00116.

accounts altogether. This conduct further evidences his intent to hide gambling debts and is consistent with his behavior prior to filing for bankruptcy. Even if there were only a remote chance that the creditors would seek to review his accounts, by this activity, Judge Porteous made sure that neither his disclosed Bank One account nor his undisclosed Fidelity money market account reflected any payments to Grand Casino in this time frame.²⁹¹

b. Treasure Chest and Harrah's

Judge Porteous continued to take out credit and incur debt after he filed his bankruptcy forms on April 9, 2001, and prior to the creditors meeting on May 9, 2001.

On April 10, 2001, the day after Judge Porteous filed his forms and schedules with the bankruptcy court, Judge Porteous took out \$2,000 in markers at the Treasure Chest Casino. He paid all the markers back the same day in chips.²⁹²

On April 30, 2001, Judge Porteous submitted a casino credit application to Harrah's Casino and requested a \$4,000 credit limit. This application lists "\$0" for indebtedness. Judge Porteous signed the application.²⁹³ On that same day, Judge Porteous took out \$1,000 in

²⁹¹ The sequence of events associated with this Beau Rivage debt is as follows: (1) On April 6, 2001, Judge Porteous requested a one-time credit increase at the Beau Rivage Casino from \$2,500 to \$4,000; (2) On April 7-8, 2001, Judge Porteous took out \$2,000 in markers at the Beau Rivage Casino. He left the casino owing \$1,000; (3) On approximately April 30, 2001, Judge Porteous withdrew \$1,000 from his IRA, which was paid to him in the form of a check. He endorsed the check directly to Danos, and she deposited it into her personal bank account on May 1, 2001; (4) On April 30, 2001, Danos wrote a check payable to the Beau Rivage in the amount of \$1,000. The memo line of that check referenced Judge Porteous. That payment was credited against Judge Porteous's Beau Rivage account on May 4, 2001. See HP Ex. 303 (Beau Rivage Credit History); HP Ex. 304 (Beau Rivage Balance Activity); HP Ex. 382 (records related to \$1,000 Beau Rivage payment); House Chart 11 ("Judge Porteous's Use of Secretary Danos to Pay His Casino Debts in April 2001").

²⁹² See HP Ex. 305 (Treasure Chest Customer Transaction Inquiry).

²⁹³ See Horner SITC at 1007:15 – 1008:5; HP Ex. 149 (Harrah's Casino Credit Application); HP Ex. 326 (Central Credit, Inc. Gaming Report for Judge Porteous).

markers at Harrah's Casino and wrote a check to pay these markers. Harrah's held the check for 30 days before depositing it, so the markers were not repaid until May 30, 2001.²⁹⁴

On May 7, 2001 Judge Porteous took out \$4,000 in markers at the Treasure Chest Casino. He left the casino owing this amount and repaid the \$4,000 two days later, on May 9, 2001 – the same day as the Creditors Meeting – in cash.²⁹⁵

2. Bankruptcy Creditors Meeting

On May 9, 2001, the Section 341 Creditors Meeting was held in Judge Porteous's bankruptcy case.²⁹⁶ Bankruptcy trustee Beaulieu presided over the hearing, which was attended by Judge Porteous and attorney Lightfoot. As to incurring debt going forward, Judge Porteous was provided with a copy of a pamphlet entitled "Your Rights and Responsibilities in Chapter 13." During his testimony before the Fifth Circuit Special Committee, Judge Porteous acknowledged receiving the pamphlet from the bankruptcy trustee. Section 6 of this pamphlet discussed credit while in Chapter 13 and specifically provided:

You may not borrow money or buy anything on credit while in Chapter 13 without permission from the bankruptcy Court. This includes the use of credit cards or charge accounts of any kind. If you or a family member you support buys something on credit without Court approval, the Court could order the goods returned.²⁹⁷

²⁹⁴ See HP Ex. 306 (Harrah's Patron Credit Activity).

²⁹⁵ See HP Ex. 307 (Treasure Chest Customer Transaction Inquiry).

²⁹⁶ See HP Ex. 129 (*In the Matter of Porteous*, Case No. 01-12363, Trustee's Memo to Record (Bankr. E.D. La. May 9, 2001)); Lightfoot Task Force at 49. See also 11 U.S.C. § 341 (2003). A Section 341 Creditors Meeting is a statutorily mandated meeting of creditors and equity security holders that is held by the bankruptcy trustee. The purpose of a Section 341 Creditors Meeting is to permit examination of the debtor under oath regarding his petition and bankruptcy schedules.

²⁹⁷ See HP Ex. 130 (Creditors Meeting Hearing Transcript); HP Ex. 148 (Chapter 13 "Rights & Responsibilities" Pamphlet); Porteous 5th Cir. at 60.

Judge Porteous was thereafter placed under oath and asked if everything in his bankruptcy filing was true and correct. Judge Porteous stated, “yes.” Judge Porteous was also specifically asked if he listed all of his assets in his bankruptcy filing, and again he answered “yes.” He also affirmed that his take home pay was “about \$7,500 a month.”²⁹⁸

Bankruptcy Trustee Beaulieu made it clear to Judge Porteous that he was no longer allowed to incur any new debt or to buy anything on credit. Specifically, the trustee told Judge Porteous that he was “on a cash basis now.”

Judge Porteous did not disclose at the hearing that between the time of filing for bankruptcy and the date of the Creditors Meeting, he had incurred additional debt (some of which he had paid through Danos) by taking out markers at casinos. Nor did he disclose that he had increased a credit line at a casino, concealed a credit card in his bankruptcy filing, or that he had outstanding markers owed to Harrah’s Casino on the date of the meeting.²⁹⁹

Between the Creditors Meeting on May 9, 2001 and the date the Confirmation Order was signed on June 28, 2001, Judge Porteous continued to gamble, take out casino markers, and incur new debt.³⁰⁰

²⁹⁸ See HP Ex. 130 (*In the Matter of Porteous*, Case No. 01-12363, Creditors Meeting Hearing Transcript (Bankr. E.D. La. May 9, 2001) at SC00595-96)).

²⁹⁹ *Id.* at SC00598. As it turned out, the Creditors Meeting was perfunctory, and Judge Porteous’s concerns that creditors or the trustee would seek to examine his bank statements were unnecessary. Nonetheless, Judge Porteous’s repayment of casino debts by running IRA payments through Danos’s accounts, or his various cash payments to the casinos prior to filing for bankruptcy, reflect the care he exercised to hide his gambling from the Bankruptcy Court and creditors.

³⁰⁰ These activities included: (1) On May 16, 2001, Judge Porteous took out a \$500 marker at the Treasure Chest Casino. He repaid the marker the same day in chips; (2) On May 26-27, 2001, Judge Porteous took out \$1,000 in markers at the Grand Casino Gulfport. He paid back \$900 on May 27, 2001 and paid back the remaining \$100 on June 5, 2001; and (3) On June 20, 2001, Judge Porteous took out a \$500 marker at the Treasure Chest Casino. He repaid the marker the same day in chips. See HP Ex. 308 (Treasure Chest Customer Transaction Inquiry);

I. The June 28, 2001 Confirmation of Judge Porteous's Bankruptcy Plan, and Judge Porteous's Subsequent Violations of the Confirmation Order

1. The Order's Prohibition Against Judge Porteous Incurring New Debt

On June 28, 2001, U.S. Bankruptcy Judge William Greendyke signed an Order Confirming the Debtor's Plan and Related Orders (the "Confirmation Order").

If Judge Greendyke had known of Judge Porteous's previously described actions in connection with his bankruptcy filing, Judge Greendyke would not have signed the Confirmation Order, and "would probably have sua sponte objected on the basis of lack of good faith."³⁰¹

Among its terms, the Confirmation Order prohibited Judge Porteous from incurring new debt without the permission of the trustee:

The debtor(s) shall not incur additional debt during the term of this Plan except upon written approval of the Trustee. Failure to obtain such approval may cause the claim for such debt to be unallowable and non-dischargeable.³⁰²

During his Fifth Circuit testimony, Judge Porteous testified that he understood the Confirmation Order at the time the order was entered.³⁰³ Judge Porteous's understanding that he needed the bankruptcy trustee's permission to incur new debt is evidenced by the fact that on at least two separate occasions he sought and received such permission.³⁰⁴

HP Ex. 309 (Grand Casino Patron Transaction Request); HP Ex. 310 (Treasure Chest Customer Transaction Inquiry).

³⁰¹ See William Greendyke 5th Circuit Special Committee Hearing Testimony ("Greendyke 5th Cir.") at 384-85. The good faith of the debtor is a confirmation requirement.

³⁰² See HP Ex. 133 (*In the Matter of Porteous*, Case No. 01-12363, Confirmation Order (Bankr. E.D. La. June 28, 2001) ("Confirmation Order")).

³⁰³ Porteous 5th Cir. at 62.

³⁰⁴ First, on December 20, 2002, the bankruptcy trustee granted Judge Porteous's request to refinance his home. And second, on January 2, 2003, the bankruptcy trustee granted Judge Porteous's request to obtain two new car leases. See Lightfoot Task Force at 49-50; HP Ex. 339 (Beaulieu letter approving home refinancing); HP Ex. 340 (Beaulieu letter approving new car leases).

2. Violations of the Confirmation Order

Judge Porteous was subject to the terms of his Chapter 13 repayment plan for three years. Notwithstanding Judge Greendyke's Confirmation Order that "[t]he debtor(s) shall not incur additional debt during the term of this Plan except upon written approval of the Trustee,"³⁰⁵ Judge Porteous: (1) took out 42 markers over the course of fourteen different gambling trips at four different casinos, totaling over \$33,000 in debt; (2) applied to increase his credit limit at one of those casinos and thereafter utilized his increased credit line; and (3) obtained and used a new credit card. Judge Porteous did not obtain the permission of the trustee or the bankruptcy court to engage in these activities.

a. Casino Markers

After the Confirmation Order was signed and issued, Judge Porteous continued to gamble on a regular basis and intentionally violated Judge Greendyke's Confirmation Order by incurring debt in the form of taking out casino markers without obtaining permission from the bankruptcy trustee. He obtained casino markers on his existing lines of credit at the casinos and sought an increase on one of his lines of credit.³⁰⁶

Judge Porteous took out at least 42 markers between July 19, 2001 and July 5, 2002. The following chart summarizes Judge Porteous's gambling activity during the first year following the Confirmation Order.

³⁰⁵ See HP Ex. 133 (Confirmation Order), *supra* note 302.

³⁰⁶ See HP Ex. 149 (Harrah's Casino Credit Application); HP Ex. 326 (Central Credit, Inc. Gaming Report for Judge Porteous).

Date	Casino	Number of Markers	Total Dollar Amount	Repayment Date(s)
07/19/2001	Treasure Chest	1	\$500	07/19/2001
07/23/2001	Treasure Chest	1	\$1,000	07/23/2001
08/20-21/2001	Treasure Chest	8	\$8,000	08/20-21/2001 (\$5,000) 09/09/2001 (\$2,000) 09/15/2001 (\$1,000)
09/28/2001	Harrah's	2	\$2,000	10/28/2001
10/13/2001	Treasure Chest	2	\$1,000	10/13/2001
10/17-18/2001	Treasure Chest	9	\$5,900	10/17/2001 (\$1,500) 11/09/2001 (\$4,400)
10/31/2001-11/01/2001	Beau Rivage	6	\$3,000	11/01/2001
11/27/2001	Treasure Chest	2	\$2,000	11/27/2001
12/11/2001	Treasure Chest	2	\$2,000	12/11/2001
12/20/2001	Harrah's	1	\$1,000	11/09/2002
02/12/2002	Grand Casino Gulfport	1	\$1,000	02/12/2002
04/01/2002	Treasure Chest	3	\$2,500	04/01/2002
05/26/2002	Grand Casino Gulfport	1	\$1,000	05/26/2002
07/04-05/2002	Grand Casino Gulfport	3	\$2,500	07/05/2002 (\$1,200) 08/11/2002 (\$1,300)
TOTAL		42	\$33,400³⁰⁷	

Judge Porteous has attempted to suggest that there exists some legal ambiguity into whether borrowing money from casinos – evidenced by the “marker” – constituted a form of

³⁰⁷ See Homer SITC at 1009:23 – 1011:2 (identifying table); House Table 7.

debt. However, there is no ambiguity in this concept. When Judge Porteous borrowed from the casino, or took out a marker, he was then indebted to the casino for the period of time that the marker was outstanding. This is well understood by Judge Porteous's attorney, Lightfoot, bankruptcy trustee Beaulieu, and expert witness Chief Bankruptcy Judge Keir – men who have handled thousands of bankruptcy cases.

In Lightfoot's opinion, a marker was a civil debt: "I believe a marker is at least a promise to pay. Promise to pay is a claim in bankruptcy."³⁰⁸ Similarly: "[A] marker, to me, they look just like a check. And as I had researched it in the past, I found that it was – the big fight was whether or not it was a check. But it certainly was a debt in my – and it is a debt in my opinion. It's a promise to pay."³⁰⁹

Beaulieu testified that markers constituted indebtedness, and that Judge Porteous's taking out markers violated the confirmation order:

- Q. In your view, does a marker from a casino – is that a form of indebtedness for your purposes?
- A. Yes.
- Q. Now, you know the order that was filed by judge -- was signed by Judge Greendyke said that the debtor is not allowed to incur any new debt without the written permission of the trustee. Do you recall that?
- A. Yes, sir.
- Q. And the evidence is undisputed that in the year following the filing of the petition, and I believe after the order was entered, Judge Porteous, I believe the number – signed up for 42 markers amounting to roughly

³⁰⁸ Lightfoot SITC at 1077:16–1078:4.

³⁰⁹ *Id.* at 1179:3-24 *See also* Lightfoot Task Force at 53 ("I have had some cases involving gambling, people who had markers, and, of course, they are a civil liability. It is a debt like any other debt in that sense. So it has to be listed. I would have listed and do list anybody who has a casino-type debt."); *id.* at 64 ("Mr. GOODLATTE. And is there any question in your mind that a marker is a form of indebtedness? Mr. LIGHTFOOT. No doubt at all.")

\$30,000. I could be off in my numbers. But should that have been – first of all, did that violate the order?

A. In my opinion, it does.³¹⁰

Henry Hildebrand, a bankruptcy trustee called as an expert by Judge Porteous, and who has handled 150,000 cases, also testified that Judge Porteous's taking out gambling markers violated Judge Greendyke's Order.³¹¹

Finally, it is clear that Judge Porteous understood that borrowing from casinos – or taking out markers – constituted a form of debt. Judge Porteous accepted the following definition of a marker in his testimony before the Fifth Circuit Hearing:

A marker is a form of credit extended by a gambling establishment, such as a casino, that enables the customer to borrow money from the casino. The marker acts as the customer's check or draft to be drawn upon the customer's account at a financial institution. Should the customer not repay his or her debt to the casino, the marker authorizes the casino to present it to the financial institution or bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time.³¹²

In addition, Judge Porteous's actions immediately preceding his bankruptcy, where he sought to repay his casino markers prior to filing for bankruptcy, make it clear that he understood the markers constituted reportable debt. Thus, notwithstanding Judge Porteous's experts, who sought to cast doubt on the proposition that taking out markers equates with taking out debt, the evidence is uncontested that Judge Porteous understood that a marker was debt for purposes of complying with the confirmation order.

The fact that Judge Porteous violated the confirmation order in taking out other debt by obtaining and using a credit card, as discussed in the next section, confirms Judge Porteous's

³¹⁰ Beaulieu SITC at 1540:22 – 1541:15.

³¹¹ Hildebrand SITC at 1846:18-22, 1885:13-15.

³¹² See Porteous 5th Cir. at 64–65.

willingness to violate the Confirmation Order. The fact that some of the markers were repaid the same day is not relevant to the conclusion that they constituted prohibited debt at the moment Judge Porteous received the chips for markers. As Chief Bankruptcy Judge Keir explained: “When the casino pushes the markers across the counter to the gambler, who doesn’t immediately pay for them, but will pay for them, the gambler is now obligated to pay the casino for the value of the markers. That’s when the debt arises. That is debt, and all debts are covered by the order.”³¹³

Finally, Judge Porteous’s handling of these debts again explains why he did not disclose the Fidelity money market account. To make his November 9, 2001 payment of \$4,400 to the Treasure Chest Casino, Judge Porteous withdrew \$1,760 from his IRA, which he deposited into his Fidelity money market account, and he then wrote a check for \$1,800, payable to the Treasure Chest Casino, drawn on his Fidelity account. (Judge Porteous repaid the remaining \$2,600 on November 9, 2001 in cash.)³¹⁴

Similarly, to make the August 11, 2002 payment of \$1,300 to the Grand Casino Gulfport, Judge Porteous once again used his undisclosed Fidelity money market account. He wrote a

³¹³ Keir SITC at 1995:3-8. *See also id.* at 1194:17 – 1195:22; Keir Task Force at 79 (“The debt is incurred when the marker is taken. That is when the debt arises. You owe the money. And it is the incurrence of the debt that was prohibited by the order.”).

³¹⁴ *See* Horner SITC at 1011:11-23; HP Ex. 316 (Treasure Chest Casino Customer Transaction Inquiry); HP Ex. 530 (IRA and Fidelity records showing \$1,760 withdrawal from IRA and \$1,800 check written out of Fidelity to the Treasure Chest Casino); House Chart 19 (“Judge Porteous’s Use of Undisclosed Fidelity Account in Bankruptcy to Pay Casino Debts”) (referred to as “Chart 18” in the SITC transcript). In addition, Judge Porteous used the undisclosed Fidelity account to accumulate cash outside of his disclosed Bank One account. By May of 2002, Judge Porteous accumulated a balance of \$8760.37 in the Fidelity account, while the balance in the Bank One account was \$1120.91. In June of 2002, his Fidelity balance was in excess of \$7,843.37, and his Bank One balance was \$857. *See* Horner SITC 1016:1-14; House Chart 18 (“Judge Porteous’s Use of Undisclosed Fidelity Account to Accumulate Cash Outside of Disclosed Bank One Checking Account”).

check to the Grand Casino on July 26, 2002 for \$1,300 drawn on the undisclosed Fidelity account, which cleared the casino on August 11, 2002.³¹⁵

b. Judge Porteous's Application For, and Use of, a New Credit Card

On August 13, 2001 – less than two months after Judge Greendyke's Confirmation Order was entered – Judge Porteous applied for a new Capital One credit card, without seeking the approval of the bankruptcy trustee. The credit card carried a \$200 credit line. Judge Porteous began using it immediately for dining out, clothing purchases, theater tickets, gasoline, and groceries, among other things. In May 2002, Judge Porteous's credit line was increased to \$400, and in November 2002, it was increased again to \$600.³¹⁶

When Judge Porteous obtained and used this new Capital One credit card without permission from the Trustee, he violated Judge Greendyke's Confirmation Order.³¹⁷

c. Taking Out an Additional Line of Credit

On July 4, 2002, Judge Porteous succeeded in increasing his credit limit at the Grand Casino Gulfport from \$2,000 to \$2,500. Immediately thereafter, Judge Porteous gambled at the casino and took out \$2,500 in markers.³¹⁸

³¹⁵ See Horner SITC at 1011:24 – 1012:5; HP Ex. 325 (Grand Casino Patron Transaction Report); HP Ex. 530 (Fidelity check written by Judge Porteous to the Grand Casino for \$1,300); House Chart 19 ("Judge Porteous's use of Undisclosed Fidelity Account in Bankruptcy to Pay Casino Debts") (referred to as "Chart 18" in the SITC transcript).

³¹⁶ See Horner SITC at 1008:23 – 1009:14; HP Ex. 341(a) (Capital One Credit Application); HP Ex. 341(b) (Capital One Statements).

³¹⁷ See Keir SITC at 1196:16 – 1197:7; Hildebrand SITC at 1885:16-20.

³¹⁸ See HP Ex. 324 (Grand Casino Gulfport Credit Line Change Request); HP Ex. 325 (Grand Casino Gulfport Patron Transaction Report); Horner Task Force at 18 (identifying the Grand Casino Credit Line Change Request and identifying Judge Porteous's signature on the document; testifying that a casino will not increase a gambler's credit line without the gambler proactively requesting the credit line increase).

3. Lightfoot's Knowledge of Judge Porteous's Post Confirmation Order Conduct

Judge Porteous did not tell Lightfoot that he had taken out markers, applied for a new credit card, or sought credit line increases at casinos:

- Q. Did Judge Porteous ever tell you that he gambled on credit from casinos after the confirmation order?
- A. No.
- Q. Would it have been a surprise to you that he took 14 gambling trips and signed 42 markers during the year after his confirmation?
- A. I didn't know about it, so it's a surprise.³¹⁹

J. Judge Porteous Should Be Convicted and Removed from Office for the Conduct Alleged in Article III

1. The Conduct Demonstrates Judge Porteous is Not Fit for Office

Judge Porteous's misconduct in connection with his Chapter 13 bankruptcy constitutes "high crimes" for which he should be convicted and removed from office. Judge Porteous's conduct demonstrates that he is not fit to hold office. He committed numerous acts of dishonesty: filing for bankruptcy under a false name; concealing his tax refund; paying off and concealing preferred creditors; and hiding accounts. The lies and false statements reflect a premeditated determination to continue gambling and to conceal gambling debts while in bankruptcy, which he did notwithstanding a court order forbidding him to do so. Moreover, his dishonest conduct consisted of more than filling out forms. Rather, he undertook a series of financial actions such as having his secretary make payments to creditors, or paying off a casino in cash the day prior to filing, that demonstrate his intent (and vigilance) to create and maintain a false picture of his financial activities before the bankruptcy court. He willfully and deliberately violated a judicial order, and the evidence demonstrated that he did so in a premeditated fashion

³¹⁹ Lightfoot SITC at 1099:17-25.

– by concealing an account (Fidelity) that he could use secretly to pay gambling debts at the time he filed for bankruptcy .

His conduct was “material” in many respects. First, the amounts at issue were significant. There would have been \$300 more a month available to creditors if Judge Porteous had disclosed the tax refund, and an additional \$175 a month if he had reported accurately his true income (putting aside the greater amounts he would have received once the social security withholding stopped – amounts of which Judge Porteous certainly was aware). Plus, there was another \$4,588 that he opted to pay to certain undisclosed creditors that was, therefore, not available to his disclosed creditors. (The fact that these amounts were spread out among three creditors – Grand Casino Gulfport (\$2000), Treasure Chest (\$1500) and Fleet (\$1088) so that it was not efficient for the trustee to seek to collect these amounts from these entities – does not diminish in the slightest the fraudulent nature of Judge Porteous’s conduct.)³²⁰ Moreover, his failure to disclose material facts fundamentally distorted the bankruptcy proceeding. Judge Porteous had reason to conclude that if he were honest, he would have invited further scrutiny into his financial affairs, resulting in curbs on his gambling activity.

A fundamental requirement for obtaining bankruptcy relief is that the debtor act in “good faith.” Dishonesty in the filing of bankruptcy petitions is the antithesis of good faith. Bankruptcy Judge Greendyke has indicated that if he had known all the facts concerning Judge Porteous’s conduct, he “would probably have sua sponte objected on the basis of lack of good faith.”³²¹ Lightfoot testified that one of the reasons he instructed Judge Porteous pre-bankruptcy to stop taking on debt was because of this “good faith” requirement: “Well, by the time someone

³²⁰ See Keir SITC at 1197:8-23. The “defense” of “no harm, no foul” is not available to one who violates a bankruptcy judge’s court order.

³²¹ Greendyke 5th Cir. at 385.

is in a financial distress sufficient to be consulting about a bankruptcy, it is not good faith for such a person to continue making debt. So I always admonish them not to do it anymore, not to make any more credit card charges, et cetera.”³²²

Judge Porteous’s actions in connection with his bankruptcy proceedings “cast a cloud on the integrity of the judiciary.”³²³ The bankruptcy system depends on the honesty and candor of the debtors in disclosing financial information.³²⁴

Judge Keir testified to the effect on the bankruptcy system as the result of Judge Porteous’s actions:

Because Judge Porteous served as a judge, he obviously must have known what the words “under penalty of perjury” mean. And by falsely putting down information or omitting information and admittedly falsely doing it in the petition, he obviously must have known he was committing a perjurious act. And that seems to be - to go certainly to intent.

In addition, although not part of the bankruptcy code, it’s my view that these actions cast a cloud, if you will, on the integrity of the judiciary, and that public officials, whether they’re elected or appointed, have a duty to not have that kind of cloud cast on the integrity of the government.

If the public has no confidence in its courts, there aren’t enough police officers, there are not enough judges, there are not enough officials of any kind that are . . . going to keep the peace in the public and make this an orderly society. There has to be that level of confidence, and this kind of activity certainly would attack and weaken that.³²⁵

³²² Lightfoot Task Force at 43. *See also* Keir SITC at 1199:7-18 (“it’s a requirement under Section 1325 of the Code that a plan be proposed in good faith”); Keir Task Force at 74.

³²³ Keir SITC at 1198:17-23.

³²⁴ *See* Keir SITC at 1185:11-25; Hildebrand SITC at 1878:1-9, 1878:16 – 1879:8; Ronald Barliant Senate Impeachment Trial Committee Hearing Testimony at 1921:16-19.

³²⁵ Keir SITC at 1198:9 – 1199:6. *See also* Keir Task Force at 72, 69-70 (explaining that “the whole system demands and depends upon the honesty of the honest but unfortunate person who seeks relief.” Individuals simply can’t just decide “that they can do whatever they want, ignoring laws, and so long as you can’t measure the particular damage of the violation, there is no violation at all. That would be chaos.”)

In short, as charged in Article III, “Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.” Federal judges oversee bankruptcy court appeals. How could any member of the public who might have a bankruptcy matter before Judge Porteous in the future have confidence in any decision he would render, knowing that the Judge himself condones filing under a false name under penalty of perjury? The simple answer is, they could not. Judge Porteous’s conduct in his bankruptcy so undermines the public trust, he cannot be allowed to remain on the bench.

2. Judge Porteous’s Conduct Constitutes a “High Crime”
Warranting Conviction and Removal from Office

Judge Porteous has argued that Article III should be dismissed because it alleges private, minor, bankruptcy misconduct for which Judge Porteous was never prosecuted. Specifically, he claims that (1) his conduct was arguably “personal” and (2) the Department of Justice concluded that his conduct did not merit prosecution. However, neither argument is relevant to whether Judge Porteous’s conduct constitutes a “high Crime” warranting conviction and removal from office.³²⁶

Article III clearly charges that, by his conduct in the bankruptcy proceedings, “Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the federal judiciary, and demonstrated that he is unfit for the office of federal judge.”³²⁷ Whether similar conduct by a private person would warrant a criminal prosecution is

³²⁶ This portion of the brief tracks in substantial respects Section III.B. of The House of Representatives’ Consolidated Opposition to Judge G. Thomas Porteous, Jr.’s Five Motions to Dismiss the Articles of Impeachment at 47–52 (July 28, 2010).

³²⁷ See H. Res. 1031, 111th Cong., 2d Sess., at 6 (2010).

a far different issue than whether that same conduct by a federal judge on matters that touch centrally upon his duties, would warrant his removal from office.³²⁸

Judge Porteous's argument, which rests on the "private" nature of the financial misconduct, is fundamentally indistinguishable from the argument that Judge Claiborne raised and that the Senate rejected in that Impeachment trial. In that case, Articles of Impeachment against Judge Claiborne charged him with filing false tax returns. In his motion to dismiss, Judge Claiborne argued in terms that track Judge Porteous's claims here, namely, that impeachment "was designed to reach those in high places guilty of official delinquencies or maladministration" and that the charges against him were "based on alleged private misconduct, as distinguished from official misconduct."³²⁹ In its response, the House stressed that nothing in the text of the Constitution supported the private / public distinction and stated that if the Framers sought impeachment to be limited to "official" conduct, they certainly could have included such a limitation in the Constitution. Moreover, as the House explained in Claiborne, that narrow view of impeachable conduct was "offered and rejected by the Framers of the Constitution," and that the Framers "rejected, at two separate junctures, the concepts of

³²⁸ Judge Porteous further complains that Article III fails to set forth all the elements of a criminal offense. As set forth above, the Articles of Impeachment do not purport to allege violations of specific criminal laws and need not do so to sustain a conviction by the Senate.

³²⁹ See [Judge Claiborne's] Motion to Dismiss the Articles of Impeachment on the Grounds They Do Not State Impeachable Offenses at 3, *reprinted in Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate*, ("Claiborne Impeachment Report") S. Hrg. 99-812, 99th Cong., 2d Sess., at 244, 246 (1986). As to whether "non-official" conduct could constitute a basis for impeachment, Judge Claiborne further went on to argue: "[o]ffenses not immediately connected with office, such as murder, burglary, and robbery, are left to the ordinary course of judicial proceedings, while impeachment was historically limited to misconduct in office." *Id.*

professional ‘malpractice’ or ‘maladministration’ as the sole basis for the impeachment of federal officials.”³³⁰

At the oral arguments, Judge Claiborne’s counsel repeated the arguments he had made in his written motion, arguing, for example: “[O]ur position, of course, is that there is no allegation at this point in time that the behavior of Judge Claiborne in any way was related to misbehavior in his official function as a judge; it was private misbehavior. And we submit that, based on that private conduct, it is not an impeachable offense.”³³¹ In response, House Manager Kastenmeier reiterated: “As has been pointed out, it would be absurd to conclude that a judge who had committed murder, mayhem, rape, or perhaps espionage in his private life, could not be removed from office by the U.S. Senate.”

Chairman Mathias, on behalf of the Senate Impeachment Trial Committee, denied Judge Claiborne’s motion to dismiss, ruling:

There is neither historical nor logical reason to believe that the Framers of the Constitution sought to prohibit the House from impeaching and the Senate from convicting an officer of the United States who had committed treason or bribery or any other high crime or misdemeanor which is a serious offense against the government of the United States and which indicates that the official is unfit to exercise public responsibilities, but which is an offense which is technically unrelated to the officer’s particular job responsibilities.³³²

³³⁰ See [The House of Representatives’] Opposition to [Judge Claiborne’s] Motion to Dismiss Articles of Impeachment for Failure to State Impeachable Offenses at 3–4, *reprinted in* Claiborne Impeachment Report, *supra* note 335, at 443–44.

³³¹ See Proceedings of the Senate Impeachment Trial Committee [Judge Claiborne], Statement of Oscar Goodman, Esq. (counsel for Judge Claiborne) (Sept. 10, 1986), *reprinted in* Claiborne Impeachment Report, *supra* note 335, at 77.

³³² See Proceedings of the Senate Impeachment Trial Committee [Judge Claiborne], Statement of Senator Mathias (Sept. 10, 1986), *reprinted in* Claiborne Impeachment Report, *supra* note 335, at 113–14.

The Senate ultimately convicted Claiborne on the tax evasion article, a verdict that resolved any question that “personal” misconduct may warrant a judge’s conviction and removal.

The Judge Walter Nixon impeachment in 1989 further illustrates the inapplicability of the private conduct versus official conduct distinction and provides additional grounds to reject Judge Porteous’s claims. In that case, Judge Nixon had attempted to persuade a local sheriff to go easy on the prosecution of one of Judge Nixon’s business associates, an individual who had provided Judge Nixon with lucrative investment opportunities. Thereafter, when investigated for bribery for having taken things of value from the business associate, Judge Nixon lied to the FBI and the Grand Jury and denied he had spoken to the Sheriff. Ultimately, Judge Nixon was impeached for lying to the FBI and committing perjury before the grand jury.

The Judge Nixon case establishes the propriety of impeachment when it is shown that a federal judge made false statements under oath and took other acts of concealment to interfere with a federal judicial proceeding, even one which had no bearing on any case in his own courtroom. Judge Porteous’s false statements and pattern of concealment in the bankruptcy case fall well within the Nixon precedent.

Similarly, the fact that Judge Porteous was never prosecuted for the bankruptcy conduct is likewise not relevant. As noted at the outset, the fundamental inquiry involves fitness for office. Whether an individual has been criminally prosecuted (let alone convicted) is wholly irrelevant to whether a given course of conduct warrants impeachment.

The essence of the argument advanced by Judge Porteous was addressed by the House in connection with the impeachment of Judge George English for a variety of acts for which he was not criminally prosecuted. The Report accompanying the Articles noted there may well be circumstances where:

[a] civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and . . . his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution.³³³

Under Judge Porteous's theory of constitutional interpretation, Congress can impeach only if the Department of Justice prosecutes. Aside from the fact that most of the impeachments in this country's history have not followed criminal prosecutions, there is no principled basis for Congress – either the House or Senate – to abdicate its constitutionally assigned roles associated with the exercise of the impeachment power, conflate the power to impeach with the power to prosecute, and cede that power to the Attorney General of the United States.

Indeed, the Senate has spoken clearly that the existence of a federal prosecution – even a federal criminal conviction – does not drive its consideration of whether the conduct alleged in the Articles of Impeachment warrants conviction and removal. Judge Claiborne was ultimately convicted and removed by the Senate for his conduct. The Senate acquitted on the Article which specifically charged the federal conviction as grounds for impeachment. Similarly, the Senate convicted and removed Judge Hastings, even after he was acquitted in his jury trial.

The Report accompanying the Articles of Impeachment of Judge Porteous addressed the relevance of the fact that the Department of Justice did not prosecute Judge Porteous:

First, the nature of Congress's determination whether to impeach is fundamentally different from DOJ's decision whether to prosecute. Congress does not decide guilt or innocence with reference to a criminal statute. Rather, it is for Congress to make what is in essence a "fitness for office" determination. Congress alone has the power to remove an unfit Federal judge, and conduct that renders a judge unfit may not necessarily violate a criminal statute.

Second, Congress has an independent responsibility to review the evidence and cannot rely on DOJ's assessment of what the evidence reveals. Thus, just as the

³³³ Impeachment of Judge George W. English, *excerpts from* Cong. Rec. (House), Mar. 25, 1926 (6283-87), *reprinted in* IMPEACHMENT, SELECTED MATERIALS, HOUSE COMM. ON THE JUDICIARY, Comm. Print (1973) at 164.

House heard the evidence involving Judge Samuel B. Kent, and before that of Judges Walter Nixon and Robert Collins, and did not rely solely on the fact that each of those judges had been criminally convicted, so it is proper for Congress to consider and review the evidence that relates to the conduct of Judge Porteous, even though some of that evidence (but not all) was considered by the Department of Justice.

* * *

Fifth, the Impeachment Task Force has . . . uncovered new evidence that simply was not considered by the Department, . . . [specifically] the Task Force and the Committee had the benefit of the Fifth Circuit hearings which expanded on the evidence available to the DOJ.

The evidence is clear that that Judge Porteous's dishonest statements and acts in his bankruptcy proceedings demonstrate that he cannot be entrusted with upholding the integrity of federal judicial proceedings, notwithstanding the Department of Justice's failure to prosecute. The evidence is clear that Judge Porteous's continued presence on the federal bench brings the federal judiciary into disrepute. The evidence is clear that Judge Porteous has demonstrated, by his contempt for federal judicial process that he is not fit to be a federal judge.

VI. ARTICLE IV

A. Introduction

In the summer of 1994, on the eve of his nomination to become a United States District Judge, Judge Porteous was engaged in two corrupt schemes. One scheme involved Robert Creely and the law firm Amato & Creely (the "curatorship scheme"), whereby Judge Porteous would assign curatorships to Creely, and the law firm would kick back approximately half the fees in cash to the judge. The other scheme was a corrupt relationship with the Marcottes and their bail bonding business whereby Judge Porteous would set bail at amounts requested by the Marcottes (to maximize their profits), and set aside or expunge the convictions of his employees, in return for favors from the Marcottes such as meals, a trip to Las Vegas, and house and car repairs.

Article IV alleges that during his background check to be a federal judge, Judge Porteous made a series of materially false statements, as follows: (1) denying under oath on his Supplemental SF-86 that there was anything “in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known;” (2) “falsely [telling] the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion,” and (3) representing under oath on a Senate Judiciary Committee Questionnaire that, to the best of his knowledge, he did “not know of any unfavorable information that may affect [his] nomination.”³³⁴

Article IV alleges that these statements were false because, in truth and in fact, as Judge Porteous well-knew, he had engaged in corrupt relationships with attorneys Creely and Amato, and with bail bondsman Louis Marcotte and that if the Senate became aware of this unfavorable information it would have destroyed any chance of confirmation.

B. Judge Porteous’s False Statements to the FBI

In 1994, Judge Porteous, in connection with his nomination to be a Federal judge, was the subject of an FBI background check and was required to submit to interviews, and fill out various forms and questionnaires.³³⁵

³³⁴ H. Res. 1031, Art. IV.

³³⁵ *See generally* HP Ex. 69(b) (FBI Background Check of Judge Porteous).

1. The Supplement to the SF-86

Judge Porteous filled out and signed a document entitled "Supplement to Standard Form 86 (SF-86)." (The "Standard Form 86" is entitled "Questionnaire for Sensitive Positions (For National Security)"). That form sets forth the following question and answer by Judge Porteous:

10S. [Question] Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details?

[Answer] NO

Judge Porteous signed that document under the following statement:

I understand that the information being provided on this supplement to the SF-86 is to be considered part of the original SF-86 dated April 27, 1994 and a false statement on this form is punishable by law.³³⁶

As part of the background check, Judge Porteous was interviewed by the FBI on July 6 and 8, 1994 about the contents of this form.

That statement was false because, in fact, he had received illegal kickbacks from Creely (and the firm Amato and Creely) and had a corrupt relationship with the Marcottes which "could be used by someone to coerce or blackmail" Judge Porteous.

2. FBI Interviews – July 6-8, 1994 and August 18, 1994

Judge Porteous, when interviewed by the FBI on July 6 and 8, 1994, was asked a series of questions designed to elicit information which might bear upon his fitness to serve as a federal judge. The FBI Agents, in their write-up of the interview, recorded Judge Porteous as stating:

PORTEOUS said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgement, or discretion.³³⁷

³³⁶ *Id.* at PORT 0298.

³³⁷ See HP Ex. 69(i) (Un-redacted copy of Judge Porteous FBI interview).

In or about late July 1994, the FBI in New Orleans sent the results of its initial background investigation to FBI Headquarters in Washington D.C. After review by FBI Headquarters, further investigation was requested. In particular, FBI Headquarters directed by way of a teletype dated August 12, 1994, directed the agents to ask specific questions of various persons related to certain allegations concerning Judge Porteous's conduct in setting bonds. The agents were directed to inquire of specific persons whether Judge Porteous had received monies from an attorney to reduce bond in the "Keith Kline" case, and whether he had improperly reduced a bond for money in another case handled by a bondsman named Adam Barnett. The agents were then directed to re-interview Judge Porteous to provide him with an opportunity to address the allegations.³³⁸ The instructions from FBI Headquarters to the agents in New Orleans also specifically directed the agents to ask the "coercion/integrity" questions of the individuals who were to be interviewed or re-interviewed.³³⁹

Accordingly, Judge Porteous was interviewed a second time by the FBI on August 18, 1994, about concerns related to 1993 allegations that he had received monies from an attorney and a bail bondsman to reduce bond for Keith Kline. He was also questioned about his reduction of an unrelated bond where the bondsman was Adam Barnett.

In the August 18, 1994 interview, FBI Agent Bobby Hamil, as directed by FBI Headquarters, also asked Judge Porteous the "coercion/integrity" questions. In that interview, which Hamil memorialized in an FBI "302" on the same day, Judge Porteous stated "that he was unaware of anything in his background that might be the basis of attempted influence, pressure,

³³⁸ See HP Ex. 69(b) at PORT 0478-480 (FBI Background Check of Judge Porteous).

³³⁹ *Id.*

coercion or compromise and/or would impact negatively on his character, reputation, judgement or discretion.”³⁴⁰

Thus, on two occasions in the summer of 1994, the FBI asked Judge Porteous the “coercion/integrity” questions described above. On both occasions, Judge Porteous denied being aware of anything in his background that might be the basis of “attempted influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgement or discretion.” On both occasions, those statements were false, because at that very time, Judge Porteous was engaging in the two separate corrupt relationships that have been described.

Further, at the August 18th interview, Judge Porteous was also asked about misconduct in setting bonds (particularly whether he took bribes to reduce bond in the “Keith Kline” case) as well as his relationship with bail bondsman Adam Barnett (which, as the evidence before the SITC revealed, included corrupt aspects).³⁴¹ Judge Porteous was thus put on specific notice in this second FBI interview that misconduct in connection with his bond-setting practices was material to the FBI (and the Executive Branch) in assessing his fitness to be nominated. Judge Porteous nonetheless falsely denied there was anything in his background that would “impact negatively on his character, reputation, judgement or discretion.”

³⁴⁰ *Id.* at PORT 0493-494.

³⁴¹ Evidence was presented at the SITC Hearing that Judge Porteous had set bonds at Barnett’s requests, and that Barnett had paid for Judge Porteous’s car repairs. *See* Louis Marcotte SITC at 515:11-15. In addition, evidence was presented in the form of a newspaper article, *see* HP Ex. 119(z), that Barnett had used his personal residence, which had little equity, as part of the equity portion of various “split bonds” that he obtained from Judge Porteous. The article reported that Barnett used this same piece of property as security for several bonds, including two set by Judge Porteous. At his second background check interview with the FBI, Judge Porteous described Barnett as “a trusted bondsman who he had known a long time.” *See* Ex. 69(b) at PORT 0493 (Porteous Background Check Documents).

Judge Porteous was nominated to be a federal judge on August 25, 1994.³⁴²

3. September 6, 1994 – Senate Committee on the Judiciary Questionnaire

On September 6, 1994, Judge Porteous, in his United States Senate Committee on the Judiciary “Questionnaire for Judicial Nominees,” was asked the following question and gave the following answer:

[Question] Please advise the Committee of any unfavorable information that may affect your nomination.

[Answer] To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.

The signature block in the form of an “Affidavit,” reads as follows:

AFFIDAVIT

I, Gabriel Thomas Porteous, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Gretna, Louisiana, this 6 day of September, 1994.³⁴³

It was signed by Judge Porteous and by a notary. Again for the reasons described in connection with the Supplement to the SF-86 and the FBI interviews, Judge Porteous’s answer, under oath, to the Senate, was knowingly false.

Thus, Judge Porteous’s four written and oral statements were in each instance false, made with the intent to deceive, and made with intent of procuring the judicial office without disclosing material information which would have affected his obtaining the federal office.

At no time during these interviews or in filling out the questionnaires did Judge Porteous inform the FBI, the White House, or the Senate that, at the very time he was being considered for a federal judgeship, he was engaged in two on-going corrupt relationships, namely, the

³⁴² See Ex. HP 9(a) (President Clinton’s Nomination of Judge Porteous).

³⁴³ See Ex. HP 9(f) (Senate Judiciary Committee Questionnaire (Question 11 and Signature Block) at 33-34).

“curatorship scheme” with Creely and the firm of Amato & Creely, and the corrupt relationship with the Marcottes and their bail bonding business.

The questions are sufficiently precise, and Judge Porteous was well aware of his conduct that should have been disclosed in response to these questions. He cannot plausibly contend that the fact that he was assigning curatorships to the Creely and receiving a portion of fees back from his firm would not subject him to pressure or impact negatively on his character. He cannot plausibly contend that the fact that he was receiving car repairs and other things of value from a bail bondsman for whom he was routinely setting bonds as requested or setting aside convictions of employees doing his errands would not subject him to pressure or impact negatively on his character.

Everyone knows what is actually at the core of the questions. They are really asking: Are you an honest person? Are you a person of integrity? Do you have the requisites to hold a position of honor, trust, and profit? Do you have judicial integrity? That is at the core of all these questions. That is not at the periphery. And what Judge Porteous lied about was his gross misconduct as a judge: taking money from parties, taking money in cash envelopes, not reporting any of this to anyone.³⁴⁴

In short, Judge Porteous would have understood the questions as seeking out information as to corrupt, illegal behavior or behavior which otherwise constituted an abuse of his judicial office. Furthermore, in the second of his two FBI interviews, Judge Porteous was put on explicit notice that his relationship with bondsmen was material to the consideration of his judicial appointment. Judge Porteous’s knowledge that the details of his relationship with Marcotte were

³⁴⁴ See also Professor Calvin Mackenzie Senate Impeachment Trial Committee Hearing Testimony at 2039:6 – 2040:4 (kickbacks to attorneys should have been disclosed in response to the catchall questions).

material, and his concern that they be concealed, is evidenced by Judge Porteous's efforts to learn exactly what Marcotte was asked and what he told the FBI. Finally, Judge Porteous's understanding of the materiality of that relationship, and his intent to conceal it, is further evidenced by his set-aside of the Wallace conviction, and by his timing of that set aside, discussed in Section E below.

C. The Louis Marcotte Interviews

Notably, both Louis Marcotte and Robert Creely – Judge Porteous's confederates in the two corrupt schemes – each made false statements to the FBI on Judge Porteous's behalf.

On August 1, 1994, Louis Marcotte was interviewed by the FBI. That interview is discussed in detail as part of the evidence associated with Article II.³⁴⁵ In substance, Louis Marcotte – on behalf of Judge Porteous – lied to the FBI when interviewed on August 1, as to his knowledge of Judge Porteous's financial circumstances, his alcohol usage, and in response to the general "integrity" questions. Soon after that interview, Louis Marcotte informed Judge Porteous the substance of the interview and told that Judge Porteous that he (Marcotte) had given Judge Porteous a "clean bill of health."³⁴⁶ Thus, at the time Judge Porteous was re-interviewed by the FBI on August 18, and at the time he signed his Senate Judiciary Committee Questionnaire on September 6, Judge Porteous could confidently conceal his corrupt relationship with Louis Marcotte from the FBI, because he knew that Louis Marcotte had also misled the FBI.³⁴⁷

³⁴⁵ See Section IV.

³⁴⁶ See Louis Marcotte SITC at 583:21-24; Louis Marcotte Task Force at 64.

³⁴⁷ Judge Porteous, through counsel, has completely mischaracterized one aspect of the allegations set forth in Article IV. Included in that Article is the allegation: "As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench."

D. The Robert Creely Interview

On August 1, 1994, Robert Creely was interviewed by the FBI as part of Judge Porteous's background check. In that interview, Creely stated that he "knows of no financial

Judge Porteous has characterized this factual allegation as follows: "[T]he House specifically impeached Judge Porteous on the failure to mention a brief conversation he had with Louis Marcotte. . . . Now, the House Managers have said that the judge should be impeached because he failed to mention this conversation when he filled out these forms, when he filled out the background form, for example. The only problem [is that] the conversation occurred after the forms were filled out. It was impossible for him to put into these documents a conversation that hadn't occurred yet." Turley SITC Opening Statement at 108:19 – 109:10.

This argument on behalf of Judge Porteous is fatally flawed because Judge Porteous's counsel has his facts wrong.

Even the most superficial reading of Article IV makes it clear that it does not allege that Judge Porteous "fail[ed] to mention a brief conversation he had with Louis Marcotte." Judge Porteous's counsel is simply mischaracterizing what Article IV alleges in order to make a false and misleading argument.

Second, Judge Porteous's counsel is incorrect about the sequence of events concerning Marcotte's interview with the FBI and when Judge Porteous signed the Senate Judiciary Committee Questionnaire. Marcotte was interviewed by the FBI on August 1, 1994 at which time he lied on behalf of Judge Porteous, giving him a "clean bill of health." Shortly thereafter Marcotte informed Judge Porteous that he lied to the FBI on Judge Porteous's behalf. Accordingly, by the time Judge Porteous was re-interviewed by the FBI on August 18, he was aware that Marcotte had lied to the FBI in an effort to help him. Moreover, Judge Porteous signed his Senate Judiciary Committee Questionnaire on September 6, 1994, long after he was aware Marcotte had lied on his behalf. Once again he let Marcotte's lies stand uncorrected in answering the Questionnaire under oath.

Ultimately, this entire argument on behalf of Porteous is a total red herring. Article IV sets out four instances when Judge Porteous lied in order to get his cherished "lifetime appointment." These lies encompass corrupt relationships with lawyers and bail bondsmen which should have been revealed in response to the questions posed. Judge Porteous repeatedly lied because he knew that the truth was the death knell for his ambitions. The only way he could obtain the position was to lie to the Senate. The mischaracterization of Article IV is a transparent effort to avoid the consequences of Judge Porteous's repeated lies about facts that would have ended his opportunity to get his "lifetime appointment."

problems on the part of the candidate, and the candidate appears to live within his economic means.”³⁴⁸

Creely’s statement that he “[knew] of no financial problems of Judge Porteous” was false, as Creely knew Judge Porteous had significant financial problems. As he testified before the SITC: “[N]o, he was not living within his means.”³⁴⁹

On the same day of Creely’s interview, Judge Porteous assigned a curatorship to Creely and continued to assign curatorships – perpetuating the corrupt scheme – through his confirmation and swearing in.³⁵⁰

E. The Aubrey Wallace Set Aside

1. The Facts

At around the time of Judge Porteous’s nomination, Louis Marcotte made several requests of him to set aside Aubry Wallace’s conviction.³⁵¹ Judge Porteous agreed to do it, but informed Marcotte that he would do so only after he was confirmed, because he did not want to jeopardize his “lifetime appointment.” Marcotte testified:

Q And do you recall Judge Porteous’s response [to Marcotte’s request to set aside Wallace’s conviction]?

A He kind of put me off and put me off. And he said look, Louis, I’m not going to let anything stand in the way of me being confirmed and my lifetime appointment, so after that’s done I will do it.³⁵²

³⁴⁸ See HP Ex. 69(b) at PORT 0476-477 (Porteous Background Documents).

³⁴⁹ See Creely SITC at 277:19 – 280:9

³⁵⁰ See HP Ex. 189(224) (curatorship assigned by Judge Porteous to Creely on August 1, 1994); HP Ex. 189(225) (August 9, 1994); HP Ex. 189(226) (August 18, 1994); HP Ex. 189(219) (August 29, 1994); HP Ex. 189(223) (Sep 13, 1994); HP Ex. 189(222) (Sep. 21, 1994).

³⁵¹ Aspects of the Wallace set-aside are discussed in Section IV.

³⁵² Louis Marcotte SITC at 536:9-12 (emphasis added).

Senator McCaskill specifically inquired as to whether the “lifetime appointment” phrase was Louis Marcotte’s or Judge Porteous’s:

Q. [Sen. McCaskill] [W]as that particular phrase, “his lifetime appointment,” was that the words of Judge Porteous or was that something you supplied in terms of the context?

A. That was the words of Judge Porteous.

Q. And did Judge Porteous use the word “lifetime appointment” whenever he referred to his appointment to the federal bench?

A. Yes, he does.³⁵³

Louis Marcotte has consistently described the events surrounding the Wallace set aside – to the FBI in 2004, and later to the House and Senate – including Judge Porteous’s statement that he would wait until after he was confirmed to set aside the conviction so that it would not jeopardize his “lifetime appointment.”

For example, in his Task Force Testimony, Louis Marcotte described the conversations he had with Judge Porteous concerning Wallace’s set aside as follows:

Mr. SCHIFF. Can you tell us a little bit about the conversations you had with him where he indicated that he was concerned with confirmation if they found out about this or if the newspapers made it public?

Mr. MARCOTTE. Yeah. He just didn’t want to make himself- he was worried about the confirmation, but he was trying to- he didn’t want anything to come up that would, you know, cause him a problem from being confirmed.

Mr. SCHIFF. And can you tell us what his words were, as best you can recall, how he expressed to you his concern that things might become public?

Mr. MARCOTTE. He said, “Louis, I am not going to let Wallace get in the way of me of becoming a Federal judge and getting appointed for the rest of his life to set aside his conviction. Wait until it happens, and then I’ll do it.”³⁵⁴

³⁵³ Louis Marcotte SITC at 607:16-23.

Further, in both his SITC testimony as well as in his House testimony, Louis Marcotte specifically mentioned that Judge Porteous stated he was concerned about the press finding out about the set-aside.³⁵⁵

Judge Porteous's actions corroborate Marcotte's recollection of the conversation, and reflect Judge Porteous carrying out his expressed intent to set aside the conviction only after his confirmation.

There was no reason for Judge Porteous to wait until after his confirmation to set aside the conviction. As a procedural matter, it was necessary for Judge Porteous first to amend the sentence prior to setting it aside. This step was put in motion when, on September 20, 1994,

³⁵⁴ Louis Marcotte Task Force at 60 (emphasis added). *See also* Louis Marcotte Sen. Dep. at 143:23 – 145:12 (adopting 2004 statement to the FBI that Judge Porteous “was not going to risk a lifetime judicial appointment for Wallace”).

³⁵⁵ In his SITC testimony, Marcotte mentioned that Judge Porteous had a concern that the set-aside “would come out in the newspaper.” Louis Marcotte SITC at 536:22-23. Marcotte testified similarly, and provided further detail, in his House Task Force testimony:

Mr. SCHIFF. You mentioned that, with respect to Mr. Wallace, that Judge Porteous expressed a reservation about setting aside the conviction until his confirmation took place. Can you tell us a little bit about that conversation? You said you had to press him. Did he tell you why he was concerned it would affect his confirmation?

Mr. MARCOTTE. Because if anyone—if the newspaper grabbed hold of it, then he would be worried that it would interfere with him being—his confirmation.

Mr. SCHIFF. So he was aware that this was something that——

Mr. MARCOTTE. Probably wasn't kosher.

Mr. SCHIFF. And, for that reason, the Senate might not confirm him if he knew that he was setting aside a conviction as a favor to you?

Mr. MARCOTTE. Yes, sir.

Louis Marcotte Task Force at 59.

Robert Rees, on behalf of Wallace, filed a “Motion to Amend Sentence.”³⁵⁶ On September 21, 1994, Judge Porteous held a hearing and amended Wallace’s sentence to permit the conviction be set aside.³⁵⁷ Judge Porteous entered the order amending sentence orally at the hearing, and the following day entered a written order.³⁵⁸ As of September 21, 1994, after having amended the sentence, there was nothing to prevent Judge Porteous from setting aside the conviction at that time. However, consistent with his previously expressed intent to hide his actions, Judge Porteous chose to wait, for he had not yet been confirmed.³⁵⁹

Judge Porteous was confirmed by the Senate on October 7, 1994.³⁶⁰ Thereafter, on October 14, 1994, Judge Porteous held an unnoticed hearing at which he orally set aside Wallace’s conviction. He entered a written order to the same effect on that day.³⁶¹

Absolutely nothing in Wallace’s case occurred between September 21, 1994 (when Judge Porteous amended the sentence) and October 14, 1994 (when he set it aside) that explains the

³⁵⁶ See HP Ex. 82 (*Louisiana v. Aubrey N. Wallace*, No. 89-2360, Motion to Amend Sentence (24th Jud. Dist Ct., Jeff. Par., La. Sep. 20, 1994)).

³⁵⁷ As described in the discussion of the facts associated with Article II, the set aside had a variety of legal infirmities. The discussion in this Section addresses the significance of the set-aside as reflecting Judge Porteous’s intent, and does not otherwise address its legal merits.

³⁵⁸ See HP Ex. 69(d) at PORT 0620-624 (*State of Louisiana v. Aubrey Wallace*, No. 89-2360, Transcript of Proceedings (24th Judicial Dist. Ct., Jeff. Par. Sept. 21, 1994)); HP Ex. 82 (*Louisiana v. Aubrey N. Wallace*, No. 89-2360, Order (amending sentence) (24th Jud. Dist Ct., Jeff. Par., La. Sep. 22, 1994)).

³⁵⁹ See Rees SITC at 1986:8 –1987-6.

³⁶⁰ See HP Ex. 9(c) (Congressional Record Reflecting Senate Confirmation of Judge Porteous).

³⁶¹ See HP Ex. 69(d) at PORT 0625-629 (*State of Louisiana v. Aubrey N. Wallace*, No. 89-2360, Transcript of Proceedings (24th Jud Dist. Ct., Jeff. Par., La. Oct. 14, 1994); HP Ex. 82 (*State of Louisiana v. Aubrey N. Wallace*, No. 89-2360, Order (setting aside arrest and dismissing charges) (24th Jud. Dist Ct., Jeff. Par., La. Oct. 14, 1994)).

delay. The only event of significance that explains the timing is that Judge Porteous was confirmed in the interim. As Judge Porteous made clear to Marcotte, he was going to set aside the conviction only after his Senate confirmation so as not to jeopardize his confirmation to his “lifetime appointment,” and that’s exactly what he did.

2. The Significance of the Set-Aside

The facts associated with the set-aside provide powerful evidence of Judge Porteous’s wrongful intent. He explicitly expressed to Marcotte his intent to conceal material facts from the Senate, and he took actions that effectuated his expressed intent. Judge Porteous’s actions demonstrate that he knew that his relationship with Louis Marcotte was improper, material to the Senate and had to be concealed. There is no ambiguity as to Judge Porteous’s concerns and the manner in which he acted to hide his corrupt relationship.

Judge Porteous’s actions in connection with the set-aside also demonstrate that he well understood the questions he had been repeatedly asked during the background check, and the answers those questions were designed to elicit. Judge Porteous’s decision to delay the Wallace set-aside reflects his knowledge that his relationship with Marcotte was a matter in his background that would reflect negatively on his integrity – that is, that relationship was a matter that should have been properly disclosed to the FBI in response to the integrity questions that the FBI posed to him. Similarly, Judge Porteous’s willingness to set aside Wallace’s conviction at Marcotte’s request constitutes proof positive that Judge Porteous was in fact subject to coercion, leverage, and compromise. In fact, Judge Porteous felt compelled to act on Louis Marcotte’s request – during the time when Louis Marcotte had leverage over him – by taking an unjustifiable judicial action arising out of their conspiratorial relationship.³⁶²

³⁶² When pressed, Louis Marcotte acknowledged he could have “destroy[ed]” Judge Porteous – though he would not have done so. Marcotte SITC at 603:8-17.

**F. Judge Porteous Should Be Convicted and Removed from Office
for the Conduct Alleged in Article IV**

1. The Conduct Constitutes “High Crimes and Misdemeanors”

Judge Porteous’s conduct in making false statements to the FBI and the Senate in order to procure his judicial appointment established that he engaged in “high Crimes and Misdemeanors” that render him unfit to hold the office of United States District Judge. The acts of repeated dishonesty – under oath and to law enforcement agencies – demonstrate he is not fit to be a judge.

The conduct at issue is particularly significant because, in effect, Judge Porteous obtained his judicial appointment by fraud. If impeachment, conviction and removal were not permitted, then an individual who attained his judicial position by fraud would, in essence, be immune from removal – no matter what he concealed during his background check. The implications from failing to remove a judge upon proof of his dishonesty prior to his confirmation on material matters that go to the heart of judicial integrity would be to reduce and demean the Senate confirmation process to a game of hide the ball – there is no need to disclose anything that the Senate would not learn on its own, and, once confirmed, a federal judgeship is a lifetime safe harbor. While that may be the system that Judge Porteous would have the Senate adopt, it is certainly not one contemplated by the Constitution or the Senate.

Lying to or defrauding the Senate in order to be approved as a federal judge is serious as a stand-alone matter in that it plainly erodes the essential, indispensable integrity without which a Federal judge is unable to do his job. For, by defrauding the Senate in his confirmation proceedings, Judge Porteous has engaged in misconduct that is egregious and has a more than obvious connection to his present position. The nexus is that Judge Porteous deprived the Senate of information that would undoubtedly have changed the outcome in his confirmation hearing.

His failure to disclose is nothing less than an attack on the integrity of the confirmation process and an affront to the constitutional responsibilities of the President and the Senate.

In light of the core dishonesty reflected in the conduct in Article IV – dishonesty in the confirmation process to cover up dishonesty in his capacity as a state judge – and in light of the fact that by such dishonesty Judge Porteous perpetrated a fraud on the Senate in obtaining his judgeship, Judge Porteous should now be convicted and removed from office.

2. Judge Porteous's Arguments Are Meritless

Judge Porteous mischaracterizes certain aspects of Article IV, and raises a series of complaints that are factually and legally meritless.

First, there is the suggestion that because this conduct occurred prior to Judge Porteous's taking the federal bench, it cannot constitute a basis for impeachment. This issue was fully addressed in the discussion of Article II. There is no basis for the Senate to decline to consider pre-federal bench conduct that meets the "high Crimes and Misdemeanors" standard for conviction and removal. The facts underlying Article IV illustrate precisely why pre-federal bench conduct must be considered. They demonstrate that Judge Porteous obtained his position on the federal bench by misconduct, fraud, and by concealing material facts. There is nothing in the Constitution that requires that the Senate overlook this conduct, or prevents the Senate from removing Judge Porteous from office to remedy the fraud he perpetrated to obtain nomination and confirmation. As Professor Gerhardt noted:

Particularly in cases in which an elected or confirmed official has lied or committed a serious act of wrongdoing to get into their present position, the misconduct that was committed prior to entering office clearly bears on the integrity of the way in which the present officeholder entered office and that integrity of that official to remain in office.³⁶³

³⁶³ See GERHARDT, *supra* note 7, at 108–09.

Professor Akhil Reed Amar made, in substance, the same argument in which he explained why pre-Federal office bribery, committed to obtain the Federal office – would be grounds for impeachment and removal:

“Bribery” – secretly bending the laws to favor the rich and powerful – involved official corruption of a highly malignant sort, threatening the very soul of a democratic republic committed to equality under the law. In the case of a president who did not take bribes but gave them – paying men to vote for him – the bribery would undermine the very legitimacy of the election that brought him to office.³⁶⁴

For purposes of this discussion, it is not material that Professor Amar used the example of a president who bribed his way into office to support his conclusion that conduct that occurred prior to the individual’s assuming his official position may justify that individual’s impeachment and removal. The reasoning applies in equal force to that of a judge who lied (and knowingly permitted others to lie on his behalf) to obtain an official position. In either instance, the conduct at issue occurred prior to the individual taking his official position, undermined the legitimacy of that individual’s appointment (or election), and justifies the official’s impeachment and removal.

Second, Judge Porteous has suggested that the questions at issue seek solely for Judge Porteous to disclose “embarrassing information.” Thus, Judge Porteous’s attorney characterized the questions at issue in Article IV as akin to the following: “Did Judge Porteous failure [sic] to disclose information that he, Judge Porteous, thought would be embarrassing to President Clinton?”³⁶⁵

³⁶⁴ See AMAR, *AMERICA’S CONSTITUTION – A BIOGRAPHY*, *supra* note 17, at 201. See also Amar, *A Symposium On The Impeachment Of William Jefferson Clinton: Reflections On The Process, The Results, And The Future: On Impeaching Presidents*, *supra* note 17, at 302.

³⁶⁵ Turley SITC Opening Statement at 107:25 – 108:3.

This characterization of Article IV is simply not accurate. Only one of the four questions specified in Article IV asked anything about “embarrassing” information. That question was on the Supplement to the SF-86, which asked the following: “Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details?” Judge Porteous’s answer “NO” applied in equal terms to both the “coercion/blackmail” as well as the “embarrassment to the President” parts of that question. None of the other three questions specified in Article IV request that Judge Porteous disclose “embarrassing” information. In the FBI interviews, he was asked twice whether he was concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion. Then he was asked by the Senate whether there was “any unfavorable information that may affect [his] nomination.” Counsel’s attempt to characterize all four of these questions as little more than vague attempts to elicit “embarrassing” information is disingenuous and contradicted by the plain reading of the questions.

Furthermore, the questions are not vague. Judge Porteous well understood those questions and understood precisely the information that they sought he disclose. This is evidenced by his deliberate efforts, in connection with the Wallace set-aside, to conceal such information. The defense’s own experts agreed that a truthful answer to these questions requires, among other matters, the disclosure of a kickback scheme. Moreover, the defense expert’s own treatise on the appointments process recommends these questions be asked of nominees in a model questionnaire.³⁶⁶

³⁶⁶ G. CALVIN MACKENZIE, INNOCENT UNTIL NOMINATED (Brookings Institution Press 2001).

Judge Porteous takes issue with the purpose and efficacy of the “catch-all questions,” as a general proposition. However, there are sound reasons that those questions must be asked.³⁶⁷ In any event, if Judge Porteous did not like the questions, all he has to do was say, “I do not wish to be considered for this position.” However, he had no license to lie.

Thus, applying all the recognized and established grounds for conviction and removal – lack of integrity, bringing disrepute to the judiciary and undermining public confidence in it – Judge Porteous’s conduct warrants conviction and removal based upon Article IV.

WHEREFORE, the House of Representatives requests that the Senate convict Judge G. Thomas Porteous, Jr. on each of the four Articles of Impeachment and remove him from the Office of United States District Judge for the Eastern District of Louisiana.

³⁶⁷ The “catch-all” questions serve several valid and necessary purposes: (1) They dissuade persons from seeking Office if they know that to obtain it, they will need to lie under oath to conceal material facts; (2) it is not feasible to design a questionnaire that lists every possible variety of disqualifying misconduct. *See* Mackenzie SITC at 2052:16 – 2054:23, 2077:24 – 2078:8, 2079:19-21 (“I’m not opposed to the catchall questions.”); and (3) they prevent an unworthy candidate from moving through the confirmation process and thereafter defending his or her failure to disclose material derogatory information because no question required its disclosure. As Senator McCaskill observed:

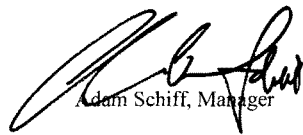
[I]s there any doubt in your mind that if someone skated through that process, didn’t disclose information and there was no catchall question, don’t you think their defense would be, “[W]ell, no one ever asked me something like that, no one ever asked me that specific question, no one – there was no specific question that addressed that?”

See Mackenzie SITC at 2077:25 – 2078:6 (questioning by Senator McCaskill).

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

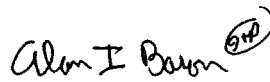
By



Adam Schiff, Manager



Bob Goodlatte, Manager



Alan I. Baron
Special Impeachment Counsel

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

November 10, 2010

Congress of the United States
Washington, DC 20515

December 3, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. –
Request for Clarification as to Closing Arguments and Arguments on the Motions

Dear Senator McCaskill and Senator Hatch:

We are writing to seek clarification on the final arguments scheduled for next week. We understand the Senate may wish to have the parties address outstanding motions to dismiss prior to closing arguments. If that is the case, we assume, but want to seek confirmation, that the motions to dismiss will be treated as they would in a court proceeding and the facts set out in the Articles will be accepted as true and the parties will confine their arguments to the legal issues raised.

If the Senate intends instead to entertain motions which raise the ultimate issue of whether the House has proved conduct at trial that warrants impeachment, we would suggest that the legal and factual issues be argued together by counsel in the closing argument. Otherwise, we fear that the closing arguments will be largely duplicative of the oral arguments on the motions. In fact, it may be that a combined presentation in closing argument of both legal and factual matters would not only streamline the presentation, it would permit the Senate to consider the legal issues upon a complete discussion of the factual record.

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Please let us know how the Senate wishes to proceed so that the House and counsel for Judge Porteous will know how to prepare for argument.



Adam Schiff, Manager

Sincerely,



Bob Goodlatte, Manager

**FINAL ARGUMENT ON THE MERITS AND SENATE
DISPOSITION OF THE ARTICLES OF IMPEACHMENT**

ORDER OF PROCEDURE—IMPEACH-
MENT AGAINST JUDGE G. THOM-
AS PORTEOUS

Mr. REID. Mr. President, I ask unanimous consent that the Senate resume consideration of the Articles of Impeachment against Judge G. Thomas Porteous, Jr., of the Eastern District of Louisiana, at 10 a.m. on Tuesday, December 7, for the commencement of arguments by the House managers and counsel for Judge Porteous on motions filed by Judge Porteous with regard to the Impeachment Articles and that the Secretary be instructed to so notify the House of Representatives.

I further ask unanimous consent that each side be permitted no more than 1 hour for argument on all motions, that counsel for Judge Porteous be permitted to open and close the motions argument, and that the parties be permitted to divide their argument as they wish.

I further ask unanimous consent that then, after recessing for the weekly party caucuses, the Senate reconvene on the Articles of Impeachment at 2:30

December 6, 2010

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p.m. on Tuesday, December 7, for the parties' final arguments on the merits of the articles. I ask unanimous consent that the parties have each 1½ hours to present articles on all four articles, which, under the impeachment rules, will be opened and closed by the House managers, with no more than two individuals speaking for each side.

I further ask unanimous consent that, at the conclusion of the 3 hours allotted for final arguments, the Senate shall immediately meet in closed session to begin its deliberations on the Articles of Impeachment and the related motions in accordance with impeachment rule XX.

I finally ask unanimous consent that the individuals listed on the document I now send to the desk be granted the privilege of the Senate floor during all open sessions while the Articles of Impeachment against Judge Porteous are under consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The list is as follows:

THE JUDGE AND HIS COUNSEL

1. Judge Gabriel Thomas Porteous, Jr.
2. Jonathan Turley
3. Daniel Schwartz
4. P.J. Meitl
5. Daniel O'Connor
6. Ian Barlow

THE HOUSE OF REPRESENTATIVES MANAGERS

7. Adam Schiff (D-CA)
8. Bob Goodlatte (R-VA)
9. Henry C. "Hank" Johnson, Jr. (D-GA)
10. Jim Sensenbrenner (R-WI)
11. Zoe Lofgren (D-CA)

SPECIAL IMPEACHMENT COUNSEL TO THE HOUSE MANAGERS

12. Alan Baron
13. Harold Damelin
14. Mark Dubester
15. Kirsten Konar

STAFF TO THE HOUSE MANAGERS

16. Jeffrey Lowenstein (Schiff)
17. Brandon Ritchie (Goodlatte)
18. Elisabeth Stein (Johnson)
19. Michael Lenn (Sensenbrenner)
20. Ryan Clough (Lofgren)

SENATE LEGAL COUNSEL

21. Morgan Frankel
22. Pat Bryan
23. Grant R. Vinik
24. Thomas E. Caballero

SENATE STAFF

25. Derron R. Parks
26. Thomas L. Jipping
27. Justin Kim
28. Rebecca Seidel
29. Erin F. Johnson
30. Paul Lake Dishman, IV
31. Susan Smelcer
32. Stephen Hedger
33. Chris Campbell
34. Paige Herwig
35. Stephen C.M. Lilley
36. Justin G. Florence
37. Matthew T. Nelson
38. Thomas J. Maloney
39. Nhan Nguyen
40. Erica Suarez
41. Bryn Stewart
42. Emily Ferria
43. Michelle Weber
44. Jason Bohrer
45. Lori Hamamoto
46. Van Luong
47. Marie Bianco

48. Leadership Staff
49. Floor Staff

Mr. REID. Mr. President, I stress the importance of all Senators attending the impeachment proceedings. I urge them to be in the Chamber at 10 a.m. tomorrow for a live quorum, which will begin at that time, prior to the commencement of the impeachment trial proceedings. This is an important constitutional part of the Senate's responsibilities, and each Senator has an obligation to participate in the case and for his or her office to be present and informed and participate. This type of impeachment proceeding has happened only a few times in the history of the Republic. It is very important for Senators to participate.



United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 111th CONGRESS, SECOND SESSION

Vol. 156

WASHINGTON, TUESDAY, DECEMBER 7, 2010

No. 160

Senate

The legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 6]

Akaka	Dorgan	McConnell
Alexander	Durbin	Menendez
Barrasso	Enzi	Merkley
Baucus	Feingold	Mikulski
Bennet	Feinstein	Murkowski
Bennett	Franken	Murray
Bingaman	Gillibrand	Nelson (NE)
Bond	Grassley	Nelson (FL)
Boxer	Gregg	Pyron
Brown (MA)	Hagan	Reed
Brown (OH)	Hatch	Reid
Bunning	Inouye	Risch
Burr	Isakson	Roberts
Cantwell	Johanns	Rockefeller
Cardin	Johnson	Schumer
Carpenter	Kerry	Sensuous
Casey	Kirk	Snowe
Chambliss	Klobuchar	Stabenow
Churn	Kyl	Tester
Collins	Leahy	Thune
Conrad	LeMieux	Udall (NM)
Cook	Levin	Vitter
Corker	Lugar	Volnovich
Cornyn	Manchin	Warner
Crapo	McCain	Webb
DeMint	McCaskill	Wyden

SCHEDULE

Mr. REID. Mr. President, Senators should be prepared to be in the Chamber throughout the day on the impeachment trial of Judge G. Thomas Porteous, Jr. At 12:30 p.m., the Senate will proceed to legislative session for a period of morning business, with Senator LEMIEUX permitted to speak for up to 15 minutes. Following his remarks, the Senate will recess until 2:30 p.m. to allow for the weekly caucus meetings. When the Senate reconvenes, there will be a mandatory live quorum to resume the court of impeachment. There may be another live quorum at 5:30 this evening to begin the closed session deliberations.

IMPEACHMENT OF JUDGE G. THOMAS PORTEOUS, JR.

CALL OF THE ROLL

Mr. REID. Mr. President, I suggest the absence of a quorum.
The ACTING PRESIDENT pro tempore. The clerk will call the roll.

Mr. REID addressed the Chair.
The PRESIDENT pro tempore. The majority leader is recognized.
Mr. REID. Is a quorum present?
The PRESIDENT pro tempore. A quorum is present.

COURT OF IMPEACHMENT

The PRESIDENT pro tempore. Under the previous order, the hour of 10:12 a.m. having arrived and a quorum having been established, the Senate will resume its consideration of the Articles of Impeachment against Judge G. Thomas Porteous, Jr.

The House managers and Judge Porteous and counsel will please make their entry before the proclamation is made.

(The House managers, Judge Porteous, and counsel proceeded to the seats assigned to them in the well of the Chamber.)

THE JUDGE AND HIS COUNSEL

1. Judge Gabriel Thomas Porteous, Jr.
2. Jonathan Turley
3. Daniel Schwartz

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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December 7, 2010

4. P.J. Meitl
5. Daniel O'Connor
THE HOUSE OF REPRESENTATIVES MANAGERS
6. Adam Schiff (D-CA)
7. Bob Goodlatte (R-VA)
8. Henry C. "Hank" Johnson, Jr. (D-GA)
9. Jim Sensenbrenner (R-WI)
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31. Stephen Hedger
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33. Paige Herwig
34. Stephen C.N. Lilly
35. Justin G. Florence
36. Matthew T. Nelson
37. Thomas J. Maloney
38. Nhan Nguyen
39. Erica Soares
40. Bryn Stewart
41. Emily Ferris
42. Michelle Weber
43. Jason Bohrer
44. Lori Hamamoto
45. Van Luong
46. Marie Blanco

The PRESIDENT pro tempore. The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Terrance W. Gainer, made the proclamation, as follows:

Hear ye, hear ye, hear ye. All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States Articles of Impeachment against G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana.

The PRESIDENT pro tempore. The Chair recognizes the majority leader.

Mr. REID. Mr. President, on March 17, 2010, the House of Representatives exhibited to the Senate four Articles of Impeachment against U.S. District Judge G. Thomas Porteous, Jr., of the Eastern District of Louisiana. Judge Porteous was summoned to answer, which he did on April 7, 2010, and the House of Representatives filed a reply to the answer on April 17, 2010, and amended the reply on April 23, 2010.

On the same day that the Articles of Impeachment were exhibited to the Senate, Members present in the Chamber were administered the oath, as revised by the Constitution for im-

peachment trials. Those Senators who were not present to take the oath and those who had been elected to this body since the oath was administered, should be sworn today.

However, before the oath is administered to these Senators not yet sworn, there is one preliminary matter to be addressed. The Senator from Illinois, Mr. KIRK, was a Member of the House of Representatives during this Congress when the House voted on the Articles of Impeachment. If the Senator wishes to make a statement about his participation in the Senate phase of this impeachment, this would be an appropriate time to do so.

The PRESIDENT pro tempore. The Chair recognizes the junior Senator from Illinois.

Mr. KIRK. Mr. President, I was a Member of the House of Representatives at the time the Articles of Impeachment were proffered against Judge G. Thomas Porteous, Jr. On March 11, 2010, I voted in favor of all four Articles of Impeachment in the House, as recorded in rollcall votes 102, 103, 104, and 105. I have given careful consideration to this matter and consulted with other Members of the Senate about the Senate's historical practice. Because I believe the judge is entitled to a full and fair hearing in the Senate and to avoid any possible conflict of interest, I have concluded that under the circumstances, it would be inappropriate for me to participate in the Senate trial and vote again on matters related to the impeachment, having already done so as a Member of the House of Representatives.

Therefore, I request that I be excused from sitting as a Member of the Senate while it hears the matter of impeachment proceedings against Judge Porteous.

The PRESIDENT pro tempore. Mr. KIRK is excused from further participation in this impeachment for the reasons stated.

The majority leader is recognized. Mr. REID. Mr. President, I would first ask that the House managers and Judge Porteous and counsel will take their seats. There is no reason, at this time, to remain standing.

OATH ADMINISTERED TO NEWLY ELECTED MEMBERS

Mr. President, the remaining preliminary matter is to administer the impeachment oath to the other newly elected Members of the Senate and any Member of the Senate who did not take the oath when the Articles of Impeachment were first exhibited.

Article I, section 3, clause 6 of the Constitution provides, in part:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.

The impeachment oath that was taken by Members of the Senate earlier in this session remains in effect. The four current Members who did not take the oath at that time have been so advised by the Secretary of the Senate.

The two newly elected Senate Members also should be sworn now.

The PRESIDENT pro tempore. Those Senators who have not taken the oath will now rise, raise their right hands, and be sworn.

Do you solemnly swear that in all things appertaining to the trial of impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, now pending, you will do impartial justice according to the Constitution and laws, so help you God?

SENATORS. I do.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. REID. Thank you, Mr. President. The Secretary will note the names of the Senators who have just taken the oath, and if these Senators will now present themselves to the desk, the Secretary will present to them for signature the book, which is the Senate's permanent record of the taking of the impeachment oath by Members of this body.

Mr. President, on March 17, 2010, the President pro tempore appointed, pursuant to S. Res. 458, Senators McCASKILL, HATCH, KLOBUCHAR, WHITEHOUSE, UDALL of New Mexico, SHAHEEN, Kaufman, BARRASSO, DEMINT, JOHANNES, RUSCH, and WICKER to perform the duties provided for by rule XI, the Senate's impeachment rules.

Under the leadership of its chairman, the Senator from Missouri, Mrs. McCASKILL, and its vice chairman, Mr. HATCH, the committee heard 5 days of testimony between September 13 and September 21. During that time, the committee heard from 26 witnesses, 14 who were called by the House of Representatives and 12 witnesses who were called by Judge Porteous. The committee also conducted pretrial depositions of four witnesses and admitted into evidence the testimony of a number of witnesses, including Judge Porteous, who had testified in prior proceedings, more than 300 factual stipulations and hundreds of exhibits.

The Senate is indebted to all of the members of this committee who so conscientiously discharged their responsibility in this important constitutional matter. In addition to the committee's leadership, I would like to take particular note of the contribution of Senator Kaufman, who actively participated in the committee's proceedings, although his tenure in the Senate concluded before the committee filed the report of its proceedings in the Senate.

The committee filed its report on November 15, and the report was received as Senate report 111-347. In accordance with impeachment rule XI, the committee certified the Senate hearing report 111-691, which reprints the committee's proceedings, is a transcript of the proceedings and testimony had and given before the committee.

Before proceeding further, I would like to verify with the Presiding Officer that the evidence and the testimony received by the Senate from the

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committee shall, as prescribed in rule XI: be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy and materiality, as having been received and taken before the Senate.

Will the Presiding Officer advise the Senate whether this is correct?

The PRESIDENT pro tempore. The testimony and other evidence reported by the committee will be considered, in accordance with impeachment rule XI, as having been received and taken before the Senate.

The majority leader is recognized.

Mr. REID. Thank you again, Mr. President. Rule XI provides that the Senate's receipt of evidence reported by the committee is subject to the Senate's right to determine competency, relevancy, and materiality. Further, the same rule explicitly provides that nothing in it prevents the Senate from sending for any witness and hearing that witness's testimony in open Senate or, by order of the Senate, having the entire trial before the full Senate. I would ask the Presiding Officer to advise the Senator whether, following the report of the committee, any motions have been filed asking that any witnesses be heard in open Senate.

The PRESIDENT pro tempore. In response to the majority leader, neither party, following the report of the committee, has moved that any witness be called in open Senate, and the Senate may now proceed to hear final arguments on the basis of the record reported by its committee.

The majority leader is recognized again.

Mr. REID. Mr. President, the parties have filed their final written briefs and the Senate is now ready to hear arguments.

Prior to consideration of the Articles of Impeachment, Judge Porteous has requested time to present argument on three motions that take issue with the sufficiency under the Constitution of several aspects of the Impeachment Articles framed by the House. First, Judge Porteous has moved to dismiss Article II, or for alternative relief, based on the House's inclusion of allegations of misconduct occurring prior to the commencement of the Judge's Federal service as a U.S. district judge. Second, Judge Porteous has moved to dismiss article I, or for alternative relief, based on the House's inclusion of unconstitutionally vague allegations that Judge Porteous's conduct deprived the public of its right to the honest services of his office. Third, Judge Porteous objects to the manner in which each Article of Impeachment was framed to aggregate discrete allegations of misconduct. He accordingly moves to dismiss the Articles of Impeachment or seeks alternative curative relief. The parties' written arguments on those legal issues are addressed in their post-trial briefs, as well as the motion papers submitted by

the parties to the committee, which are on the desks of all Members. In accordance with the unanimous consent agreement, each side will be permitted no more than 1 hour to present its argument on the motions.

Upon the conclusion of argument on the motions, the Senate will then turn to hearing final arguments by the parties on the Impeachment Articles. Under impeachment rule XXII, final argument will be open and closed by the House. By unanimous consent, each party shall have up to 1½ hours to present final argument on the merits.

As the Senate has done in the past, we have provided that counsel may face the full Senate during these presentations. They should remain mindful, nevertheless, that the proceedings are under the direction of the Presiding Officer. On their part, Senators should recall that any questions they have of counsel should, pursuant to impeachment rule XIX, "be reduced to writing, and put by the Presiding Officer." There is assistance available in the respective cloakrooms to aid Members in putting the questions in writing. Questions may be sent to the Chair during the argument, for reading by the Chair at the appropriate times.

The managers, on behalf of the House of Representatives—Representative SCHIFF, Representative GOODLATTE, and Representative JOHNSON, Representative SENSENBRENNER, and special impeachment counsel to the House Alan Baron are present at the managers' table. Jonathan Turley, Daniel C. Schwartz, P.J. Meitl, Daniel T. O'Connor, and Ian Barlow are counsel to Judge Porteous and are present with him.

Mr. President, motions will be argued first by Jonathan Turley, counsel to the judge, who is the moving party. By the unanimous consent order, argument on the motions on behalf of the House will be divided between Representative SCHIFF and Representative GOODLATTE. Mr. Turley may, under the unanimous consent agreement, reserve a portion of Judge Porteous's time for rebuttal.

For the argument on the articles, the managers will likewise divide their time between the two managers, and Mr. Turley will present argument on behalf of Judge Porteous. Under impeachment rule XXII, the House will open and close final argument in the impeachment articles.

The PRESIDENT pro tempore. We are now ready to hear motions. Mr. Turley will open the arguments in support of the motions to dismiss.

Mr. Turley, how much time do you wish to reserve for rebuttal?

Mr. TURLEY. We would like to reserve 10 minutes for rebuttal.

The PRESIDENT pro tempore. Ten minutes. It is so ordered. You may proceed.

Mr. TURLEY. Thank you, Mr. President and Members of the Senate, my name is Jonathan Turley, and I am the Shapiro Professor of Public Interest

Law at George Washington University and counsel to the Honorable G. Thomas Porteous, Jr., a judge of the U.S. District Court for the Eastern District of Louisiana. Joining me at counsel's table with Judge Porteous are my colleagues from the law firm of Bryan Cave: Daniel Schwartz, P.J. Meitl, and Daniel O'Connor.

As the majority leader has told you and as many of you know, the Porteous impeachment has raised a number of constitutional issues that are rather unique and of considerable concern among law professors and legislators alike. The three motions before you today are designed to put these issues squarely before you.

We understand that the Members can choose not to vote on these motions and you can, in fact, reject an article or an allegation in light of these constitutional concerns. However, these are issues that do not turn on the facts of this case. Rather, they present threshold questions for each Senator in deciding whether to establish new precedent in the scope and the meaning of impeachable offenses.

The first motion before you today is a motion to exclude, as a basis for the removal of a Federal judge, any so-called pre-Federal allegations; that is, conduct that allegedly occurred before Judge Porteous became a Federal judge. This motion primarily deals with article II, which is widely recognized as a pre-Federal claim and the focus of much discussion nationally.

Second is a motion to exclude, as a basis for removal, that Judge Porteous deprived litigants and the public of the right to his so-called honest services. The Supreme Court recently rejected that very theory as unconstitutionally vague. We believe the Senate should do likewise.

Third, and finally, there is a motion for preliminary votes on each of the multiple allegations contained in the House's Articles of Impeachment. As we will discuss, those articles are grossly aggregated, meaning that each article contains numerous separate allegations. This long-simmering dispute between the House and the Senate came to a boiling point in these articles with the unprecedented use of what we refer to as the "aggregation tactic."

Equally important to the relief that Judge Porteous is requesting is what he is not requesting. We have tailored these motions so we are not requesting the dismissal of any articles in their entirety. Instead, Judge Porteous requests that Senate deliberation be confined only to those allegations that constitute valid bases for removal under the U.S. Constitution.

Throughout history, Senators have expressed their primary concern over the precedent set by impeachment cases and the implications of their decisions that are reached in this Chamber for future cases. This care is shown in the fact that in 19 impeachments to reach this body in history, only 7 ended

in convictions. Your predecessors accepted that the impeachment clauses contain an implied Hippocratic Oath under the Constitution. Your duty, first and foremost, is to do no harm—to do no harm—to the courts and to do no harm to the Constitution. Indeed, in all of the impeachment cases resulting in acquittal, the Senators found much to condemn in the conduct of the accused. They simply didn't find impeachable offenses.

With that brief introduction, I would like to turn to the first motion before the Senate in which Judge Porteous asks for the exclusion of pre-Federal allegations.

The first motion deals with the most dangerous aspect of the Articles of Impeachment. The House, through article II, and to some degree through article I, is seeking to have Judge Porteous removed on the basis of conduct that allegedly occurred before he became a Federal judge.

The House's pre-Federal charges in this case are in direct contradiction with decades of precedent from this body and would, in fact, violate the text of the U.S. Constitution.

In the history of this Republic, no one has ever been removed from office on the basis of pre-Federal conduct—no one.

The pre-Federal claims are an attempt by the House to secure impeachment at any cost, at the cost of the constitutional standard itself to remove a previously disciplined judge just months before his retirement.

The logic of this article is much like the story my father used to tell me about a man who comes across a stranger on his hands and knees one night looking for his wedding ring under a lamppost. He joins the man, searches for an hour, and then turns to him and says: "You know, Mister, I don't see it anywhere. Are you sure you dropped it here?"

And the stranger responds, "Oh, no, no, no, I lost it down the street, but the light is better here."

Unable to find a crime during Federal service, the House managers just decided to look elsewhere down the road, before he became a Federal judge.

It does not appear to matter that experts and the Congressional Research Service warned that no individual—not a President, not a Vice President, not a Federal judge, not a Cabinet member—has ever been removed on this basis.

In order to open the Federal bench to removals for pre-Federal conduct, you must ignore the express language of the Constitution itself, which refers to conduct during Federal service, during service in office. A judge is guaranteed life tenure under the Constitution "during the behavior" in office. It is not a standard of good behavior in life. It is a standard of good behavior in office. It requires misconduct during Federal service that justifies removal from that Federal office.

The standard fashioned by James Madison and others has stood for cen-

turies, largely because of the work of your predecessors, who have rejected articles that allege pre-Federal conduct.

In 1912, in the impeachment of Judge Robert Archbald, the Senate explicitly rejected the theory of removing an individual for conduct occurring before he took Federal office for which the House was seeking removal.

In the Archbald case, there were 13 Articles of Impeachment. The first six dealt with alleged misconduct in the office for which he was being sought to be removed. The next six dealt with conduct that allegedly occurred before he entered that office. And the last article was something that is called a "catch-all" provision. That combined all of the 12 earlier provisions into one.

Archbald was acquitted on all six articles that focused on conduct prior to his assuming a seat on the circuit court. All six were defeated in this Chamber.

These were not close votes, with the House receiving no more than 29 votes for conviction on those pre-Federal articles and averaged a rather high 64-percent rate for acquittal. Many Senators rose to amplify the reasons they rejected those articles.

Senator Bryan of Florida stated:

I am convinced that articles of impeachment lie only for conduct during the term of office being filled.

Senator Brandegee of Connecticut stated:

I vote not guilty because it alleges offenses, some of which are alleged to have been committed by the respondent while he was in an office he does not hold at the present and did not hold at the time the articles were adopted.

Senator DuPont of Delaware said:

My vote of not guilty upon the article of impeachment was based upon the fact that the offenses were alleged to have been committed when he was not holding his present office.

Senator Works of California said:

I am of the opinion that the respondent can not be impeached for offenses committed before his appointment to the present office.

Senator Catron of New Mexico said:

I do not believe the House of Representatives had the right to go back of the present office held by Judge Archbald to hunt up any of his acts to charge against him so as to remove him from the office he now holds.

Senator Crawford of South Dakota stated:

I find the respondent guilty of misconduct, but it occurred before he became the incumbent in his present office. I do not believe impeachment can be sustained for the reason stated.

Finally, Senator M'Cumber, North Dakota, stated:

Impeachment proceedings cannot lie against a person for an act committed while holding an official position for which he is separated.

I could read more, but I think the point is clear. The Senate specifically dealt with this issue of pre-Federal conduct before and rejected it by a large margin. A large percentage of

Senators at the time felt strongly enough about the issue to publicly speak about the impropriety of seeking pre-Federal causes for removal.

Thirty-two Senators sat out the vote on that catch-all article 13 in the Archbald case, and many publicly stated the reason they were sitting out that vote was because it contained in that whole list some of the pre-Federal conduct. However, the judge had already been convicted of six articles that contained Federal conduct. So by a vote of just two, with these Senators sitting out the vote, that article was approved.

Article II would eradicate over two centuries of precedent, and for what purpose? The House alleges Federal rather than pre-Federal conduct in article III and article IV. Even article I has some Federal claims. We are eager to reach those issues, and they offer an ample basis for the review and, yes, possible removal of a judge without opening the Federal bench—and all other Federal offices—to pre-Federal attacks.

One statement in the Archbald case stands out particularly prophetic and relevant. When confronted with the pre-Federal conduct, Senator Stone of Missouri rose to give the following warning to his colleagues, and by extension to you, his successors:

It would not be difficult to conceive a case where under great pressure, when the country was in the state of high political excitement and when some supposed political exigency was influencing a partisan public opinion, a hostile partisan majority might hark back to some alleged misbehavior of a judge.

Now, one can certainly imagine a period of "high political excitement" if you tried hard enough. The point is that despite the rhetoric and passions of periods of great political upheaval, Senators have stepped forward to protect our core constitutional values and standards. This is why the Framers gave Senators long terms and large constituencies—to allow them to resist the passions and distemper of contemporary politics.

Once the Senate allows the House to cross this constitutional Rubicon for the first time, Congress would be able to dredge up any pre-Federal conduct to strip the bench of unpopular judges or to remove other Federal officials at the whim of the House. It would raise the very real possibility that an unpopular opinion issued by a Federal judge or a Supreme Court Justice could trigger an impeachment based on alleged acts from decades of practice before taking office. Moreover, other Federal officials, such as the Vice President, or a Cabinet member, could be similarly confronted with pre-Federal conduct as a basis for removal.

I expect my esteemed colleagues from the House to raise again a rather old saw that if you accept the defense's argument, the Senate would be precluded from removing someone who committed murder before taking office. Of course, an extreme hypothetical

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like this points out the absurdity of the case against Judge Porteous. In this case, the Justice Department did not even find evidence to bring a single charge of criminal wrongdoing. Once again, the House simply wants to go where the light is better. In this case, it wanted to go to a hypothetical place.

But to be blunt, in deference to my colleagues, I must say this is an nonsensical argument from a constitutional standpoint. The reason is that in a case of a pre-Federal murder, the judge would likely be subject to trial during his or her Federal term. If convicted, a judge would likely be sentenced to life in prison. While the crime may have predated his confirmation, he became a convicted felon during his Federal service. That is the basis for the removal. Further, the judge could not possibly serve in a time of good behavior given his conviction and presumed incarceration.

The House, I believe, will also argue the reasons for the lack of any precedent of removals for pre-Federal conduct. The record is rather telling. There hasn't been such a case. Why? The House will argue that the reason is that people who are charged with pre-Federal misconduct simply resign if it is serious. History repudiates that argument. It is simply not true. A number of individuals have had information about misconduct in their pre-Federal lives revealed after they took office and yet never faced impeachment. For example, Supreme Court Justice Hugo Black admitted after his confirmation that he was in fact at one time a member of the Ku Klux Klan. There was outrage with that disclosure; that controversy had not been raised before confirmation.

As our filings document, numerous other Supreme Court Justices, as well as a bevy of other Federal officers, have had damaging information of this kind revealed. Hugo Black did not face impeachment.

This body has removed only seven judges in 206 years through the impeachment process and has never removed anyone for pre-Federal conduct.

If you believe Judge Porteous committed removable offenses as a Federal judge, so be it—and he is here to be judged himself—but do so on that basis of the remaining articles, not on article II.

It is a great burden and responsibility to stand before you not just as counsel for Judge Porteous, but as a constitutional law scholar. The importance of article II transcends this case and, frankly, transcends this judge. It is a direct attack on a constitutional standard that has guaranteed an independent judiciary for two centuries. Whatever you do today, please do no harm. Judge Porteous stands ready to be judged for his conduct on the Federal bench. However, like so many scholars and commentators, I ask you to hold the constitutional line, as did your predecessors, and reject pre-Federal claims as the basis for his removal.

I would like now to turn to perhaps the most novel problem raised in this impeachment: the reliance in article I on a theory that was rejected by the Supreme Court after the impeachment vote in the House.

At issue is the honest services claim that is at the heart of article I. Even before this impeachment, honest services claims were controversial in Federal court. Various judges, in fact, rejected this claim.

While experts were predicting a rejection in whole or in part of the theory, the Supreme Court accepted three cases dealing with honest services. The House was fully aware those cases had been accepted by the Supreme Court. The House was fully aware that lower court judges had rejected this theory. They simply took a gamble and decided to take a risk and structured article I as an honest services claim. They lost that gamble. When the court ruled in *Skilling v. United States* and two related cases, rejecting the use of this theory in cases without express allegations of bribery and kickbacks, neither bribery nor kickbacks are alleged in article I.

In fact, they are not mentioned in any of the articles.

Indeed, the House's own witnesses testified that there was no such bribery or kickback scheme to influence Judge Porteous on the Federal—or, for that matter, on the State—bench. House managers are now going to ask the Senate to cover their bad bet on *Skilling* and ignore that the stated theory of article I was rejected by the Supreme Court as a viable criminal claim. The dangerous implications of such a vote are difficult to overstate.

The Senate has never removed a Federal judge on the basis of a legal theory specifically rejected by the Supreme Court. If allowed, Congress could remove Presidents, judges, Cabinet members on theories that they are barred as invalid in Federal court. Ironically, if Judge Porteous were presiding in that case, he would be bound by the rule of law to reject an indictment of a public official on this identical claim that is now being offered as the basis for his removal.

House managers crafted article I around the same theory of honest services as was advanced by the Federal Government in the *Skilling* case. Article I alleges that Judge Porteous is "guilty of high crimes and misdemeanors and should be removed from office" because, in connection with a recusal motion—a recusal motion in a single case—before him, he "deprived the parties and the public of the right to the honest services of his office."

The House asserts that Judge Porteous caused this deprivation of honest services in three ways: First, that he failed to disclose certain information during the recusal hearing held in the so-called Lifemark case about his relationship with one of the attorneys in the case—Jake Amato—and Amato's partner Bob Creely. Second,

he made misleading statements at the recusal hearing about his relationship with these two attorneys; third, that he ultimately denied a motion to recuse.

Now, the reason the House did not allege either bribery or kickbacks became obvious when the defense was allowed to cross-examine the House witnesses before the Senate committee concerning article I, all of whom denied any bribe or kickback scheme by Judge Porteous. Faced with various House witnesses who insisted, universally, that Judge Porteous was not and could not be bribed, the House turned to a claim of "a scheme or artifice to deprive another of the intangible right of honest services."

In basing its allegations on this provision of the Criminal Code—which is title 18, section 1346—the House followed a longstanding precedent of crafting articles to reflect actual crimes. That, however, happened to be the provision that was rejected in *Skilling*. The House finalized and approved article I in March 2010. That means for months the House knew an honest services claim could be rejected by the court and decided to rely on it because it could not expressly claim a Federal bribe or kickback.

The reason for the House's 'honest services' gamble was obvious: Beginning in the early 1990s—actually more in the late 1990s—the Justice Department began what was called the Wrinkled Robe investigation. In the course of that investigation, they conducted a long-running grand jury investigation, with plea bargains, countless subpoenas and searches of judges in Louisiana. In the end, some judges were indicted. However, the government, which looked specifically at Judge Porteous, as well as some of the other judges, found the evidence did not support bringing an indictment against Judge Porteous for any crime.

Permit me to repeat: Judge Porteous had agreed to waive the statute of limitations to allow the government to bring a criminal charge against him. He decided that it would not be appropriate for a Federal judge to rely on the statute of limitations to protect himself from criminal charge. He signed three waivers to permit those charges, even though they could have been blocked under the statute of limitations.

The Department of Justice then investigated and found insufficient evidence to bring a charge of any kind—big or small—against Judge Porteous. In declining to prosecute, the DOJ specifically cited a host of rather fundamental problems in bringing such a case. It said that it did not believe it could carry the burden of proof, it did not believe it could secure a verdict of conviction from a jury, and that there was a general lack of evidence to show "mens rea and intent to deceive." That only left the soon-to-be-rejected theory of honest services, without a specific charge of bribery or kickback.

The House's gamble failed in June when the Supreme Court issued its trio of decisions, led by the *Skilling v. United States* decision, where the court directly—and by the way, unanimously—rejected the theory of the underlying article I. The court expressly held that absent specific allegations of a bribe or kickback, “no other misconduct falls within the statute’s province.” In direct relevance to this case, the court expressly rejected the notion that “nondisclosure of a conflicting financial interest can constitute criminal deprivation of ‘honest services.’” Nondisclosure of a conflicting financial interest: That should sound familiar because that is article I.

As noted earlier, article I does not include any allegation of a bribe or kickback. Instead, it refers to a “corrupt scheme” that “existed” when Judge Porteous was a State—not a Federal—judge. It alleges a “corrupt scheme” that he had with attorneys Amato and Creely. As we will address in greater detail in our closing argument, there was, in fact, no corrupt scheme. Our proof is the testimony of the House’s witnesses, not our witnesses—the attorneys themselves who denied a scheme of bribery or kickback.

The greatest irony of the House’s use of the honest services claim is that the very concern stated by the Supreme Court was that it was so ambiguous that it would not give citizens notice of what it is they could be charged with criminally. Yet that is the same concern James Madison raised when crafting an impeachment standard. Madison said Congress should not be able to use a standard that was so vague as to make removal easy or to rob people of knowledge of what they could be removed for.

So after the Supreme Court in *Skilling* rejects this very theory as so ambiguous, so vague it cannot be used in a Federal court, the House picked up that very theory and said: But we think you should use it as the basis to remove Federal officers—from Presidents to judges to Cabinet members.

Simply put: Deprivation of honest services is the modern equivalent of “maladministration.” Many of you know that James Madison and the Framers rejected maladministration as a standard for impeachment. By the way, they also rejected corruption. The term “corruption” was viewed as far too vague to allow the Members of the Senate to remove a judge on that basis. So what the House is doing is taking a standard of honest services, which was rejected for the same reason, and effectively making it a standard of the United States for the basis of removal of a Federal judge.

Since article I does not allege a bribe or kickback, it is constitutionally invalid under *Skilling*, and this body should not import that standard into the U.S. Constitution. While an Article of Impeachment does not have to be co-extensive with a crime to be valid, an article must give fair notice of what

conduct can result in removal. An impeachment speaks not just to one judge, it speaks to all judges. They need to know because they need to know that they can perform their duties without having a Damocles sword dangling over their head, not knowing if an unpopular decision will trigger removal. They deserve fair notice.

It is worth noting that after the court’s decision, Senator LEAHY introduced a bill that was committee sponsored by Senator WHITEHOUSE and former Senator Kaufman to amend the Federal honest services statute in response to *Skilling*. That bill—known as the Honest Services Restoration Act—would revise the honest services statute to prescribe what is defined as “undisclosed self-dealing” by a public official.

Notably, even under the new statutory definition of honest services, the allegations in article I would not meet that standard any more than it would meet the standard under *Skilling*. Senator LEAHY’s bill defines “undisclosed self-dealing” as a public official performing an official act “for the purpose” of benefiting either himself or others and their financial interests.

Article I doesn’t allege that Judge Porteous denied the recusal motion for the purpose of benefiting himself. Indeed, the House doesn’t allege that he was at that time receiving gifts from Mr. Creely or Mr. Amato. Those gifts—which we will talk about later—occurred years before. But, of course, that is not the prior and it is not the current standard. The Senate must decide if a Federal judge can be removed on the alleged claim of a corrupt scheme despite the Supreme Court ruling.

To allow such a removal would be to sever any connection between the viability of a criminal claim and the basis for the removal of a Federal judge. Indeed, it would establish a Federal judge can be removed for conduct that is demonstrably not criminal and a theory so vague it can’t actually be used in a Federal court. The House made a bad gamble in *Skilling*. The Senate should not now make a bad gamble and a bad law.

I would like now to turn to the final motion before the Senate, which is a defense request that the Senate take preliminary votes on the numerous and separate allegations in the four Articles of Impeachment. The House managers, in drafting these articles, used a tactic called “aggregation.” It is not new. It has often been the subject of criticism by both Senators and scholars.

Aggregation is a method by which House Members, when drafting Articles of Impeachment, can circumvent the high vote required in the Constitution. They can essentially remove a Federal judge even though less than two-thirds of you agree on any specific allegation. This is accomplished by combining different claims in one article so that no single act is subject to a stand-alone

vote. By lumping together or aggregating issues, you can secure total votes even if only 5 or 10 Senators might agree that any given act is sufficient to remove a Federal judge. That negates article I, section 3, which says “no person shall be convicted without Concurrence of two-thirds of the members present.”

The aggregation tactic converts this exacting process into an undefined and fluid process where neither history nor the public will know what was the grounds by which you removed a Federal judge.

Let me try to explain this with an example. Let’s say you go back into your deliberations and 20 of you might agree that one allegation in a particular article was worthy of removal, while another 30 might reject that allegation but agree on a different allegation as sufficient for removal. Two other groups of Senators of 10 might focus on a third and fourth allegation. When it came to the final vote, you would have 70 Senators voting for removal even though no more than 30 actually agree on what should be the basis for removal—what actually satisfied the constitutional standard.

One does not have to be a strict constructionist to see the violence that approach does to the express language of the Constitution. Honestly, do Members of this body believe the Framers would establish a two-thirds majority vote to remove a Federal judge but allow a House to simply aggregate and achieve that with just 20 or 30? The Framers of the United States might have been many things, but they were not stupid and they were not frivolous. They created a two-thirds vote for a purpose. They wanted two-thirds of you to agree together that at least one act committed by a Federal judge is sufficient to satisfy this extraordinary measure of removal. Such aggregation of claims wouldn’t even be allowed in a criminal or a civil trial. A judge wouldn’t permit it. This judge wouldn’t permit it.

Senators have repeatedly objected to the aggregation of claims in past cases. However, the House knows Senators are reluctant to dismiss an article that has been duly submitted by the House. It is a game of constitutional chicken. They aggregate knowing that it would be difficult institutionally to simply dismiss an article, and for that reason we are not asking you to do that. All we are asking for you to do is to take preliminary votes on the separate allegations that have been combined in these articles to assure for yourself and for history that the constitutional standard has been met.

The House itself has conceded that the Senate can, in fact, do this—and conceded it may be necessary to do this—when we last had this discussion before the committee and Chairman MCCASKILL, Congressman SCHIFF stated at that time:

The Senate can, when it deliberates, say we want to have a separate vote internally

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on each of the facts that are alleged in article I, on each of the facts that are alleged in article II. You can make that decision and, if the vote internally is that you don't agree, and you have a further discussion and say, well, unless we agree on these pieces we don't think the conduct rises, you can make that decision.

You will find that quote on page 1861 in the green books before you. Congressman SCHIFF further noted that:

You will have every opportunity when the evidence is provided to you to vote on it in any way, shape or form you decide. Nothing we do here will prejudice that.

Later in the hearing, when Senator KLOBUCHAR asked Congressman SCHIFF whether "we could decide on our own to individually vote on each one or both of them as a group, and would we be allowed to do that," Congressman SCHIFF said "That's exactly right, Senator."

I commended Congressman SCHIFF because I believe that is an honorable and correct position. We would encourage, however, that those votes be made public. I say this not as much for the interest of my client as in the interest of history. What you say this week will speak to the remaining judges on the bench, and you should speak clearly as to what you think is sufficient to remove a Federal judge.

I also want to mention that the need for clear records is particularly important in this case because there was no criminal trial in this case. This is the first modern impeachment to come to you as a body without a prior trial and, more important, a prior trial record so the evidence, the witnesses in this case were not subject to the procedures and review of a criminal case. It was raw evidence that came in. For that reason, you will be the first to evaluate this evidence in terms of an impeachment that did not occur in a criminal case, and we believe that in light of that, you should take particularly strong steps to isolate what it is that will be the basis for removal or acquittal.

I have to point out that the problems of the House were unnecessarily created by itself, not by this body and not by the defense. The House decided to abandon good practices in the drafting of articles, good practices that were applied in prior cases. For example, in the Hastings impeachment case, where some of you, in fact, were involved, if you recall, there were 17 Articles of Impeachment. Each of those articles isolated one false statement that Hastings allegedly made. Articles II through XIV were all short and they were largely identical. The first and third paragraphs of those articles were, in fact, identical. The only difference was the specific false statement. The House did that so you would have the opportunity to say—to vote whether you believed this was a false statement and whether that specific statement justified removal. That has been the approach of the House in prior cases.

It is correct, and I believe the House is likely to mention, there are some prior cases that have multiple claims,

but those are different from an aggregation case. As I mentioned before, on some occasions, the House has submitted to you what is called a catchall provision, so what they would do is they would have, for example, six articles of impeachment, with specific acts that they believed should be subject to removal, and then the seventh article was a catchall article that combined all the previous alleged acts. The difference between this and a catchall provision is that you or, in this case, your predecessors had the ability to vote on those first six claims so you knew as a body if in fact two-thirds of you agree that any of those prior six actually did occur and actually did constitute removable conduct. That is not the case with aggregation.

What we are suggesting today is a simple process that we believe would protect the constitutional standard in this body, not just in this case but in the future. We have suggested that you simply vote preliminarily, as was discussed with Congressman SCHIFF, on each of these insular allegations. If you look at our motion, we have laid them out. There is not a great number in each of the articles. But you could vote simply on those specific allegations and determine if two-thirds of you agree that, first, they occurred and that you believe they would be the basis for removal.

You would then vote on the article as a whole, in compliance with rule XXIII. Rule XXIII requires you to take a final vote on an article that has not been divided. But by the time you took that vote, you would know whether the standard of the Constitution had been satisfied.

As we note in our filing—and I will not take your time by quoting them again—many Senators have objected to the aggregation of claims in history. In the Archbald indictment, for example, George Sutherland of Utah objected to his colleagues and stated, in exasperation: "I cannot consistently vote upon this article one way or the other," because of aggregation.

The PRESIDENT pro tempore. The Chair would like to advise you that you have consumed 40 minutes.

Mr. TURLEY. Thank you very much, Mr. President. As a law professor, I am trained to speak in 50-minute increments. I will try to wrap-up.

In conclusion, I ask that the Senate adopt this simple approach to deal with aggregated claims. We have suggested this way to deaggregate the claims. We believe it is useful, not in just this case but in future cases.

We would like to reserve the remainder of our time for rebuttal.

Thank you very much.

The PRESIDENT pro tempore. I thank you very much. The Chair has not received any written questions. Accordingly, the Senate will now hear from Representative SCHIFF in opposition to the motions.

Representative SCHIFF.

Mr. Manager SCHIFF. Mr. President, Members of the Senate, I am Rep-

resentative ADAM SCHIFF of California. I am joined by fellow House managers BOB GOODLATTE of Virginia, JIM SENBRENNER of Wisconsin, and HANK JOHNSON of Georgia, as well as our counsel, Alan Baron, who has been assisted by Mark Dubester, Harry Darnell, and Kirsten Konar.

When the impeachment trial began in this case some weeks ago, we acknowledged the historic significance of an impeachment proceeding and how rarely they are undertaken. This is for good reason. The overwhelming majority of men and women appointed to the bench have great integrity and uphold the enormous trust the public places in them. Very seldom does someone corrupt get nominated for the bench and, in those cases where a significant problem is discovered during the confirmation process, most withdraw from further consideration or their confirmation is denied. It is very rare that a corrupt official is nominated and his corruption escape discovery until after he is appointed, but it does happen. It happened here with the appointment of G. Thomas Porteous, who is not only a corrupt State judge but would become a corrupt Federal judge as well.

By means of the impeachment and removal process, the Framers of the Constitution sought to protect the institutions of government by allowing Congress to remove persons who are unfit to hold positions of trust. As Alexander Hamilton noted when referring to jurisdiction to impeach an official in Federalist 65: "There are those offenses which proceed from the misconduct of public men or, in other words, from the abuse or violation of some public trust."

The charges against Judge Porteous here, in the view of the House of Representatives, are precisely that, abusive and violative of the public trust, and he must be removed.

As a Federal district judge in New Orleans, the first proceedings against Judge Porteous began before a disciplinary panel of the Fifth Circuit Court of Appeals. After taking evidence and conducting 2 days' worth of hearings in which Judge Porteous testified under a grant of immunity, the Fifth Circuit concluded that Judge Porteous's misconduct "might constitute one or more grounds for impeachment" and referred the matter to the judicial conference of the United States headed by Chief Justice Roberts. The Chief Justice, in conference, also concluded that impeachment may be warranted and referred the case against Judge Porteous to the House of Representatives. The case was also recommended for potential impeachment by the Department of Justice which, in part, because the statute of limitations had run on many of Judge Porteous's offenses, felt that impeachment might be the more appropriate remedy.

Although Judge Porteous signed an agreement when in discussions with the Justice Department, it did not reset the clock on the vast majority of

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potential charges, from the kickbacks from the lawyers or the bail bondsmen, corrupt activity, which were already time-barred from prosecution. In the House Judiciary Committee, we undertook a thorough investigation, interviewing a great many witnesses, taking depositions, acquiring documents never found by the Justice Department, including the very revealing transcript of the recusal hearing in the hospital case mentioned by my opposing counsel, where Judge Porteous so grievously misled and deceived the parties. At the conclusion of our investigation, the Committee considered carefully whether Judge Porteous's conduct was so morally repugnant, so violative of public trust, and whether he had so demeaned himself in office that he was guilty of high crimes and misdemeanors and should be removed from the bench.

Unanimously, the committee concluded he was guilty of high crimes and misdemeanors and must be impeached.

Our committee then studied the very issues implicated in this morning's three motions to dismiss. We considered carefully how many articles should be crafted, whether his conduct naturally divided itself into coherent schemes and, if so, how many, so as to give the public clear knowledge of what he was charged with and to give Judge Porteous a fair opportunity to defend himself and to give the Senate clear articles to vote upon. We concluded that the judge's conduct could be divided quite logically into four parts: One article based on his corrupt scheme with the lawyers, one article based on his corrupt scheme with the bondsmen, one based on his false bankruptcy petition, and one based on his deception of this very body, the Senate. We did not wish to pile on charges against Judge Porteous by dividing any of these articles into unnatural pieces, something a prosecutor might refer to as "loading up" an indictment.

There were other charges we considered as well, the evidence of which was introduced at trial, such as his many serious false statements on mandatory judicial disclosure forms, but opted instead to introduce that as evidence of his willingness to perjure himself when it suited his interests, something very relevant to both his statements to the Senate and in the bankruptcy proceeding.

The House has great discretion in how it drafts an Article of Impeachment, which is why the Senate Impeachment Trial Committee in this case ruled against precisely this same motion counsel makes only 2 months ago, finding that the schemes charged were very straightforward.

We also considered whether a charge of a violation of a specific criminal statute, that the judge violated 18 U.S.C. section X.Y or Z, but rejected that approach. Most impeachments do not charge specific crimes, some charge no crimes at all, and impeachment precedent is very clear—no particular stat-

ute need be referenced, only the conduct that constitutes a high crime or misdemeanor, which is why, as I will explain later, Judge Porteous's motion to dismiss article I, claiming that it charges a violation of 18 U.S.C. section 1346, is so fatally flawed. The article charges no such violation of that statute and, indeed, makes no reference to that code section whatsoever.

The House Judiciary Committee considered how to view the illicit conduct of Judge Porteous, not only while he was on the Federal bench but prior to his appointment, and, indeed, during the very confirmation procession itself. We concluded we could not ignore the judge's corrupt prior conduct or his conduct during the confirmation because it was so interwoven with his corruption on the Federal bench. His deplorable handling of the hospital case while a Federal judge, his lies during the recusal hearing, his hitting up the lawyers for cash—the very reason the lawyer was brought into that hospital case to begin with. Although all that conduct occurred while Judge Porteous was on the Federal bench, none of it can be fully understood without considering the judge's prior conduct in relationship with those same attorneys.

It was also the unanimous view of the Judiciary Committee that, whether a high crime or misdemeanor occurs before or after someone is appointed to the bench, if it is such a violation of the public trust that the institution of the judiciary will be harmed, that the public will lose confidence in the decisions of the court and of that judge, then he must be impeached. To reach the opposite conclusion would be to countenance a continuing injury to the judiciary, which would be forced to retain judges proved to be corrupt. Even where a judge is indicted and convicted on conduct that occurred before his appointment, the Senate would be powerless to remove him from office or from lifetime salary though he sits in prison. Nothing in the language of the Constitution or 200 years of precedent supports such an absurd result.

This was the unanimous view not only of the House Judiciary Committee, but when the matter was brought before the full House, it was the unanimous view of that body as well.

The Senate can decide to convict Judge Porteous on articles I, II, and III on the basis of corrupt conduct on the Federal bench alone, if it chooses—and count 4 addresses the concealment and false statements to the Senate during the confirmation itself—or the Senate may, as I will discuss later, convict Judge Porteous on the basis of his prior conduct as well consistent with the Constitution, with precedent, with a considered opinion of experts, and with sound public policy reasons as well.

But first, let me turn to each of the judge's three motions. In considering Judge Porteous's motions to dismiss,

let me begin with a discussion of his arguments that the charges against him are improperly aggravated. In order to do so, it may be useful to provide a brief summary of the evidence charged in each article so that the full Senate can see, just as the Senate Impeachment Trial Committee concluded, that the House was well within its discretion in how it drafted the articles. Each contains a coherent scheme of conduct giving the judge, the Senate, and the public a clear understanding of the charges against him, and the motion must be denied. It is also worth pointing out, as the Senate Impeachment Trial Committee report demonstrates so clearly, none of the really salient facts in this case are in dispute.

Article I. Article I alleges and the evidence at the trial has now established that Judge Porteous, while a State judge, initiated and implemented a corrupt kickback scheme with attorney Robert Creeley and his partner, Jacob Amato. The essence of the scheme was that Judge Porteous, in his judicial capacity, assigned curatorship cases to Creeley, and thereafter the firm of Amato & Creeley gave Judge Porteous approximately half of the legal fees generated by those cases. A curatorship is a small case where the appointed lawyer represents a missing party and has to do some minor administrative work. The payments to the judge were always made in cash, as Amato testified at trial, to avoid a paper trail. Contrary to what counsel has just represented, Amato testified that it was a classic kickback scheme.

Prior to Judge Porteous's initiation of this curator kickback scheme, he had asked Creeley for small sums of money from time to time. Creeley gave him the money until Judge Porteous asked for larger amounts—\$500 or \$1,000 at a time. At this point, Creeley balked. It was then that Judge Porteous began assigning Creeley the curatorships and seeking the cash back from Creeley and his partner, Amato.

The evidence is undisputed that Judge Porteous assigned Creeley over 190 of these cases from 1988 to 1994, resulting in fees to the firm of about \$40,000. Both Creeley and Amato independently estimated they gave Judge Porteous a total of about \$20,000 in cash. They both testified that they understood that the cash they gave Judge Porteous was funded by these curatorships.

By initiating and implementing this curatorship kickback scheme, Judge Porteous abused his position of trust as a judge by corruptly taking actions in his official capacity designed and intended to enrich himself. This is judicial misconduct and abuse of power, and it is most venal. But this was only the beginning of Judge Porteous's egregious misconduct. It gets worse.

Thereafter, when Judge Porteous became a Federal judge, he presided over a complex, high-stakes, nonjury case. You will hear it referred to as the Liljeberg case, the hospital case.

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Amato enters his appearance in this case as an attorney for the Liljebergs. Even though this case has been around for years—tens of millions are at stake—he enters the case 6 weeks before trial.

When opposing counsel filed a motion to recuse Judge Porteous, because he was concerned about the late introduction of this attorney, seeking that Judge Porteous reassign the case to another judge based on what counsel understood to be the judge's close relationship to Amato, Judge Porteous deliberately misled counsel and the parties, concealing his previous corrupt financial relationship that had existed between himself, Amato, and Creeley.

In fact, Judge Porteous did something much worse. The transcript of that hearing was truly revealing and sets forth a series of misleading statements, half-truths, and outright lies by Judge Porteous. As but one example, Judge Porteous steered the colloquy of a discussion of whether Amato had ever given Judge Porteous campaign contributions. In that discussion, Judge Porteous stated:

The first time I ran, 1984, I think it is the only time when they gave me money.

That statement was clearly false and deceptive and concealed many thousands—indeed, tens of thousands of dollars—in cash that Amato and his partner had given Judge Porteous.

Judge Porteous denied the recusal motion, and the order was appealed. The court of appeals, based on the false record Judge Porteous had created, affirmed the denial. So counsel for the other party, Lifemark, was unwillingly forced to represent his client against an opposing counsel who had given Judge Porteous thousands of dollars as part of a corrupt scheme.

In one of the most appallingly corrupt acts among many by Judge Porteous, after the case is tried but has not been decided—and again, a nonjury case; the judge is the trier of fact as law—the judge solicits and receives a secret cash payment of \$2,000 from Amato.

Amato would testify during the Senate trial that it was the worst decision of his life and would acknowledge that he worked on this case for 2 years, stood to make \$500,000 to \$1 million in fees if he prevailed, and if he lost, he would make nothing, and that this was one of the reasons he gave the judge the cash—because the judge was presiding over this very important case.

Judge Porteous decides the Liljeberg case very favorable to Amato's client. This decision is later reversed in scathing terms by the U.S. Court of Appeals for the Fifth Circuit in an opinion by the appellate court which characterized Judge Porteous's central rulings as "inexplicable," "apparently constructed out of whole cloth," and "close to being nonsensical."

Not until the case was long over and the parties had moved on would they learn that the lawyer for the prevailing side at trial had given the judge thousands in secret cash.

That is article I.

Article II alleges and the evidence has shown that Judge Porteous, while a State judge and extending into his tenure as a Federal judge, had a corrupt relationship with local bail bondsman Louis Marcotte and his sister Lori Marcotte. The essence of the relationship was that Judge Porteous would take official acts to financially benefit the Marcottes by setting bail in amounts that they requested to maximize their profit—not in the best interest of the public, not what was necessary to secure the defendant's appearance in court but would maximize their profit. In addition, he would set aside the criminal convictions of the Marcottes' employees.

The way the bond arrangement worked was this: Louis Marcotte would interview the defendant and their family to figure out the most expensive bond they could possibly afford and would ask Judge Porteous to set the bond at precisely this amount, and the judge would do so. If the bond was set too low, below what the family could afford, Marcotte would lose money. If the bond was set too high, then the defendant could not use Marcotte at all, and Marcotte would lose money. It had to be set just right to maximize their profit. And Judge Porteous was their go-to bond-setter.

Although other judges would later go to jail for precisely this same relationship with the Marcottes, Louis Marcotte testified at the Senate trial that no one—no one did more for them than Judge Porteous. And Marcotte said further that the more they did for Porteous, the more he did for them.

The Marcottes supported Judge Porteous's lifestyle in numerous ways. In response to Judge Porteous's request, they frequently took Judge Porteous out to expensive restaurants, paying for his food and copious amounts of liquor. They sent their employees to pick up his cars at the courthouse, repair them, fill them up with gas, detail them, and leave buckets of shrimp or bottles of liquor in them when they were done. They sent their employees to his house to do home repairs, where they spent 3 days repairing 85 feet of damaged fence—digging the holes, laying the concrete, picking up the fence boards, doing the construction. And they paid for one or more trips to Las Vegas for the judge and his secretary.

As we proved during the trial, Judge Porteous was also asked by Louis Marcotte to expunge or set aside the felony convictions of two Marcotte employees so they could be licensed as bail bondsmen. Judge Porteous obliged but, significantly, told Marcotte that he would not set aside one of the convictions until after Senate confirmation of his position as a U.S. district judge because Judge Porteous did not want to jeopardize what was, in the judge's words, his lifetime appointment. In essence, Judge Porteous told Marcotte that he would set aside the conviction

but that he needed to hide the corrupt relationship from the Senate. In fact, this is exactly what he did. Shortly after Senate confirmation but before he was sworn in as a Federal judge, Judge Porteous did, in fact, set aside the conviction of Marcotte's employee. It had to be done precisely then, after confirmation, so you would not learn about it, but before he was sworn in because once he was sworn in, it was too late, he could no longer expunge the conviction.

What the articles allege and the evidence establishes is that this was a classic quid pro quo relationship between a judge with his hand out and a corrupt bondsman who was willing to pay for what the judge could do for him.

Judge Porteous's corrupt relationship with the Marcottes did not come to an end after Judge Porteous became a Federal judge, although he no longer had the power to set bonds or expunge convictions for the Marcottes. The Marcottes continued wining and dining Judge Porteous because they needed his help to recruit a successor—other State judges—to assume Judge Porteous's former role in setting bonds at the amounts necessary to maximize their profits. Once again, Judge Porteous agreed, meeting with State judges and vouching for the Marcottes and using the prestige and power of his office to foster these new, corrupt relationships.

One of the judges Porteous helped the Marcottes recruit while he was a Federal Judge was a State judge named Ronald Bodenheimer. Bodenheimer testified that he did not hold Louis Marcotte in high regard and would not deal with him because he had a low regard for Marcotte's character and believed he was a drug user. Bodenheimer testified that when Judge Porteous vouched for Marcotte's integrity, it was critical to his decision to form a relationship with Louis Marcotte.

Judge Bodenheimer would later be convicted and incarcerated on Federal corruption charges, in part because of his corrupt relationship with the Marcottes, setting bonds in the amounts they requested in return for financial favors. Both the Marcottes also would plead guilty to corruption charges premised on these same relationships.

Now let me turn to article III.

By 2001, Judge Porteous had close to \$200,000 in credit card debt, a substantial portion of which resulted from his gambling problem. For years, Judge Porteous had dishonestly concealed his debts and the extent of his gambling by filing false annual disclosure forms.

Ultimately, in March of 2001, Judge Porteous filed for bankruptcy. His filings were replete with dishonest representations. First, to conceal his identity, Judge Porteous filed and signed the petition under penalty of perjury using a fake name: G.T. Ortous. Further, just a few days prior to filing, as part of his plan to conceal his identity,

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he obtained a post office box which he listed as his residence on the bankruptcy petition. He concealed assets so he could gamble, such as a \$4,100 tax refund, even through the bankruptcy form asked him specifically whether he was expecting a tax refund. He concealed a money market account that he used the day before filing bankruptcy and that he used while in bankruptcy to pay for his gambling. He lied under oath about preferential payments to creditors, particularly casinos. He falsely denied under oath having gambling losses in response to a question on the form that asked just that. He had his secretary pay off a credit card account shortly before filing and then failed to report the transaction.

After the bankruptcy judge issued an order confirming Judge Porteous's chapter 13 plan, which prohibited him from incurring new debt without permission, Judge Porteous violated the order by secretly incurring additional debt at several casinos and by obtaining and using a new credit card, all without the permission of the bankruptcy trustee.

In sum, his bankruptcy was replete with deliberately false statements made under penalty of perjury in an effort to avoid public disclosure of his bankruptcy and his gambling problem. Now, let me turn to article IV.

I previously mentioned that while he was a State judge, Judge Porteous had corrupt schemes going on with attorneys Amato and Creeley and with the Marcottes. How, then, did he ever get confirmed in the first place?

Article IV alleges and the evidence establishes at Judge Porteous repeatedly lied to the Federal Bureau of Investigation and to the U.S. Senate in responding to questions posed to him as part of the confirmation process on no less than four occasions—particularly in response to the very questions that would have required that he disclose his corrupt relationships with Creeley, Amato, and the Marcottes. He was interviewed twice by FBI agents, and filled out two separate questionnaires, one of which was sent directly to the Senate Committee on the Judiciary.

There is perhaps no question more important of an applicant for a Senate-confirmed position than that which seeks information concerning the candidate's integrity. Judge Porteous's responses to these questions were false given his corrupt relationship with attorneys Amato and Creeley and his corrupt relationship with the Marcottes and their bail bond business.

There is a wealth of evidence that makes clear that Judge Porteous understood the questions as calling for his disclosure of his corrupt relationship with the Marcottes. Most critically, as I mentioned, in the summer of 1994, Louis Marcotte asked Judge Porteous to set aside the felony conviction of one of his employees named Aubrey Wallace—a Marcotte employee

who had taken care of Judge Porteous's cars and had performed house repairs for Judge Porteous. Marcotte testified that Judge Porteous responded to Marcotte's request by telling Marcotte:

Louis, I am not going to let Wallace get in the way of me becoming a Federal judge and getting appointed for the rest of [my] life. . . . Wait until it happens, and then I'll do it.

In short, Judge Porteous would set aside the conviction as Marcotte requested, but he would hide that act from the Senate so as to not jeopardize his confirmation. Judge Porteous knew that he had to conceal his corrupt relationship with Marcotte if he had any hope of being confirmed as a U.S. District Judge—and that is exactly what he did.

Almost all of the salient facts in this case I have just mentioned are not seriously contested. In connection with article I and his relationship with Creeley and Amato, Judge Porteous admitted the critical facts during his sworn testimony before the Fifth Circuit—where he was given immunity from the use of his testimony in any criminal proceeding. He admitted Creeley gave him money and then balked at continuing to do so. He was asked about the curator moneys, and he admitted sending the curatorships to Creeley and getting cash from Amato and Creeley after he assigned them the curatorships. Though he will not call it a kickback, Judge Porteous does not deny getting the cash back from the attorneys after sending them the curatorships.

When he was asked how much money he got back from Creeley and Amato during the Fifth Circuit proceedings, his answer was: "I have no earthly idea." "I have no idea. Not 'I didn't get the money'; not 'I don't know what you're talking about,' but in terms of how much: 'I have no idea.' The payments of cash to Judge Porteous occurred so often and for such a prolonged period of time, he could not, or would not, estimate how many thousands of dollars he received from them.

Does he admit getting the \$2,000 in cash in an envelope after soliciting it from Amato during the pendency of the Liljeberg case? Yes, he admits to that in the Fifth Circuit. He takes issue, strangely enough, with the envelope itself. He can't remember whether the money was delivered in bank envelope or a regular envelope, but he doesn't deny getting an envelope with cash during the pendency of this multimillion-dollar litigation. He doesn't remember whether he got it personally or whether he sent his secretary to pick it up, but he doesn't deny getting the cash.

The record is absolutely clear that Judge Porteous did not disclose his receipt of curatorship money when he was asked to recuse himself from the Liljeberg case. He admits filing bankruptcy under a false name, saying only it was his lawyer's idea. He admits not disclosing his pending income tax refund on the forms as required. He ad-

mits not disclosing his gambling losses on the forms as required. He admits not disclosing a bank account he used for gambling. And as to the Judge's false statements to the FBI and Senate, the defense's own expert testified that if the Judge had received kickbacks while on the State bench, and if he had a corrupt relationship with bail bondsmen, he would have understood that this must be disclosed in answer to the questions he was asked by the FBI and the Senate.

These were the facts the House considered in unanimously approving four articles of impeachment. The House determined that the corrupt conduct by Judge Porteous fell into four discrete schemes, one involving his corrupt relationship with Amato and Creeley, another pertaining to the Marcottes, a third reflecting his false filings in bankruptcy, and the final concerning his deception of the Senate and the FBI.

Notwithstanding the historic precedent of giving the House broad discretion in the drafting of articles of impeachment and the plain logic of this division, Judge Porteous complains that the articles contain allegations that, in counsel's words, are improperly "aggregated." The Senate has never ordered an article passed by the House to be divided up according to the accused's desires, or required multiple votes on an article, a proposal prohibited by the Senate's own rules.

Unlike his motions to dismiss articles I and II, this motion was heard and decided by the Senate Impeachment Trial Committee on the merits, which rejected it completely.

Judge Porteous claims that the structure of the Articles of Impeachment aggregates a series of disparate allegations. He argues further that the Senate should dismiss all of the articles in its pleadings or, in so many words, vote on each separate factual predicate claim within each article. Judge Porteous mischaracterizes the articles in this case, and misstates the impeachment precedent on this issue. There is no basis for granting the relief he seeks, and the motion should be denied.

First, as a factual matter, the articles simply do not contain a series of unrelated, discrete acts as Judge Porteous contends. Each article describes a course of conduct in pursuit of a unitary end, pursued through a combination of means. Article I describes Judge Porteous's improper conduct while presiding over the Liljeberg case, arising from his concealed corrupt financial relationships with attorneys Creeley and Amato; article II describes Judge Porteous's corrupt relationship with Louis and Lori Marcotte and provides the details of what he received from them and what he did for them; article III describes the numerous dishonest acts and false statements under oath by Judge Porteous to deprive his creditors and the bankruptcy court of the truth surrounding his financial circumstances; and article IV

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describes Judge Porteous's false statements during the confirmation process when he concealed his corrupt relationships with attorneys Creely and Amato and the Marcottes. Even though each of these separate schemes comprised discrete acts, each article describes a single coherent scheme.

Second, as such, each of the articles easily withstand scrutiny under long-settled Senate precedent. The Nixon Impeachment Committee ruled that Articles of Impeachment are properly framed if they give "fair notice of the contours of the charges against the judge and (2) contained an intelligible, essential accusation, thus providing a fair basis for conducting the evidentiary proceedings."

There is no reason for the Full Senate to set aside the analysis and decision of the Senate Impeachment Trial Committee in this case, which found the Nixon standard persuasive and consistent with the Constitution and ruled that "Each of the four Articles against Judge Porteous meets the Nixon standard." In reaching this conclusion, the committee summarized the articles, and stated: "Each Article provides Judge Porteous with fair notice of the contours of the charges against him and makes clear, intelligible allegations."

Each article contains a series of factual allegations comprising the charged "course of conduct" that constitutes that article. Although the requirements for how a count is charged in a criminal indictment do not apply in an impeachment, we think that Senator WHITEHOUSE—a former U.S. Attorney—got it right when he said during the proceedings:

Let's say you were looking at a case say involving a scheme and artifice to defraud, and a whole bunch of conduct is alleged in that particular scheme and artifice to defraud. The jury doesn't have to agree on every single piece of that having been done; they have to look at the evidence and conclude ("Yep, based on what we see, we do see a scheme and artifice to defraud in this particular case.")

Isn't that the case here, as well? Because the course of conduct [is] integrated enough [it] can fall within the general impeachment standard of high crime and misdemeanor?

That analysis hits the nail right on the head—each of the four articles describes integrated schemes, integrated courses of conduct. Looking at article I, for example, defense counsel argues in his brief that the recusal hearing alone should be three separate counts—one stating the recusal motion was improperly denied, another charging that during the recusal hearing he should have disclosed the kickbacks from Creely and Amato, and a third, that he made false and misleading statements during the same recusal hearing. One hearing—three articles. Had we charged it the way counsel suggests, is there any question in your mind that counsel wouldn't be here before you today arguing that the House improperly disaggregated one corrupt scheme to pile on three separate charges?

In fact, none of these articles constitutes what in the past has been occasionally referred to as an "omnibus" article—where articles involving discrete spheres of misconduct are joined in a single article. Had we drafted a fifth article, that set out his relationship with Amato and Creely, and the Marcottes, and the bankruptcy and the deception of the Senate and said that because of all these acts together he should be removed, that would be considered an omnibus article. The House chose not to do so, although we note that the House has frequently returned omnibus articles summarizing the prior counts, and the Senate has not only deemed them proper but repeatedly voted to convict on such omnibus articles.

Judge Porteous has suggested that the consideration of the articles as drafted is unfair or would lead to confusion. According to Judge Porteous, Senators would not really understand what they were voting on in voting to convict. This, however, is hardly a serious contention. In article I, there is no credible reason to believe that a Senator would not convict unless he or she were satisfied with the core factual theory set forth in that count, and the same as with articles II, III, or IV.

Counsel for Judge Porteous has argued that the cases of Judges Hastings and Archbald support his claim, pointing to the comments of some individual Senators. But as the Senate Impeachment Trial Committee in this case so correctly pointed out: "This, however, was not the adopted view in either instance as both judges were convicted on the aggregated articles." So in both the cases cited by counsel, the Senate voted to convict on the omnibus or aggregated articles.

Judge Porteous's arguments are no different, in substance, to those raised in the Hastings impeachment. In that case, there was a parliamentary inquiry as to whether, in order to find Judge Hastings guilty, a Senator had to find that he committed each of the four allegations in a given article. The President pro tempore of the Senate responded:

This is for each Senator to determine in his own mind and in his own conscience and in accordance with his oath that he will do impartial justice under the Constitution and law. It is the Chair's opinion, if the Senator in his own conscience and based on the facts as he understands them determines that, in any one of the paragraphs, Judge Alcee L. Hastings has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States, he should vote accordingly.

And so it is here. It certainly is not necessary for the Senate to proceed sentence by sentence or paragraph by paragraph, so long as you are able to find, based on the facts as you understand them, that Judge Porteous, by his conduct in the given article, has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States.

The alternate request of counsel, to require multiple votes on each article, was also rejected by the Senate Impeachment Trial Committee and should be rejected here. As the committee ruled: "The Impeachment Rules do not permit Judge Porteous's suggestion that the Senate vote separately on the individual impeachable allegations within each Article. Impeachment Rule XXIII states that an article of impeachment 'shall not be divisible for the purpose of voting thereon at any time during the trial.'"

Now, let me turn to Judge Porteous's motion to dismiss article I. Judge Porteous acknowledges in his written pleadings, that for the purpose of this motion all the facts alleged in article I should be accepted as true. Judge Porteous urges the Senate to dismiss article I on three grounds—first, that it charges a violation of title 18, U.S.C. section 1346, the mail and wire fraud statute, claiming that under the Supreme Court's decision in *Skilling*, an honest services claim cannot be made under that code section. Second, he argues that Judge Porteous could not have known that taking kickbacks, lying during a recusal hearing, or soliciting thousands in cash from an attorney with a case before him could constitute grounds for his impeachment. Most remarkably, he claims that he did nothing wrong and that taking secret cash from an attorney whose case is under submission in your courtroom is, at most, only an appearance problem. It is just such an argument which demonstrates his unfitness for the bench.

First, as to his "honest services" argument it is helpful to provide some background on what an honest services charge is in a criminal case. 18 U.S.C. Section 1346 and 7 are the wire and mail fraud statutes. Under those laws, a defendant in a criminal case can be charged with defrauding someone of money, property or honest services. Judge Porteous argues here that he has been charged with a violation of the mail and wire fraud statutes, and if this were a criminal case, he would seek to dismiss the charge on the basis that it did not adequately set out a crime under that statute. The problem with the Judge's argument is that he is not charged with mail or wire fraud under section 1346 or 7, this is not a criminal case, and even if it were, he would still lose under the very case he cites—for in *Skilling*, the Court found that you could be charged with honest services fraud in any case involving a kickback scheme.

It is plain from a reading of article I that the House has not charged, nor is it required to charge, that Porteous is guilty of mail or wire fraud in violation of title 18. The article I described by Judge Porteous's counsel bears little resemblance to the article that was actually charged in this case, which consists of six paragraphs that describe how Judge Porteous received kickbacks from attorneys Amato and Creely how he dishonestly presided

over the Liljeberg case by concealing these kickbacks and making intentionally misleading statements at the recusal hearing, and by secretly soliciting and accepting cash from Amato while the case was pending.

Article I, despite defense counsel's claim, is not patterned after the mail fraud or wire fraud statutes—or any other criminal statute—and it does not otherwise allege a "scheme or artifice to defraud," or any other language that would be necessary to charge a criminal "honest services" fraud offense. Article I is written in non-technical language and focuses on Judge Porteous's receipt of kickbacks and his acts of concealment of corrupt financial relationships in the course of presiding over a case. Article I concludes that Judge Porteous "brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge." Whether the conduct alleged in article I also violated criminal laws, or could have resulted in an indictable offense for "honest services fraud," simply has no bearing on any issue before the Senate, and no plausible reading of article I as actually drafted suggests that it intended to import Supreme Court interpretations of a Federal statute.

It is for the Senate to determine whether charged conduct demonstrates that the individual is not fit to be a judge. That determination does not turn on whether the conduct at issue constitutes a Federal criminal offense. Indeed, one of the first impeachments was of a judge for drunkenness, and, for most of this Nation's history, Federal judges have been impeached, and convicted, and removed pursuant to articles that have not alleged the commission of Federal criminal offenses. As the Senate committee in this case repeatedly pointed out, this is not a criminal case. Impeachments in this country, as opposed to the British example, are not punitive in nature and threaten the judge with no loss of liberty or jail time. They are designed to protect the institution from the ill effects of having a corrupt officer destroy the public trust in that institution.

Finally, if this were a criminal case, and he were charged with mail or wire fraud, and you were judges rather than Senators, and the judge stood to go to jail rather than lose his office, he would still lose under the very precedent he cites. Skilling, Skilling, the former CEO of Enron, was charged with mail and wire fraud on the theory that he deprived shareholders of truthful information about the value of the company. The Supreme Court held, as to these counts, that if Congress wanted the statute to apply this broadly, it would need to do a better job saying so, because the charges against Skilling didn't involve bribery or kickbacks. If the scheme did involve kickbacks, as alleged in article I, the Court said the

charges would be fine. As the Court stated: "A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under section 1346 on vagueness grounds."

Finally, Judge Porteous argues that article I should be dismissed because it charges only the appearance of impropriety, not actual wrongdoing, as if no judge can be expected to know that he cannot receive secret cash from an attorney with a pending case, or that he cannot receive kickbacks from attorneys after sending them cases. That is truly a remarkable assertion. Judges are on notice from the day they are sworn that they may be convicted and removed if they commit high crimes and misdemeanors—that is the constitutional standard to which judges must adhere, and Judge Porteous and every other judge ought to understand that it requires a very basic level of integrity.

When Judge Porteous—or any judge—is exposed as having accepted things of value from attorneys appearing before him and then ruling in favor of the client represented by those same attorneys, he damages the judicial system and brings the Federal courts into disrepute. This is especially so here, where Judge Porteous's ruling for his financial benefactors was reversed on the central issues in the litigation, in an opinion that excoriated the judge. Whether the House proved these facts is a matter you must decide when you deliberate on the case after closing arguments. The Senate report makes clear most of these facts are beyond dispute. But accepting the allegations in article I as true, as defense counsel concedes you must for the purpose of this motion, there is no question that they set out a chargeable high crime and misdemeanor. For these reasons, Judge Porteous's second motion must be denied. Let me now turn to his motion on article II.

Judge Porteous argues that article II must be dismissed on three grounds: First, because it alleges conduct both before and after his appointment to the Federal bench and dismissal is constitutionally required as shown by the Senate's precedent in Archbald. Second, because House experts testified that a judge could never be impeached on the basis of prior conduct. And finally, because the article only alleges Judge Porteous socialized with the wrong people.

Judge Porteous, in his moving papers, again concedes that the allegations in article II, for the purpose of this motion, must be accepted as true. Those allegations are, in summary, this: That Judge Porteous, while a State judge, began a corrupt relationship with the Marcottes in which the judge solicited and accepted numerous things of value, meals, trips, home repairs, car repairs for his personal use and benefit and in return, took official actions benefiting the Marcottes, setting bail in a way to maximize their

profits, expunging the convictions of Marcotte employees both before and after his confirmation for the Federal bench, and using the power and prestige of his office as a Federal judge in helping recruit other State judges to form the same corrupt relationship with the Marcottes.

As you can see, article II by its own terms charges conduct which occurred before confirmation to his Federal judgeship, after his confirmation but before he was sworn in, and after he was sworn in and while serving on the Federal bench. The conduct charged in article II, while he was a Federal judge is egregious, using the power of his office to help recruit other State judges to form the same corrupt relationship with the Marcottes that he had—a relationship these other judges would later go to jail for. We proved this at trial, but more than that, this conduct, for the purpose of this motion, and much as defense counsel may forget, must be accepted as true. Just as in article I, the Senate may convict on article II if it chooses solely on the basis of what Judge Porteous did as a Federal judge.

The only article that charges pre-Federal bench conduct alone, is article IV, which charges Judge Porteous with making false statements to the Senate and FBI during the confirmation process. Interestingly, although Judge Porteous takes other issue with article IV, he does challenge the constitutionality of the fact that only prior conduct is alleged in article IV. And in fact, as I will discuss in a moment, even defense counsel recognize that it is not only constitutional to impeach a judge on prior conduct in certain cases, but that it is inevitable as well.

The Constitution itself is silent on when a high crime of misdemeanor warranting impeachment must take place. The Constitution describes certain types of conduct for which impeachment is warranted, such as bribery or treason, but does not say when the misconduct must have been committed. Plainly, had the Framers wished to confine the time the conduct must have taken place, it would have been easy to do so. They could have provided that an officer could be removed for a high crime or misdemeanor committed while in that office. But they chose not to so limit the scope of impeachment, and for good reason.

The deliberations of the Framers who were focused on the impeachment clause make it clear that it was the institution they sought to protect from the destructive influence of an officer who violates the public trust and brings the institution into disrepute. Whether the high crime or misdemeanor occurs before or after appointment to a particular office, if the conduct of that official has brought the institution into ill repute, it stands to reason that the Framers intended that conduct to warrant impeachment. There is certainly no indication, that in a charge such as article II, which describes conduct before, during and after

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appointment, that anything in the text of the Constitution presents a grounds for dismissal.

The one precedent in which a judge was charged in a single count with both pre and post office conduct is the 1919 impeachment of Judge Robert W. Archbald. There were 13 Articles of Impeachment brought against Archbald. Six articles accused him of misconduct on the Commerce Court where he was then assigned at the time of his impeachment and trial; six accused him of misconduct on the district court—his prior judicial appointment. Article 13 set forth allegations that involved his conduct on both courts and is therefore directly analogous to both articles II in the case against Judge Porteous. And on this article, the Senate convicted Judge Archbald.

Because debate was closed during the floor vote in the Archbald impeachment, there was no formal debate or discussion about the Senate's jurisdiction to impeach over prior conduct. The Senators were not required to state their reasons for their votes, although some did. Senator Owen, for example, stated:

Whether these crimes be committed during the holding of a present office or a preceding office is immaterial if such crimes demonstrate the gross unfitness of such official to hold the great offices and dignities of the people.

Another Senator specifically noted that he was voting not guilty on all but one of the prior court counts because he felt the evidence did not support conviction on those counts, but that his vote should not be misinterpreted as suggesting that charging prior conduct was improper. In fact, five Senators did not feel the evidence was sufficient on any count, pre or post.

More than a quarter of the Senate was absent in the Archbald case, and it is impossible to determine what motivated the votes of every Senator in Archbald. We do know that of the 68 Senators who believed there was sufficient evidence to convict on at least one count, a full 34 of them expressed unequivocally that they believed a judge should be impeached on the basis of misconduct preceding their appointment to their current position. How do we know this? Because 32 of them said so, by voting to convict on purely prior conduct, and 2 others publicly stated that they would have done so, if the evidence of guilt were stronger. Only seven expressed the view advocated by Judge Porteous.

But one conclusion is beyond question: the Senate voted to convict Archbald on the one count that most closely resembles article II against Judge Porteous and alleged conduct both prior to and during his tenure in the current office.

Defense counsel argues that constitutional experts who testified before the House Impeachment Task Force took the position that prior conduct could not be considered by the Senate as a basis for impeachment. This is a rather

incredible claim, since each of the experts testified precisely to the contrary, that the timing of the misconduct was not a constitutional impediment or the standard, but rather the effect of retaining a corrupt official on the institution.

Distinguished constitutional scholars who testified before the House Impeachment Task Force were unequivocal in their views that the Constitution permits impeachment, conviction and removal of a Federal judge for pre-Federal bench conduct. They noted that the Constitution provides no limitation, and that the principles underlying the reasons for the impeachment process—protecting the integrity of the Federal judiciary—compel this conclusion.

Professor Michael Gerhardt explained in his written statement:

Say, for instance, that the offense was murder—it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a Federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process.

Professor Akhil Amar stated at the hearing:

Let's take bribery. Imagine now a person who bribes his way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can't immunize the bribery from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.

Moreover, defense counsel himself concedes in his written statement of the case to the full Senate that prior conduct can be an appropriate grounds for impeachment. In discussing a case where a judge might be indicted and convicted of a murder that he committed before appointment to the Federal bench—that was only discovered later—the defense conceded impeachment would be appropriate, writing: "There would be little controversy about removing a judge from office who was convicted of murder during his term of office, and the precedential value of such an action would be limited."

Nor has defense counsel taken the position that impeachment for prior conduct should be limited to cases of murder. The Senators from Illinois may recall the case of Judge Otto Kerner. He had been the Governor of Illinois before his appointment to the Seventh Circuit Court of Appeals. While on the court of appeals, he was indicted and convicted for accepting bribes while governor, long before he was put on the bench. In writing about the case of Otto Kerner, defense counsel not only asserted that Kerner could be impeached for the bribes he took as governor, but that his impeachment was inevitable. To quote Mr. Turley, "Judge Otto Kerner, Jr., of the United States Court of Appeals for

the Seventh Circuit, resigned before inevitable impeachment after he was convicted for conduct that preceded his service.

Let us assume that the statute of limitations had not barred prosecution of Judge Porteous on the kickbacks, or his corrupt scheme with the Marcottes, and like Judge Bodenheimer, he had been sent to jail based on that prior conduct. Would it be any less inevitable that he must also be impeached and removed from office?

Although Judge Porteous's counsel acknowledges the appropriateness of impeaching for prior conduct in murder, bribery, and other cases—indeed its inevitability—he evidently seeks to distinguish this case because Judge Porteous was not first convicted during a criminal trial. Of course, the Constitution does not require a criminal conviction prior to impeachment. The Framers didn't want to delegate to the Department of Justice the power to remove a judge, which would be the effect of saying it requires a conviction to remove someone on that basis. The language of the Constitution presumes, when it says that a prosecution may follow not precede impeachment, when it provides in article I, section 3 that a party convicted in an impeachment trial "shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to our criminal law."

In many prior impeachments, there has been no criminal trial and, in fact, in the Hastings case impeachment followed acquittal in a criminal case. So, plainly, the Constitution doesn't require a prior criminal trial or conviction to impeach, whether the conduct occurred or not.

Nonetheless, counsel argues it is unfair here, because a criminal trial would have more fully brought out the facts in the case, and provided a more detailed record. But this ignores the very full record in the fifth circuit proceeding, the depositions in this case, as well as the comprehensive trial before the Senate Committee. It is worth pointing out that during that trial, Judge Porteous has been represented not only by the very capable Mr. Turley, but at least 8 attorneys from the law firm of Bryan Cave. Moreover, this team of attorneys did not feel it was necessary to use the entire amount of time they were permitted to put on their case and simply rested. You would think, if counsel really felt that there was more to the case that needed to be illuminated, it would have used the full opportunity it was given to present witnesses.

Finally, there is a policy argument advanced by Judge Porteous, that if the Senate convicts him on the basis of conduct that occurred in part before he was on the federal bench, even though it is intertwined with his appointment and service on the bench, it will open the impeachment process to abuse by partisan interests. These partisan interests, upset with a judge's decision or

judicial philosophy, might conjure up some prior misconduct and use it to urge the impeachment of a judge.

It is true that the power to impeach a judge based on prior conduct could be abused, like any other power. If partisan interests wish to urge the impeachment of a judge whose decisions they don't like, they could just as well conjure up misconduct which occurred while the judge was on the bench, as before. The protection against that abuse rests in two places: it rests with the House to reject any impeachment charge which is a mere subterfuge for attacking a judge's decision of philosophy. And it rests here, in this chamber, where you must never remove a judge for partisan reason and erode independence of the judiciary.

Importantly, there is no allegation, no suggestion, not by defense counsel or anyone else, that this is the case with Judge Porteous. There is no claim that this impeachment is based on some illicit partisan interest.

There is a more serious consequence, however, of concluding that judges cannot be impeached for prior conduct, that confirmation is a safe harbor against all removal for all prior offenses be they undiscovered at the time. And that is the destruction to the public trust that would accompany a constitutional or policy determination that a judge who has so disgraced his office, by committing a high crime or misdemeanor, though they sit in jail, must continue to be called "judge," must continue to be paid their full salary for life, and rest beyond the reach of this body.

Whether the Senate concludes that prior conduct alone should be the basis of an impeachment, article II alleges impeachable conduct that occurred not just before but while he was a Federal judge, and for the purpose of this motion to dismiss those allegations are accepted as true, this final motion must be denied.

For these reasons, Judge Porteous's motion to dismiss should be denied. I would be happy to respond to any questions.

The PRESIDENT pro tempore. Thank you very much, Mr. Turley.

Mr. TURLEY. Mr. President, I thank you for allowing me a chance to rebut some of what my esteemed colleague told you today.

I have to begin by making an observation, and perhaps you noticed what happened. We were told we were going to speak to you this morning about constitutional issues. The first thing the House did was start to go through these specific allegations against Judge Porteous, the merits of the case. Maybe I am a bit sensitive, but the way I heard it made it sound as if, if you don't like this guy, don't like what the merits say, it should influence how you read the Constitution.

As many of you know—and I believe all of you know—constitutional interpretations don't depend on how you feel about someone. It doesn't depend

on how you feel about a case. It depends on how you read the Constitution. So my opposing counsel took you up 10,000 feet, had you look down at these articles, and said: Look at all the bad things we say this guy did. He is asking you to interpret the Constitution.

He is not asking you to interpret the Constitution. You are required to do that. That is your job. It doesn't matter if he was guilty of all these things. He is not guilty, and we will make that argument. That doesn't have any bearing on how you interpret these clauses.

I also have to object to the use by the House of testimony by law professors in the House proceedings. As some of you know, the House of Representatives submitted a post-trial brief that contained statements from law professors on the merits of impeachment basically telling you what you should do in this case. The committee and Chairman McCaskill, correctly in our view, ruled that is not appropriate. It would not be allowed in a court of law. So the House was told to redo their brief and resubmit it. The House then proceeded to introduce that very same information in today's presentation. I simply have to object.

I also have to object that, when they did so, the House didn't actually quote the law professors fully on the issue of pre-Federal conduct. Professor Omar actually dismissed it as just all that State stuff. Professor Gerhardt said nobody should be convicted of pre-Federal conduct, which completely contradicts what the House has said. The reason we objected to the inclusion of these professors—and if I could testify, I think my testimony should have been excluded—is that it is your decision. Judges don't hear experts on the merits of decisions.

I wish to actually address the constitutional issue. I will, however, take the liberty to deal with one factual assertion that the House has made because it was in direct response to something I had said. I told the Members of this body that Judge Porteous agreed to waive all the statutes of limitations that he was asked to waive. He did not think it was appropriate to stand behind the statutes of limitations. The House proceeded to suggest that he had not, that there were some statutes of limitations that he did not waive. The record will show, if you look at some of the material we have already submitted to you in our post-trial brief, that, in fact, Judge Porteous agreed to every waiver of the statutes of limitations put in front of him. He did not refuse any waiver of a statute of limitation.

When they said to him: We want the ability to charge you, even if you could block charges as to limitations, he said: So be it. I am a Federal judge. If you find crimes, charge me. Just make sure we understand this, DOJ began its investigation in the mid to late nineties. The statute of limitations on the Articles of Impeachment ran 5 to 10

years. So no statute of limitations had passed for anything he did as a Federal judge, which is what we are discussing today.

But putting that aside, the prosecutors had a problem with the statute of limitations with regard to Judge Bodenheimer, and it didn't stop them from charging. All they did was charge conspiracy and said there were ongoing acts, so the statute of limitations had to run. It wasn't even a speed bump on their way to charge Judge Bodenheimer.

Specifically, Judge Porteous waived, among others, the right to charge him with bankruptcy fraud, bribery, illegal gratuities, criminal conflict of interest, criminal contempt, false statements, honest services or wire fraud. Those were requested of him and that is what he signed. I think it would have been unfair to suggest somehow he hasn't done that.

The Senate has heard from the House that they were simply showing considerable restraint and deference to this body by aggregating counts. By aggregating counts, my esteemed colleague on the other side said that, after all, you wouldn't want us to break those up into what he calls unnatural pieces. I wish to talk about those unnatural pieces in a second. I cannot allow in the past when the House said: Do any of you doubt that if we had disaggregated, the defense would not be here today complaining that they were facing individual articles on individual claims? I will simply represent to you, if you look at the record, no one—no criminal defense attorney in history has objected to having specific defined charges. But, more important, if you look at the history of this body, defense attorneys and Members of this body have objected to the aggregation that is being used in these articles.

Indeed, the House of Representatives, in Hastings, separated specific false statements so you could make a decision whether a judge gave a false statement, a specific one, before you reached your decision to remove them. Those weren't unnatural pieces. Those were stand-alone charges. Those would be in an indictment as separate counts.

My esteemed colleague also has objected that we are asking you to set up a situation where some judge is going to sit in a prison, and I believe the expression was "force people to call him judge." Once again, just as the response was to go into the merits instead of constitutional issues, clearly, the light is better by directing your attention to a mythical judge sitting in a Federal prison making people call him judge. I will argue that case if you want me to. But I have to tell you, I lose. The judge cannot serve in office in good behavior in prison. I don't know of anyone who is credible who has said at any time that a judge could insist on being treated as a judge in that instance. I don't know about being called a judge, but to be a judge, that would not be possible, in our view.

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I wish to address a couple points about aggregation. The House obviously walked back from Mr. SCHIFF's statement to the committee that you have the authority to do preliminary votes. That was very clear. At the time, I commended Mr. SCHIFF for that position. I have no idea what the authority is for saying that you cannot organize your deliberations any way you want. What you are required to do under rule XXIII is have a final vote on the article, and it cannot be divided. We suggest you do that. All we are proposing is that the Senate know what it is voting on, to look at the individual issues presented in these articles.

Furthermore, the House said this was already rejected by the committee. We were given a fair hearing by the committee in the pretrial motion, and I thank the chair and I thank the vice chair for that opportunity. If you look at the record, what occurred was that some Senators agreed that they had difficulties with the aggregation issue. And Mr. SCHIFF stood up and said: You don't have to decide it because you have the authority to do this. You can go ahead and make determinations on individual issues.

Some Senators raised this question, and it was ultimately not granted at that time. Instead, we have submitted it to you.

I will only submit to you that it makes no sense, honestly, for the Framers to go through the trouble of establishing a two-thirds vote requirement but allow the House to simply aggregate charges that virtually guarantees that, in many cases, two-thirds of you will not agree on the reason you are removing a Federal judge. That can't possibly be what the Framers intended because they weren't stupid men. They were very careful and deliberate men, and they set up a standard that was exacting.

The House also says: In addition to our being able to do this—to aggregate—because it would be so exhaustive to turn one article into three, even though they did that in Hastings and prior impeachment cases—that, by the way, these aren't individual claims; they are actually all related. So they do not have to be separate because the House says it wouldn't make any sense; you wouldn't understand it.

I direct your attention to article II. In article II, Judge Porteous is accused of using his power and prestige of Federal office to assist bail bondsmen in making relationships and acting corruptly. All right, I understand that. I don't think it is an impeachable offense, seeing that "corruption" is the exact word Madison rejected. But still, that is a stand-alone issue. You can make a decision if that happened. I will simply say—because I will not argue the merits at this time; I was told to argue the motions—that we have very strong disagreements with the factual representations made by the House. But that is one of the claims in article II. In the same article, he is charged

with knowing that Louis Marcotte, a bail bondsman from Gretna, LA, lied to the FBI in an interview.

Those are two very distinct charges. One is saying that he essentially procured someone to testify or make statements falsely, and one is that he used his office to assist in a corrupt relationship. As you can imagine, if you were standing here in my place, could you defend against both those points with the same argument? I don't think so. Those two points raise two different issues. They actually refer to two different issues in the Criminal Code.

What I am asking from you, with all due respect, is to give this judge the process you would want for yourself if, God forbid, you were accused of anything like what the Judge is accused of. Would it be fair, if you stood here accused, to have the House say: You know what, we don't have to separate allegations; we can just pile them all together because, after all, they have one thing in common: Judge Porteous. That is not enough.

We have submitted a motion that showed no discernible connection between some of these aggregated claims, and we will leave it to that because we have limited time, and I know the Members of this body have somewhere to go, and I will try to wrap up as quickly as possible. I would simply note on the Skilling issue that if you listen carefully, the House, on Skilling, said that it is not a problem after Skilling because you can read in a kickback scheme into these articles. If you want to, you could read these facts and say: Well, that is a kickback, so Skilling applies.

Isn't the danger to that argument obvious? The Senate would be changing an Article of Impeachment. That is what they are being invited to do. The House of Representatives has the sole authority and obligation to define what it is that a judge should be removed for. It is not just their power, it is their obligation. Now the House says: Look, we are given great discretion to give you whatever we want. No one tells us what has to be in an article. We can do it because we have the authority to do it. That is true. And the Constitution gives you great authority to turn down an article from the House of Representatives. That is what you can do.

So this idea that the House would produce four articles that don't even mention bribery or kickbacks but that you can read it into those articles is unbelievably dangerous. It means you could get any article and transform it here on the floor of the Senate. You could remove someone for something the House Members did not agree should be submitted to you. Isn't that danger obvious?

The House had the opportunity to state that there was a bribe or a kickback. Bribery is in the standard. It was used by the Framers. They rejected corruption, but they put bribery in. So the question is, Are you allowed to do

a do-over here on the floor of the Senate and simply ask the Members of the Senate to make the article fit like it is close enough for jazz? That is not the standard under the Constitution.

Now, the House says the Constitution is silent on when conduct has to occur in order for it to be the basis for the removal of a Federal judge. In fact, I thought I heard the House say that the Framers chose not to put in a statement in the Constitution when it occurred. Like many in this room, I have spent a lot of time with those debates—probably more than I should. I don't remember ever seeing that. My understanding is the Framers never addressed this issue, but they did address it in the Constitution. They just didn't put it in the impeachment clause. But when they defined life tenure, they said you have life tenure during good behavior. During good behavior in what? There wasn't good behavior in life. They said good behavior in office. It was a reference to the office that they held because they wanted to make sure people would not abuse their Federal office.

The life tenure guarantee under article III of the Constitution was to guarantee an independent judiciary by saying that you could not be denied life tenure as long as you served with good behavior in that office. What the House would have you believe is that the Framers would allow you—even though it refers to good behavior in office—to remove a judge for anything they did in life. Once again, does that track with what you know about article III? Does that make sense in terms of the only seven judges who were removed by this body; that all the time, it turns out that for 206 years Congress could have removed someone for anything they did in life?

Now, the House says you shouldn't be scared by the implications of all of this; that if you allow pre-Federal conduct, if you allow anything done in life to be the basis of removal of a Federal judge, don't be concerned about abuse. God knows Congress would never abuse any authority under the Constitution. And basically the argument was, trust us, we are the House. That is not what the Framers said in the Constitution. They didn't say to trust them because of the House.

And yes, you are here. The House said: Don't worry, you are here. So even if we abuse this, it has to go through you. Now, that is true. God knows this body has stopped a lot of impeachments. It has only agreed to seven removals. But is that the constitutional standard, that the House can go ahead and just impeach anyone for anything they did in life and seek the removal and hope you correct their actions?

The PRESIDENT pro tempore. The time has expired.

Mr. TURLEY. Thank you, Mr. President. And thank you, Members of Congress—Senate.

The PRESIDENT pro tempore. The Chair has received two questions for

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both sides, one from Senator DURBIN and the other from Senator LEAHY.

The clerk will report.

The legislative clerk read as follows: Senator Durbin's question to both sides: What is the standard of proof for the movant or petitioner in impeachment proceedings such as the extant case?

The PRESIDENT pro tempore. Do you wish to respond, Mr. Turley?

Mr. TURLEY. Senator DURBIN, the standard which we will be addressing when we get to the merits of the case has been subject to considerable historical debate. I will give what I believe is the weight of that historical record.

It is true that the Constitution does not enunciate a specific standard in terms of a burden of proof. We do not agree with the House that they refer to high crimes and misdemeanors as a standard. That is not a standard of proof; that is the definition of a removable offense. There is a difference.

So what we would suggest is that the Senate can look at a known standard, such as beyond a reasonable doubt. Beyond a reasonable doubt, of course, is the standard for a criminal case. The Constitution is written in criminal terms of high crimes and misdemeanors. That is one of the reasons why historically you have had these articles crafted closely to the Criminal Code. In fact, many impeachments actually took directly from a prior indictment and made the indictable counts the Articles of Impeachment.

The House has argued that standard is not necessary and too high. Well, we would submit to you—and we will certainly argue this when we get to the merits—that in the House recently, when they held a Member up for censure, they had a clear and convincing standard, that you must at least be satisfied with clear and convincing evidence. In my view, as an academic, it must be somewhere between clear and convincing and beyond a reasonable doubt.

What is more clear, Senator, is what it is not; that is, if you read the impeachment clauses, the clear message is that you can't just take facts that are in equipoise—allegations supported by one witness and denied by another—and just choose between them; that the facts have to, in your mind, go beyond a simple disagreement and be established, in our view, at a minimum by clear and convincing evidence.

The PRESIDENT pro tempore. Representative SCHIFF.

Mr. Manager SCHIFF. Mr. President, Senators, the Senate has considered and rejected the adoption of any particular standard, such as beyond a reasonable doubt. What the Senate has determined in the past in these cases is that, essentially, each Senator must decide for themselves, are they sufficiently satisfied that the House has met its burden of proof, are they convinced of the truthfulness of the allegations and that they rise to a level of high crimes and misdemeanors.

It is a decision where—and we can get into precise language the Senate

has used in the past, but the Presiding Officer has instructed each Senator to look to their own conscience, to look to their own conviction, to be assured they believe that the judge in this case has committed the acts the House has alleged. So it is an individual determination, and the Senate has always rejected adopting a specific Criminal Code-based standard, such as beyond a reasonable doubt or a civil standard of convincing or clear and convincing proof because it is an individual Senator's decision.

It also reflects the fact that, as the Framers articulated, this is a political process—not political in the partisan sense but political in that it is not a criminal process. It is not going to deprive someone of their liberty. What it is designed to do is to protect the institution.

So I think the question for each Senator is, Has the House sufficiently proved the case that, in the view of each Senator, to protect the institution, there must be a removal from office? So it is an individual determination.

The PRESIDENT pro tempore. Thank you very much.

And now will the clerk read the question from Senator LEAHY.

The assistant legislative clerk read as follows:

Senator Leahy's question to both sides: The Senate Judiciary Committee requires a sworn statement as part of a detailed questionnaire by a nominee. Until this questionnaire is filed, neither the Judiciary Committee nor the Senate votes to advise and consent to the nomination. Would not perjury on that questionnaire during the confirmation process be an impeachable offense?

The PRESIDENT pro tempore. Professor Turley.

Mr. TURLEY. Thank you, Mr. President. Thank you, Senator LEAHY.

In my view, yes, that is if you commit perjury in the course of confirmation, that would be basis for removal. In fact, I believe Mr. SCHIFF made reference to perjurious statements by Judge Porteous. We will be addressing that because that is not charged.

What would have to be done is the House would have to accuse someone of perjury as in the Hastings case and have perjurious statements, and then I could stand here and tell you why there is no intent to commit perjury or why the statements were, in fact, true.

While Mr. SCHIFF referred to perjury, once again, perjury is not one of the Articles of Impeachment. And what I would caution—even though it can be, I would again caution this should not be an ad hoc process by which you can graft on actual criminal claims by implying them in language issued by the House.

The PRESIDENT pro tempore. Congressman SCHIFF.

Mr. Manager SCHIFF. Thank you, Mr. President, Senators. This essentially is what article IV is about which charges Judge Porteous with making false statements to the FBI and to the Senate during his confirmation process,

and the answer is yes, absolutely. But I think what is very telling here is that counsel has conceded that, yes, if someone perjures themselves in the confirmation process they can and should be impeached but by definition that is conduct which has occurred prior to their assumption of Federal office. If someone can never be impeached on the basis of prior conduct, his answer should have been no, but plainly counsel recognizes there are circumstances where impeachment is not only appropriate but inevitable and essential. And where someone lies to get the very office that they are confirmed to, to deprive him of that office, to deprive him of the ill-gotten gain of that deception I think is not only constitutional but essential to uphold the office as well as to uphold the confirmation process itself.

The PRESIDENT pro tempore. Thank you very much. That concludes the argument on the motions.

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Murray	Shaheen	Vitter
Nelson (NE)	Shelby	Voinovich
Nelson (FL)	Snowe	Warner
Pryor	Specter	Webb
Reed	Stabenow	Whitehouse
Reid	Udall (CO)	Wyden

Mr. REID addressed the Chair.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. REID. Mr. President, is a quorum present?

The PRESIDENT pro tempore. A quorum is present.

The Senate will resume consideration of the Articles of Impeachment against Judge G. Thomas Porteous, Jr.

The Chair understands that final arguments for the House on the Articles of Impeachment will be presented by Representative SCHIFF and Representative GOODLATTE. Mr. SCHIFF has asked to speak first. Mr. SCHIFF, do you wish to reserve time for closing, and, if so, how much time?

Mr. Manager SCHIFF. Mr. President, if it is permitted, after I make some brief introductory remarks, I will turn it over to my colleague, Mr. GOODLATTE, to speak. When he is finished speaking, we would like to reserve the balance of our time unless we are required to set that up in advance.

The PRESIDENT pro tempore. You may proceed.

Mr. Manager SCHIFF. Mr. President and Members of the Senate, this is a case about a State court judge from Gretna, LA, who had a gambling problem and a drinking problem, and as a result of both of those problems also had serious financial problems. He was constantly short of money.

This judge entered into a corrupt scheme with lawyers and bail bondsmen who could help him lead a lifestyle he could not otherwise afford. He sent the lawyers cases. They kicked back money from those cases to the judge, and they paid for many of his meals, his liquor, his parties, even some of his son's expenses.

He set bonds for the bail bondsmen at the amounts that would maximize their profits. He expunged the convictions of their employees, and they also paid for many of his meals, his trips, his home repairs, his car repairs, and lavish gifts.

The White House was not aware of this corrupt activity and nominated the judge to the Federal bench. The judge misled the Senate about his background, concealed the kickbacks and graft, waited until after his confirmation hearing but before he was sworn in to expunge the conviction of another bail bond employee, and falsely told the Senate that there was nothing in his background that would adversely affect his confirmation.

Unaware of what the judge had been engaged in, he was confirmed. The very reason why the information sought by the Senate was so material—whether he had a drinking problem; whether he had a gambling problem; whether he lived beyond his means; whether he engaged in conduct that would make

him the subject of compromise or coercion—was to prevent the damage to the institution of the judiciary that would be caused by putting a corrupt man on the bench.

What happened when the judge took the Federal bench was all but predictable: The corruption continued. The judge declares bankruptcy; he files with a false name and signs under penalty of perjury; he hides assets; falsely states his income; secretly takes out a new credit card; violates the bankruptcy court order by incurring new debt; he files false judicial financial disclosures stating that he has no more than \$30,000 worth of credit card debt when he owes over \$100,000 on his credit cards; and, most pernicious to the interests of his creditors, he keeps on gambling.

The judge is assigned a complex case and a trial that has been years in the making, pitting a hospital against a pharmacy, and worth many tens of millions of dollars. Six weeks before trial, one of the lawyers who had been paying him kickbacks in the State court is brought in at the last minute to represent the pharmacy.

The hospital smells a rat. They do not know about the kickbacks, but they are suspicious about why an attorney with no experience in the case or complex bankruptcy litigation would be brought in. So they ask around, and they do not like what they hear. They ask the judge to recuse himself and he refuses, falsely representing that he never received money from the attorneys but once, and even that was only a campaign contribution that went to all of the judges of that parish.

The case goes to trial, and is taken under submission by the judge. While he is considering how to rule, he goes fishing with the lawyer who paid him the kickbacks and hits him up for \$2,000 more in cash. The two partners at the law firm put the cash in an envelope, and the judge sends his secretary to pick it up. At the law firm, the judge's secretary asks: What is in the envelope? The lawyers' secretary rolls her eyes. "Never mind," the judge's secretary says. "I don't want to know."

The relationship with the bail bondsmen is not over either. He can no longer set bonds for them, but he can help them recruit other judges who will step into his shoes by vouching for their character, by bringing them together, and he does. And now we are here.

Everyone around the judge has fallen. The bondsmen have gone to jail. The other State judges he helped recruit have also gone to jail. The lawyers who gave him the cash have lost their licenses and given up their practices. Most of all, the institution itself has suffered greatly. Litigants and the public in New Orleans wonder, in seeing the example of this judge, whether they too must pay a judge in cash and under the table, do the home or car repairs or other favors for the judge to

RECESS

The PRESIDENT pro tempore. The Senate stands in recess until 2:30 p.m.

Thereupon, the Senate, at 12:49 p.m., recessed until 2:30 p.m. and reassembled when called to order by the Presiding Officer (Mr. BEGICH).

IMPEACHMENT OF JUDGE G. THOMAS PORTEOUS, JR.—Continued

Mr. DURBIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 7]

Akaka	Coburn	Hatch
Alexander	Cochran	Inouye
Barnes	Collins	Isakson
Begich	Crapo	Johanns
Bennet	Dorgan	Klobuchar
Bennett	Durbin	Kyl
Bingaman	Enzi	Leahy
Bond	Feingold	Levin
Brown (OH)	Franken	Lugar
Burr	Grassley	McCaill
Cantwell	Gregg	McCaskill
Cardin	Hagan	Merkley

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win their case or have their conviction expunged.

Only the judge remains defiant, claiming his problems are no more than the appearance of impropriety, not actual wrongdoing. He retains his office, his title, his full salary, though he hears no cases and has not for years and, if he can just eke it out a little longer, a full retirement. The judge is a gambler, and he is betting he can beat the system just one more time.

In a moment, I will turn it over to my colleague, BOB GOODLATTE, to give a detailed presentation that what the House proved at trial were high crimes and misdemeanors committed by Judge G. Thomas Porteous. The remarkable thing about this case is that most of the pertinent facts are not in dispute. As the neutral, factual report prepared by the Senate Impeachment Trial Committee demonstrates, the evidence on most of the salient points was uncontested.

At the same time, the report is not a substitute for hearing from the witnesses themselves. Because that is not possible for the entire Senate, you are hearing from the Senators who did. The Senate Impeachment committee of 12 conducted a remarkable trial, weighed the credibility of every witness, ruled on every objection, heard every argument, and they will be a great resource to you in your deliberations.

To give but one example, it is uncontested that Judge Porteous solicited and received \$2,000 in cash secretly from an attorney and his partner while that attorney's case was under submission. Judge Porteous himself admits this before the Fifth Circuit. The judge called it a loan that he never paid back. But his counsel has taken to calling it a wedding gift, as if it were a piece of China from the Pottery Barn. Significantly, no one other than defense counsel has ever called this cash a wedding gift—not Amato and Creely, who paid it, not the secretary who delivered it, and not even the judge himself. This is at best defense counsel at his most creative. The 12 Senators who heard the testimony are in the best position to refute those characterizations which are so at odds with the evidence.

One last example before I turn it over to Mr. GOODLATTE. The defense has suggested many times during prior proceedings—and may today—that Judge Porteous has been impeached for nothing more serious than having lunch with attorneys or bail bondsmen. This was represented to the committee of 12 Senators after the pretrial deposition of Bob Creely, at which only Senator JOHANNES was present. But because Senator JOHANNES had heard the testimony, he was able to inform the other Senators of what Creely had really said. As JOHANNES admonished the defense:

I sat through the Creely deposition, and to suggest that this was about a purchased lunch is really, in my personal opinion, very misleading.

He later went on to say:

Again, I will emphasize, please don't try to convince my colleagues that the Creely deposition was just about a free lunch. It was not, and I can cite what I heard that day.

The 12 Senators who heard these witnesses can cite what they heard during that trial, and they will be a tremendous resource.

I would now like to introduce Mr. GOODLATTE of Virginia for a detailed presentation of the evidence the House presented. When he concludes, we will reserve the remainder of our time for rebuttal argument.

The PRESIDENT pro tempore. The Chair recognizes Representative GOODLATTE.

Mr. Manager GOODLATTE. Thank you, Mr. SCHIFF.

Mr. President, let me turn to what the evidence showed.

By way of background, in the early 1970s, Judge Porteous practiced law as a partner with Jacob Amato. Robert Creely was an associate who worked for them. Amato and Creely ultimately split off and formed their own law firm as equal partners. They each remained friends with Judge Porteous.

In 1984, Judge Porteous was elected judge of the 24th Judicial District Court in Jefferson Parish, LA, with its courthouse in Gretna, outside New Orleans. He served as a State judge from August 1984 through October 28, 1994, when he was sworn in as a U.S. district judge for the Eastern District of Louisiana.

Starting with article I, let me first describe what the evidence established concerning Judge Porteous's "curatorship" kickback scheme with Creely and Amato.

While he was a State court judge, Judge Porteous started to ask Creely for money. At first, he asked for small amounts—\$50 or \$100—money that Creely had in his wallet, which Creely would give him. At some point in the mid to late 1980s, Judge Porteous began to request more significant sums from Creely, amounts in the range of \$500 or \$1,000. Creely resisted giving Judge Porteous that sort of money. As Creely testified:

I did tell him I was tired of giving him cash. . . . I felt put upon that he continued to ask—I thought it was an imposition on our friendship. . . . I told him a couple of times ["I'm tired of giving you money. I'm tired of you asking for money."]

Judge Porteous needed cash, and Creely would not give it to him. So what did Judge Porteous do? The evidence demonstrated that Judge Porteous came up with what was a kickback scheme. Judge Porteous used the power of his judicial office to assign Creely "curatorships" and then requested and received from Creely and his partner Amato a portion of the fees received by their law firm for handling those cases. Over time, Judge Porteous received approximately \$20,000 from Creely and Amato as a result of this arrangement.

Let me show you what one of these orders looks like. As you see here—Mr.

President, let me just say that I know it is difficult for some of the Senators to see these exhibits. At the conclusion of the closing arguments, we will leave all of these exhibits for the Senators to examine, if that is appropriate with the Senate.

As you see, here is an order signed by Judge Porteous assigning Robert Creely to be the curator for a missing party in a civil case.

Creely and his law firm received a fixed fee—\$200—for handling each of these matters, and it was from those fees that Judge Porteous sought the cash from Creely and Amato. This corrupt scheme went on for years.

The proof of this series of events is evidenced by the interwoven and consistent testimony of Creely, Amato, and Judge Porteous himself in his testimony under oath before a special committee of the Fifth Circuit. It is also corroborated by the court records.

First, Creely testified that after Judge Porteous started assigning the curatorships, Judge Porteous then started calling over to his office and saying: "Look, I've been sending you curators, you know, can you give me the money for the curators?" Creely testified that even though he previously had resisted giving Judge Porteous cash, he now would give him cash in response to Judge Porteous's demand because it "wasn't costing [him] anything." It did not cost Creely anything because the money Creely gave Judge Porteous came from the curatorship fees.

Amato—who split the payments to Judge Porteous with Creely 50-50—corroborated Creely's account of events. Amato testified that Creely informed him "that the judge was sending curator cases to him and that he would, in turn, give money to the judge." Amato agreed to go along with the arrangement but told Creely that "it was going to turn out bad," which it clearly has. Amato testified he knew the curatorship scheme was wrong but he was not "strong enough" to say no to what he understood to be a classic kickback arrangement.

Creely and Amato provided Judge Porteous cash every few months in response to Judge Porteous's requests. They gave him cash, as opposed to checks drawn on the firm's accounts. According to Amato's testimony, this was "to avoid any kind of paper trail."

As Creely testified, they gave him cash because "that's what Judge Porteous wanted." In most instances, Creely gave the cash to Judge Porteous; however, both Amato and Creely testified that on occasion Amato personally gave Judge Porteous the cash as well.

Judge Porteous confirmed in his testimony under oath before the Fifth Circuit the essential aspects of this scheme. Judge Porteous admitted that, one, he received cash from Creely; two, at some point in time, Creely expressed his displeasure with giving Judge Porteous cash; three, thereafter, Judge Porteous started assigning Creely curatorships; and four, that Judge

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Porteous's receipt of cash from Creely and Amato followed his assigning Creely curatorships.

First, Judge Porteous admitted he received cash from Creely and Amato.

Question. When did you first start getting cash from Messrs. Amato, Creely, or their law firm?

Answer. Probably when I was on the state bench.

Question. And that practice continued into 1994, when you became a federal judge, did it not?

Answer. I believe that's correct.

Judge Porteous confirmed that there came a time when Creely expressed resistance to giving Judge Porteous money before the curatorships started.

Question. Do you recall Mr. Creely refusing to pay you money before the curatorships started?

Answer. He may have said I needed to get my finances under control, yeah.

Judge Porteous admitted that his receipt of cash from Creely and Amato "occasionally" followed his assignment of curatorships to Creely. Although Judge Porteous refused to label the arrangement as a "kickback," he accepted the description of the arrangement that he had with Creely and Amato as one where he gave "Creely and Amato . . . curatorships and [was] getting cash back."

What about the court records?

During its investigation, the House located close to 200 orders signed by Judge Porteous assigning Creely "curatorships" between approximately 1988 and 1994. All of these orders are in evidence. These curatorships generated fees of nearly \$40,000 to the firm. Both Creely and Amato have testified consistently that they gave Judge Porteous about 50 percent of the proceeds of the curatorship fees or approximately \$20,000 in total.

For his part, Judge Porteous testified at the Fifth Circuit that he had "no earthly idea" how much Creely and Amato gave him, though he did not deny the total could have been more than \$10,000. Judge Porteous testified as follows:

Question. Judge Porteous, over the years, how much cash have you received from Jake Amato and Bob Creely or their law firm?

Answer. I have no earthly idea.

Question. It could have been \$10,000 or more. Isn't that right?

Answer. Again, you're asking me to speculate. I have no idea is all I can tell you.

On October 28, 1994, Judge Porteous was sworn in as a Federal district judge. Judge Porteous was no longer in a position to assign curatorships to Creely and Amato, and he stopped asking them for cash—at least for the time being. The fact that Judge Porteous's requests for cash from Creely and Amato temporarily came to an end at the same time he stopped assigning them curatorships constitutes additional powerful evidence that those two actions were inextricably connected and that the cash payments from Amato and Creely to Judge Porteous were not merely gifts from

the two men separate and apart from the curatorships.

Let me provide you with a little bit more flavor as to Judge Porteous's relationship with Amato and Creely. Although I have focused on the cash and curatorships, I should stress that Judge Porteous depended on the two men to provide for his entertainment and support his lifestyle in other major respects.

For example, while Judge Porteous was a State judge, both Amato and Creely frequently took Judge Porteous to lunch at expensive restaurants. Amato testified that he took Judge Porteous to lunch "a couple of times a month," amounting to "potentially hundreds of lunches," and that Judge Porteous paid only two or three times out of a hundred. At these lunches, Amato testified he typically paid for "at least two" vodka drinks for Judge Porteous. Similarly, Creely also took Judge Porteous to lunch approximately twice a month. Creely testified that when he and Judge Porteous went to lunch, either Creely paid or someone else paid but "[n]ot Judge Porteous."

In addition, Amato and Creely hosted Judge Porteous on a variety of hunting and fishing trips and arranged those trips, some of which involved air travel to Mexico, so that Judge Porteous never paid.

They gave him cash on at least one other occasion at his request. In the summer of 1994, when Judge Porteous's son Timothy was in Washington, DC, for an "externship," Judge Porteous had his secretary, Rhonda Danos, solicit and receive money from Creely and Amato to "sponsor" Timothy's position and pay for his expenses. This is all in the record.

Now let me turn to Judge Porteous's relationship with Amato and Creely after he became a Federal judge.

On January 16, 1996, Judge Porteous, now a Federal judge, was assigned a complicated civil action, *Lifemark Hospitals v. Liljeberg Enterprises*. The Liljeberg case involved a hospital—Lifemark—and a pharmacy—Liljeberg—and involved bankruptcy law, real estate law, and contract law. The matter was particularly contentious with tens of millions of dollars at stake.

The case was set for a nonjury trial before Judge Porteous in early November 1996. He was to be the trier of law and fact. In mid-September, just 6 weeks prior to the scheduled trial date, the Liljebergs filed a motion to enter the appearances of Amato and Leonard Levenson—another of Judge Porteous's friends—as their attorneys.

Amato was hired on a contingent fee basis, which meant his law firm would receive a percentage of any award. Amato estimated that if the Liljebergs prevailed in the case, he and his firm would have received between \$500,000 and \$1 million. If the Liljebergs lost, he would receive nothing.

Lifemark's lead counsel, Joe Mole, was alarmed when Amato was hired by

the Liljebergs on the eve of the trial. Even Amato testified: "I am sure my relationship with Judge Porteous had something to do with it."

Mole was concerned that Judge Porteous would figure out some way of giving an award to the Liljebergs to benefit Amato. Mole feared that with Amato on the other side, he would not receive a fair trial. So Mole did the only thing he could do under the circumstances. He filed a motion asking Judge Porteous to recuse himself, which essentially requested that Judge Porteous have the case assigned to another judge. Mole drafted the motion based on his limited understanding of the facts, alleging in substance only "that there was a close relationship between Judge Porteous and Mr. Amato and Levenson," that they were known to socialize together, that Amato and the judge had been law partners, and that the timing of Amato's entry into the case, just a few weeks prior to trial, "created suspicion."

Mole had no idea that Amato, along with his partner Creely, had actually given Judge Porteous approximately \$20,000 pursuant to the curatorship kickback arrangement, nor did he know about the other things of value that Amato or Creely had provided to Judge Porteous.

Judge Porteous held a hearing on Mole's motion. Judge Porteous's statements at the recusal hearing are set forth in detail in our brief, and the hearing transcript is also in evidence. So I am not going to repeat all of them here.

In sum, Judge Porteous made a series of deceptive, misleading, and lulling statements in which he minimized his relationship with Amato, concealed the fact of a curatorship kickback scheme, and criticized Mole for filing an unfounded motion.

In essence, Judge Porteous portrayed the relationship with Amato as simply the same sort of unexceptional relationship that he would have had with any member of the bar. For example, Judge Porteous stated:

Yes, Mr. Amato and Mr. Levenson are friends of mine. Have I ever been to either one of them's house? The answer is a definitive no. Have I gone to lunch with them? The answer is a definitive yes. Have I been going to lunch with all the members of the bar? The answer is yes.

Even that is misleading because Judge Porteous had, in fact, accepted hundreds of meals at expensive restaurants from Amato and his partner Creely.

But, most significantly, Judge Porteous made no mention whatsoever of what he knew was really the issue; that is, that he had received approximately \$20,000 in cash from Amato's law firm—money that he knew came from Amato as well as Creely.

When Mole, at great disadvantage, made a reference to the fact that Amato and Levenson had contributed to Judge Porteous's campaigns, Judge Porteous went on the offense:

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Well, luckily, I didn't have any campaigns, so I am interested to find out how you know that. I never had any campaigns, counsel. I have never had an opponent.

He went on to say:
The first time I ran, 1984, I think is the only time they gave me money.

That blanket statement was, of course, a deliberate falsehood because Amato and his firm had given Judge Porteous approximately \$20,000 in cash pursuant to the kickback scheme.

Judge Porteous concluded, with this self-serving comment in which he promises to notify counsel if he has any question that he should recuse himself, and concluded:

I don't think a well-informed individual can question my impartiality in this case.

So, in effect, what you have is Judge Porteous, who knows the facts, just not disclosing it, completely deceiving Lifemark and its counsel as to the true nature of his actual relationship with Amato, and Judge Porteous announcing to the world how honest he was—complete with the mock indignation.

Judge Porteous denied the recusal motion after the argument in open court on October 16, 1996. Lifemark appealed to the Fifth Circuit, seeking to overturn Judge Porteous's order. However, because of the false record created by Judge Porteous at the recusal hearing, that appeal was denied.

Trial was held without a jury in December of 1997, and Judge Porteous took the case under advisement. While the case was pending his decision, Judge Porteous continued to solicit and accept cash and things of value from Amato and Creely.

In May 1999, while Judge Porteous had not yet ruled on the case, he went to Las Vegas, NV, with several friends, including Creely, for his son's bachelor party. Creely paid for Judge Porteous's hotel room and some incidental room charges amounting to over \$500. He also paid over \$500 for a portion of Timothy Porteous's bachelor party dinner. These payments amounted to more than \$1,100 and are set forth on Creely's American Express card, which is in evidence. After the dinner, Creely accompanied Judge Porteous and others to a strip club, where Creely gave an employee \$200 to pay for a lap dance for Judge Porteous and a courthouse employee. Judge Porteous admitted in his Fifth Circuit testimony that Creely paid for his hotel room and a portion of the dinner.

In June of 1999, while Judge Porteous still had the Liljeberg case under consideration, the two men took a nighttime fishing trip together. On the fishing trip, Judge Porteous told Amato he needed cash for his son's wedding and requested that Amato give him approximately \$2,000.

In response to that request, Amato agreed to give Judge Porteous the money he solicited. Amato supplied \$1,000 and obtained approximately \$1,000 from his partner Creely and gave Judge Porteous \$2,000 in cash in an en-

velope. As Amato would later testify, it was "a decision I'll regret until the day I die."

As the Senate Impeachment Trial Committee Report found, the \$2,000 was picked up by Judge Porteous's secretary, Rhonda Danos. When Danos asked the law firm secretary what was in the envelope, the secretary rolled her eyes. In response, Danos said: "Nevermind, I don't want to know."

Like much of the other evidence, the fact that Judge Porteous solicited and received money from Amato in 1999 while the Liljebergs case was pending is not contested. Here is how Judge Porteous testified under oath before the Fifth Circuit:

Question. (Whether or not you recall asking Mr. Amato for money during this fishing trip, do you recall getting an envelope with \$2,000 shortly thereafter?

Answer. Yeah. Something seems to suggest that there may have been an envelope. I don't remember the size of an envelope, how I got the envelope, or anything about it.

Question. Wait a second. Is it the nature of the envelope you're disputing?

Answer. No. Money was received in [an] envelope.

Question. And had cash in it?

Answer. Yes, sir.

Question. And it was from Creely and/or—

Answer. Amato.

Question. Amato?

Answer. Yes.

Question. And would you dispute that the amount was \$2,000?

Answer. I don't have any basis to dispute it.

At the time he made the request, Judge Porteous had significant financial leverage over Amato, and his solicitation of cash from Amato had a "shakedown" quality to it. Amato bluntly acknowledged that one of the factors that impacted his decision to give Judge Porteous the cash was that Amato stood to make a lot of money in connection with the Liljeberg case then pending in front of the judge, and that Amato was not willing to "take the risk" of not giving Judge Porteous the cash the judge solicited.

Judge Porteous's solicitation of cash from Amato demonstrates Judge Porteous's egregious misuse of his judicial power to enrich himself. A judge who engages in such conduct is unfit to hold the office of U.S. district judge.

In addition, Amato and Creely continued to take Judge Porteous out to expensive lunches on a regular basis and paid over \$1,000 for a party in honor of his fifth year on the bench.

Mole knew nothing of Judge Porteous's relationships with Amato and Creely while the case was pending. Specifically, Judge Porteous did not inform Mole of the meals, the payments of expenses in Las Vegas, or the \$2,000 cash payment.

On April 26, 2000, Judge Porteous issued a written opinion in the Liljeberg case. At that time, his financial situation was desperate, and he was just weeks away from meeting with a bankruptcy attorney. Judge Porteous, who had taken judicial ac-

tions in the past with Amato and Creely to enrich himself, had powerful financial motives to curry their favor, reward them for their past loyalty and generosity, and encourage it in the future.

Thus, it is not surprising that Judge Porteous ruled in all major aspects in favor of Amato's clients, the Liljebergs. Counsel for Lifemark testified that this was "a resounding loss" for Lifemark, and Lifemark appealed Judge Porteous's decision to the Fifth Circuit Court of Appeals.

In August of 2002, the Fifth Circuit reversed Judge Porteous's decision in most significant aspects. In doing so, the Fifth Circuit characterized various aspects of Judge Porteous's rulings as "inexplicable," "constructed entirely out of whole cloth," "absurd," "close to being nonsensical," and "not supported by law."

After the case was reversed by the Fifth Circuit and sent back to Judge Porteous, the parties settled because Lifemark understandably did not want to go back before Judge Porteous.

Article II.

Now let me turn to article II—Judge Porteous's relationship with bail bondsmen Louis Marcotte and his sister Lori Marcotte. For that, it is necessary to return to Judge Porteous's roots as a State court judge.

First, let me briefly describe how the bail bonds business worked in Jefferson Parish.

From the financial perspective of bail bondsmen Louis Marcotte, he would make no money if the judge set bonds so high that the prisoner or his family could not afford to pay the premium or if a judge set bond so low that the premium was an insignificant sum. What Marcotte really wanted was for a bond to be set at the maximum amount for which the prisoner could afford to pay Marcotte the premium, which was typically 10 percent of the bond amount. That is how he maximized profits. He would interview the prisoner, know what the prisoner could afford, and attempt to have bond set at that profit-maximizing amount. If a prisoner or his family could scrape together \$5,000, Marcotte would want a judge to set bail at ten times that amount, or \$50,000, even if a lower amount would have been appropriate.

Now, in the Gretna Louisiana Courthouse where Judge Porteous sat, bail bondsmen like Marcotte dealt one-on-one directly with the judges and magistrates to have them set bonds. Prosecutors and defense attorneys were virtually never involved.

It is against this background that Judge Porteous's relationship with the Marcottes can thus be understood. Marcotte needed a judge who would be receptive to his bond request—to reduce bonds when they were too high and to set them in higher amounts if they were going to be set too low. As we know from Judge Porteous's relationship with Amato and Creely, Judge

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Porteous needed and welcomed financial support from whomever would provide it and was more than willing to use his judicial power to obtain it. Judge Porteous and Marcotte each understood what the other could do for him, and they formed a mutually beneficial corrupt relationship.

First, as to what the Marcottes gave Judge Porteous, the evidence establishes the Marcottes frequently took Judge Porteous to high-end restaurants for lunch, paying for meals and drinks. Over time, these lunches may have occurred as much as twice per week. These lunches seemed to have started in or about 1992 and are corroborated by several witnesses. The Marcottes let Judge Porteous invite whomever he wanted, especially other judges, and Judge Porteous's presence as the Marcottes' guest helped the Marcottes establish their legitimacy.

The Marcottes also paid for car repairs and routine car maintenance for Judge Porteous. On occasion these repairs were substantial and included things such as buying new tires or engine and transmission repairs or installing a new radio. In addition, Marcotte employee Aubrey Wallace would routinely pick up Judge Porteous's car to wash it and fill it with gas.

Wallace testified that Judge Porteous gave him his security code so that he could go into the judge's parking lot at the courthouse. Judge Porteous would leave the key under the mat. Wallace would pick up Judge Porteous's car and return it washed, gassed, and occasionally with a gift such as liquor left inside.

No fewer than five witnesses corroborated the fact that the Marcottes paid for Judge Porteous's car repairs.

In addition, Marcotte also paid for home repairs for Judge Porteous when an 80-foot section of fence had to be replaced. Testimony at trial from Marcotte employees Duhon and Wallace established the project took 3 days to complete.

The Marcottes also paid for a trip to Las Vegas for Judge Porteous. On this trip, Judge Porteous's secretary, Rhonda Danos, had paid for the judge's transportation up front. The evidence is clear that Lori Marcotte later paid for this trip by giving Danos cash—in Judge Porteous's chambers. Both Louis Marcotte and Lori Marcotte testified that the payment was in cash to conceal the fact that the Marcottes had paid for this trip. There is no pretense that this was some sort of legitimate act of generosity. It was obviously improper and hidden by the parties for that reason.

In return, Judge Porteous willingly became Marcotte's "go-to" judge for setting bonds. Marcotte went directly to Judge Porteous with recommended bond amounts—bond amounts that would maximize their income. Judge Porteous was receptive to them and signed countless bonds at their request. They would go to his chambers and tell him how much the prisoner could af-

ford as part of the discussions where they requested that he set bail.

As Senator Risch observed during the trial, it was really the poorest families who were hurt by Judge Porteous's relationship with Marcotte. An inherent aspect of their corrupt dealings was that bonds would be set at a higher amount than might have been set by a neutral judge who was not on the take.

And the opposite is also true: the public interest was potentially compromised when Judge Porteous reduced a bond at the Marcottes' request which thereby led to the release of someone who otherwise should have been confined. The Marcotte-Porteous relationship perverted what should have been a neutral, detached process.

In addition to setting bonds as requested, Judge Porteous took other judicial acts of significance for the Marcottes. In 1993, at Louis Marcotte's request, Judge Porteous expunged the felony conviction of a Marcotte employee—Jeff Duhon—so Duhon could obtain his bail bondsman's license.

In 1994, again at Marcotte's request, Judge Porteous set aside the conviction of another Marcotte employee, Aubrey Wallace. This took place during Judge Porteous's last days on the State bench and evidences the extent to which Judge Porteous was beholden to the Marcottes. As I will get to in a few moments, Judge Porteous timed this judicial action to occur after the Senate's confirmation of him for the Federal judgeship so as to conceal his corrupt relationship with the Marcottes and thereby not jeopardize his lifetime appointment.

There was one more thing that Marcotte did for Judge Porteous as part of their corrupt relationship when Judge Porteous was a State judge. In the summer of 1994, when Judge Porteous was undergoing his background check, the FBI interviewed Marcotte. In that interview, Marcotte lied for Judge Porteous on three specific points. First, he stated that Judge Porteous would have "a beer or two" at lunch, when, in fact, Marcotte knew that Judge Porteous was a heavy vodka drinker with an alcohol problem who would, on occasion, have five or six drinks. Second, Marcotte stated that he had no knowledge of Judge Porteous's financial circumstances, when, in fact, he knew that Judge Porteous struggled financially.

Finally, and most importantly, when interviewed by the FBI, Marcotte denied that there was anything in Judge Porteous's background that could subject the judge to coercion, blackmail or leverage. This was also not true, because Marcotte himself knew that he had a corrupt relationship with Judge Porteous and that he himself had leverage over Judge Porteous because of that relationship. In fact, Marcotte testified bluntly in September before the Senate Impeachment Trial Committee that he could have "destroyed" Judge Porteous had he chosen to do so. Marcotte told the FBI what he believed

Judge Porteous wanted him to say. In effect, Marcotte acted as Judge Porteous's agent in lying to the FBI. Marcotte then reported back to Judge Porteous as to the contents of the interviews, and told Judge Porteous he gave him a clean bill of health.

Indeed, there can be little pretense that the Judge Porteous-Louis Marcotte relationship was anything other than a corrupt business relationship. They were brought together by their financial needs. Marcotte was clear that the only reason he took Judge Porteous to lunch, took him to Las Vegas, fixed his cars, or fixed his house was because the judge was assisting them in setting bonds, and using the prestige of his office to help them with other judges. Marcotte testified: "[Judge Porteous] would do more when we would do more for him."

After Judge Porteous became a Federal judge, he could no longer set bonds for the Marcottes. Nonetheless, the Marcottes would continue to take Judge Porteous to lunch, particularly when they sought to recruit other State judicial officers to take his place in a similar corrupt scheme, or to impress business executives. Louis Marcotte explained that Judge Porteous "brought strength to the table" by his presence and his assistance. Marcotte testified: "It would make people respect me because, you know, I am sitting with a Federal judge." As Lori Marcotte described: "[State court judges] would view us as trusted people because we were hanging around with a federal judge."

Thus, Judge Porteous used the power and prestige of his office as a Federal judge to help the Marcottes expand their corrupt influence in the Gretna courthouse by vouching for their honesty, vouching for their practices, and helping to recruit a successor. Our post-trial brief details several instances of Judge Porteous providing assistance to the Marcottes as a Federal judge.

Let me talk about one of those instances in particular. In 1999, at Louis Marcotte's request, Judge Porteous spoke to newly elected State judge Ronald Bodenheimer. Prior to that conversation, Bodenheimer "stayed away from Louis Marcotte" because he had concerns about Marcotte's character and believed that Marcotte was doing drugs. During his conversation with Bodenheimer, Judge Porteous—then a United States District Court Judge—vouched for Louis Marcotte's integrity. Bodenheimer took Judge Porteous's statements seriously, and as a result of that conversation, Bodenheimer began to set bonds for the Marcottes.

The Marcottes and Bodenheimer developed a relationship that took on the characteristics of the relationship that had previously existed between Judge Porteous and the Marcottes. The Marcottes began providing Bodenheimer meals, house repairs, and a trip to the Beau Rivage casino, and

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Bodenheimer in return began to set bonds that would maximize profits for the Marcottes. Bodenheimer was eventually criminally prosecuted, pleaded guilty, and was sentenced to prison on a Federal corruption count arising from his corrupt relationship with the Marcottes.

Let me now get to one final act of the Marcotte-Porteous relationship. In the early 2000s, the FBI was investigating State court judges—including Bodenheimer—for corrupt misconduct arising out of their relationship with the Marcottes. On April 17, 2003, Louis Marcotte signed an affidavit prepared by Judge Porteous's attorney in which he falsely denied that he and Judge Porteous had a corrupt relationship.

I mention this 2003 affidavit for two reasons. First, this 2003 affidavit reflects that the corrupt relationship between the Marcottes and Judge Porteous continued during his tenure as a Federal judge. Second, just as Marcotte's 1994 false statements to the FBI helped obstruct the background check investigation, Marcotte's 2003 false affidavit—prepared by Judge Porteous's attorney—was a part of an effort to obstruct a criminal investigation. In both instances Marcotte lied to the FBI to assist Judge Porteous by concealing their corrupt relationship. It reflects how even in 2003, Judge Porteous was compromised by his relationship with Louis Marcotte.

In March 2004, Louis Marcotte pleaded guilty to a racketeering conspiracy charge involving his corrupt relationship with State judges. He was sentenced to 38 months in prison. His sister Lori Marcotte pleaded guilty at the same time as her brother and was sentenced to 3 years probation, including 6 months of home detention.

In his House testimony, his deposition, and at trial, Louis Marcotte repeatedly described Judge Porteous's overall impact on the Marcottes' business as even more significant than two other State judges who were federally prosecuted and were sentenced to jail.

Question. Mr. Marcotte, you testified in response to Mr. Turley that you did things for lots of judges.

Answer. Yes, I did.

Question. And some of those judges went to prison, did they not?

Answer. Yes, they did.

Question. Of all the judges that you did things for, who was the most important judge to you, ever?

Answer. Thomas Porteous.

Now let me turn to article III involving Judge Porteous's bankruptcy while he was on the Federal bench.

The evidence demonstrated that throughout the 1990s and into 2001, Judge Porteous's financial condition deteriorated, largely due to gambling at casinos, to the point that by March of 2001, when he filed for bankruptcy, he had over \$190,000 in credit card debt. His credit cards and bank statements in the years preceding his bankruptcy reflect tens of thousands of dollars in cash withdrawals at casinos.

Before discussing how Judge Porteous deceived the bankruptcy

court, I want to stress that for the years leading up to his bankruptcy, Judge Porteous had concealed his debts in the financial statements that he filed with the courts. Let me show you an example.

This is a little detailed, so let me walk you through it. What you see here is the portion of Judge Porteous's 1999 Financial Disclosure Report in which he was required to disclose his year-end liabilities. Judge Porteous reported two credit cards with the maximum liability being \$15,000 each—"Code J"—for a total maximum liability of \$30,000.

In fact, he had five credit cards with debts amounting to over \$100,000. These should have been reported on the form in the Liabilities box as Code "K"—debts over \$15,000. This form was blatantly false.

Judge Porteous filed false financial statements that failed to honestly disclose the extent of his credit card debts for each of the 4 years—1996 through 1999. Those forms are in evidence.

Even though Judge Porteous has not been charged in any article with filing false financial reports, these reports constitute powerful evidence as to Judge Porteous's intent. These false financial reports make it clear that the false statements in bankruptcy were part of a conscious course of conduct involving his concealment of financial activities, and not some set of innocent mistakes or oversights as claimed by counsel.

In 2000, Judge Porteous met with bankruptcy attorney Claude Lightfoot about his financial predicament. The evidence demonstrates that Judge Porteous did not tell Lightfoot at that time—or indeed at any time—that he gambled.

The two men decided that Lightfoot would attempt to work out Judge Porteous's debts owed to his creditors, and then, if that failed, that Judge Porteous would consider filing for bankruptcy. Lightfoot's attempt at a "workout," failed, and, in about February of 2001, Lightfoot and Judge Porteous commenced preparing for chapter 13 bankruptcy.

Prior to filing for bankruptcy, Judge Porteous, in consultation with Lightfoot, agreed that he would file his bankruptcy petition under a false name. To further this plan, Judge Porteous obtained a post office box, so that his initial petition would have neither his correct name nor a readily identifiable address.

If you look at this exhibit, you will see that ultimately, on March 28, 2001, Judge Porteous—a sitting Federal judge—filed for bankruptcy under the false name "G. T. Ortoous" and with a post office box that Judge Porteous had obtained on March 23, 2001, listed as his address. Judge Porteous signed his petition twice, once under the representation: "I declare under the penalty of perjury that the information provided in this petition is true and correct," the other over the typed name "G.T. Ortoous."

On April 9, 2001, Judge Porteous submitted a "Statement of Financial Affairs" and numerous bankruptcy schedules. This time, they were filed under his true name. However, they were false in numerous other ways, all reflecting his desire to conceal assets and gambling activities from the bankruptcy court and his creditors.

While I am not going through all his false statements during the bankruptcy—they are detailed in our post-trial brief—I want at least to point out some to you:

He falsely failed to disclose that he had filed for a tax refund claiming a \$4,143.72 refund, even though the bankruptcy forms specifically inquired as to whether he had filed for a tax refund.

As you see, this chart sets forth his tax return, dated March 23, 2001—3 days before he filed for bankruptcy.

It also shows the place on the form where he was required to list any anticipated tax refund. The copy here is not as clear as we would like, but question 17 required Judge Porteous to disclose "other liquidated debts owing debtor including tax refunds." As you see, the box "none" is checked. Judge Porteous never disclosed the fact of this refund—not to his attorney, not to his creditors, and not to the bankruptcy court. Instead, he kept it secret, and the money went right into his pocket.

He deliberately failed to disclose that he had gambling losses within the prior year, even though the forms specifically asked that question. In fact, Judge Porteous has admitted before the fifth circuit that he had gambling losses. In the days immediately prior to filing for bankruptcy, he paid casinos debts that he owed them in order to avoid listing those casinos as unsecured creditors. Additionally, he failed to record those preferred payments to creditors in the bankruptcy forms which required their disclosure, and failed to tell his attorney about them. Thus, casinos to which Judge Porteous owed money in March of 2001 received 100 cents on the dollar while other creditors received but a fraction of that amount. Judge Porteous favored casinos over other creditors because he did not want to jeopardize his ability to take out credit and gamble at the casinos while in bankruptcy.

He had his secretary pay off one of his wife's credit cards 5 days prior to filing for bankruptcy. Judge Porteous then reimbursed his secretary and failed to disclose this preferred payment to the credit card company on his schedules that he filed under oath with the court.

He reported his account balance in his checking account as \$100, when on the day prior to filing for bankruptcy he had deposited \$2,000 into the account. He deliberately failed to disclose a Fidelity money market account that he regularly used in the past to pay gambling debts. This particular nondisclosure demonstrates Judge Porteous's determination to have a secret account available with which to

pay gambling debts while in bankruptcy. This nondisclosure clearly was not inadvertent, since the evidence is clear that he wrote a check on that account on March 27, 2001, the day prior to filing for bankruptcy.

The single organizing principle that arranges this pattern of false statements is Judge Porteous's desire to conceal assets and to conceal his gambling so that he could gamble while in bankruptcy without interference from the court or the creditors or even his lawyer.

At a hearing of creditors on May 9, 2001, Judge Porteous, under oath, testified that the schedules were accurate. That statement, like so many of Judge Porteous's other statements under oath, was false. At that hearing, the bankruptcy trustee also informed Judge Porteous that he was on a "cash basis" going forward.

At the end of June 2001, bankruptcy Judge William Greendyke issued an order approving the chapter 13 plan, specifically directing Judge Porteous not to incur new debt without the permission of the court. Notwithstanding Judge Greendyke's order, Judge Porteous did incur additional debt without the permission of the court. He applied for and used a credit card.

Here is a blowup that includes a copy of Judge Porteous's application for a credit card and the statement showing its use in September of 2001—in violation of the order of the court.

More particularly, Judge Porteous continued to borrow from the casinos without the court's permission. This chart, which was used at trial, lists 42 times that he took out debt at casinos to gamble in the first of the 3 years he was in bankruptcy.

Further, as Judge Porteous had planned, in some instances, he paid these casino debts through the Fidelity money market account that he concealed. Here, at the top of this blowup, is a check he wrote on the concealed Fidelity money market in the amount of \$1,800 to the Treasure Chest Casino in November of 2001. Below it is a check in the amount of \$1,300 to Grand Casino Gulfport also drawn on the undisclosed money market account in July of 2002. Both of these checks repay the outstanding debts to the casinos. In short, he engaged in a pattern of deceitful activity designed to frustrate and confound the bankruptcy process.

The harm wrought by Judge Porteous's conduct in bankruptcy is really incalculable. The bankruptcy process depends totally on the honesty and candor of debtors. The trustee does not dispatch investigators to check on a debtor's sworn representations. Judge Porteous's display of contempt for the bankruptcy court is little more than a display of contempt for his own judicial office. A Federal judge who in fact heard bankruptcy appeals in his court should be expected to uphold the highest standards of honesty. It is inexcusable that Judge Porteous manipulated this process for his own benefit.

Let me now discuss article IV, and for that I need to return to the summer of 1994. Let me set the stage. At that time, while Judge Porteous was being considered for a Federal judgeship, he was engaging in two corrupt schemes: first, the curatorship kickback scheme with Creely and Amato that I previously described in connection with article I; and second, the corrupt relationship with the Marcottes I described in connection with article II.

Judge Porteous knew if the White House and the Senate found out about his relationships with either Creely and Amato or the Marcottes, he would never be nominated, let alone confirmed. In the course of the background investigation, and during the confirmation process, Judge Porteous was asked questions on four separate occasions that, if he were to answer the questions truthfully and candidly, required him to disclose his relationships with Creely and Amato and the Marcottes. On each instance, Judge Porteous lied. Because those four statements are at the heart of article IV, let me show you exactly what Judge Porteous was asked and exactly what he answered.

First, at some time prior to July of 1994, Judge Porteous filled out a form referred to as the "Supplement to the SF-86." On that form is a question that goes to the very heart of the issue associated with the background process. On that form Judge Porteous was asked:

Question. Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details.

To which Judge Porteous answered: No.

Judge Porteous signed that document under warnings of criminal penalties for making false statements. This statement was a lie.

On July 6 and July 8, 1994, Judge Porteous was personally interviewed by an FBI agent as a part of the background check process. Judge Porteous was asked by the agent the same sort of questions I discussed in connection with the SF-86. His answers were incorporated in a memorandum of the FBI agent that summarized the interview. Let me show you the relevant portions of the memorandum. Judge Porteous was recorded as saying that:

[He was] not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgment, or discretion.

These statements were also a lie.

After that interview, the FBI in New Orleans sent the background check to FBI headquarters in Washington, DC, for their review. FBI headquarters directed the agents to interview Judge Porteous a second time about a very particular allegation the FBI had received in 1993 that Judge Porteous had taken a bribe from an attorney to re-

duce the bond for an individual who had been arrested.

So on August 18, 1994, the FBI conducted a second in-person interview with Judge Porteous, this time probing possible illegal conduct on his part in connection with bond setting. Again, the FBI writeup of the interview records Judge Porteous as stating that he was unaware of anything in his background that might be the basis of attempted influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgment or discretion.

And again he lied.

Finally, after he was nominated, the United States Senate Committee on the Judiciary sent Judge Porteous a questionnaire for judicial nominees. Again, I am showing you the document. Judge Porteous was asked the following question and gave the following answer:

Question. Please advise the committee of any unfavorable information that may affect your nomination.

Answer. To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.

The signature block is in the form of an affidavit that the information provided in the document is true and accurate. Judge Porteous lied for a fourth time.

The questions Judge Porteous was asked are clear and unambiguous. In each of the four instances, the questions called for Judge Porteous to disclose his relationship with Amato and Creely and the Marcottes. There is additional evidence that suggests Judge Porteous would have well understood the reach of those questions.

First, the second of his two FBI interviews addressed Judge Porteous's bond-setting practices. It is hard to imagine he could have been put on more specific notice that his relationship with Marcotte and his conduct in setting bonds was relevant and should be disclosed.

Second, Judge Porteous's understanding of the materiality of his relationship with Marcotte and his intent to conceal it is further evidenced by his statements and conduct associated with setting aside of Aubry Wallace's felony conviction, which I referenced earlier. As I mentioned, Marcotte had an employee named Aubry Wallace, who had helped take care of Judge Porteous's cars and also fixed his house. At around the time of his confirmation, Marcotte went to Judge Porteous and asked him to set aside Wallace's burglary conviction, to take the first step in getting rid of his felony convictions, so that Wallace would ultimately be allowed to obtain a bail bonds license.

Judge Porteous agreed to do it, but informed Marcotte that he would do so only after he was confirmed by the Senate, because he did not want to jeopardize his "lifetime appointment." When asked to describe Judge Porteous's response to his request, Marcotte testified:

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Answer. He kind of put me off and put me off. And he said look, Louis, I'm not going to let anything stand in the way of me being confirmed and my lifetime appointment, so after that's done I will do it.

Marcotte went on to explain the nature of Judge Porteous's concern.

If the government would have found out some of the things that he was doing with me, it would probably keep him from getting his appointment.

Senator McCASKILL specifically asked Marcotte as to whether Judge Porteous used the "lifetime appointment" phrase. In response, Marcotte's answer was clear:

That was the words of Judge Porteous.

In substance, Judge Porteous said that he would set aside Wallace's conviction but that he was going to hide it from the Senate. It is hard to conceive of a clearer, more explicit expression of intent to deceive the Senate.

Judge Porteous's actions corroborate Marcotte's recollection of the conversation. He was confirmed by the Senate on October 7, 1994, and set aside Wallace's conviction, as he said he would, after that on October 14, 1994.

The timing of the Wallace set-aside confirms that Judge Porteous calculated and plotted to conceal material facts concerning his relationship with Louis Marcotte from you, the United States Senate. The procedural history of Wallace's case is discussed in our post-trial brief. But the salient fact is that Judge Porteous could have set aside the conviction, if he chose to do so, weeks prior to his confirmation. Absolutely nothing in Wallace's case occurred that explains his delay in waiting until after the confirmation. The only event of significance that explains the timing is that Judge Porteous was confirmed in the interim.

Moreover, Judge Porteous's willingness to set aside Wallace's conviction at Marcotte's request constitutes proof positive that Judge Porteous was in fact subject to coercion, leverage, and compromise—the very fact as to which Judge Porteous was questioned and which Judge Porteous denied.

Because of the fraud committed by Judge Porteous on the FBI and the Senate, Judge Porteous was in fact confirmed and was sworn in on October 28, 1994. He has been a Federal judge, enjoying the fruits of his deceit and the power of the position since that date.

In conclusion, the House has proved each of the four Articles of Impeachment. The evidence demonstrates that Judge Porteous is dishonest and corrupt and does not belong on the Federal bench. He has signed false financial forms, false questionnaires, and even signed documents under a false name under penalty of perjury. He has engaged in corrupt schemes with attorneys and bail bondsmen. He has betrayed his oath in handling a case dishonestly and with partiality and favor, characterized by making false statements at a hearing concerning his financial relationship with one of the attorneys, and then soliciting cash from

that attorney while the case awaited Judge Porteous's decision. He has brought disgrace and disrepute to the Federal bench.

The evidence demonstrates he has committed high crimes and misdemeanors, and the House requests that you find him guilty on each of the four counts and remove him from an office he is not fit to occupy.

Thank you for your time and attention.

We reserve the balance of our time.

The PRESIDENT pro tempore. Thank you very much.

Professor Turley, you may proceed on behalf of the judge.

Mr. TURLEY. Thank you, Mr. President, Members of the Senate. For those who were not present this morning, I am Jonathan Turley, the Shapiro Professor of Public Interest Law at George Washington University and counsel to Judge G. Thomas Porteous, a judge of the United States District Court for the Eastern District of Louisiana. Joining me again at counsel's table are my colleagues from the law firm of Bryan Cave: Daniel Schwartz, P. J. Meitl, and Daniel O'Connor.

Sitting here, listening to my esteemed opposing counsel, one is easily put in mind of another trial held almost 220 years ago—almost to this very day.

In a case that proves to be one of the turning points in American law, eight British soldiers were accused of murder in what Americans call the Boston Massacre and what the English call the Boston Riot.

Columnists demanded that the soldiers be executed and everyone came to the trial expecting less of a trial as much as a hanging. Adams himself saw the case differently. In fact, John Adams saw not just another case but the very cause for which he was already fighting, the creation of a new nation based on due process and principles of justice.

As in today's case, many of the facts were not in dispute in 1770. It was clear the British soldiers fired into the crowd, but Adams stopped the jury and challenged them to consider two questions: No. 1, whether the soldiers had acted with the required intent and malice; and, No. 2, whether the requested punishment—death—fit the crime.

It was also one of the earliest uses of the reasonable doubt standard ever recorded in our country. Proof and proportionality became the touchstone of that case and later cases that Adams helped bring into existence. In words that would echo through the ages, Adams warned the jury:

Whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence. The law will not bend to uncertain wishes, imagination or wanton tempers of men.

When the Framers turned to the Constitution, they sought to protect the judiciary from wanton and imagined offenses. In cases of impeachment, the Framers expressed fears that Congress

would yield to passions over proof in the removal of Federal judges. James Madison, George Mason, and others carefully crafted the standard of impeachment to protect the independent judiciary, and Madison said expressly that they wanted to avoid standards "so vague as to be the equivalent of tenure during the pleasure of the Senate." That is what they wanted to avoid.

They rejected "corruption" because they knew the term "corruption" could be used to mean most anything. For that reason, that term was adopted by the House in this case. It hasn't changed.

The Framers explicitly debated and rejected this vague standard of maladministration and instead demanded that a Federal judge could not be removed absent proof of treason, bribery or other high crimes and misdemeanors. Applying that standard, this Congress has refused to remove judges not because they agreed with their actions—every judge whose case was brought before Members of this esteemed body was worthy of condemnation, they had few friends—but this body drew a distinction between judges who have done wrong and judges who committed removable offenses.

I would like to tell you about the man who is on trial today, G. Thomas Porteous, Jr. He has spent virtually his entire life as a public servant. He served as an assistant district attorney, a State judge, and then a Federal judge. He served a total of 26 years, the past 16 as a Federal judge. When asked, all the witnesses in this case, without exception, described him as one of the best judges of Louisiana. As I will discuss later, however, his skills as a judge do not excuse his failings as a person. To the contrary, he has not contested many of the facts in this case and ultimately accepted severe discipline for the poor decisions he has made. He is here for you to judge now, to judge him, but he is not the caricature that has been described by the House.

Indeed, I don't know how the man described by the House avoided a criminal charge. After all, the Department of Justice got waivers to look into all these crimes. They investigated him and many other judges with "wrinkled robes." When I was sitting here, I was thinking: My Lord, how on Earth could he avoid a criminal charge? The reason is because in the Department of Justice are professionals. They look for crimes, and they didn't find any crime that could be proven at trial; any crime, great or small, against this judge.

His son, Timothy, in the hearing, expressed the toll this has cost him and his family, ranging from the death of his wife, loss of his home in Katrina. One way or the other, this man is going to come to closure now. He will either be convicted or he will retire in a matter of months as he has already promised. What is clear, either way, Thomas Porteous will not return to the bench.

He has, however, remained silent for many months as newspapers and commentators have said grossly false things about his case and about his character. He waited for this moment for his defense to be presented, as have so many defenses in his courtroom, for impartial judgment—and he gave impartial judgment. Even the House's own core witnesses said Judge Porteous gave them a fair hearing, gave everyone a fair hearing. You can disagree with actions he took, but you don't have to turn him into a grotesque caricature. He is not. He may have been many things in the eyes of others, but he was never corrupt, and he loved being a Federal judge and, despite his failings, he never compromised his court, and he never broke the oath he took as a Federal judge in October 1994. That may seem a precious distinction to some, but he is here to fight for that legacy. He has accepted his failings, but he will not accept that.

This case is not, however, just about Thomas Porteous. All impeachments speak to all judges. This case presents Articles of Impeachment that are novel and they are dangerous. We discussed some of those issues this morning. Of course, the Constitution puts that incredible burden on you. It requires you to ignore the dictates of passion and wanton tempers described by John Adams. You must decide, after considering all the evidence, whether the actions that were taken in this case rise to the level of treason, bribery or other high crimes and misdemeanors.

I would like to return to something Senator DURBIN had asked about, which is the standard of proof. As we mentioned, in the past, many have cited "beyond a reasonable doubt" as the most obvious standard for impeachments because impeachment has many criminal terms that are incorporated and also many impeachments are crafted on articles taken directly from prior criminal cases.

We also noted and stressed that the Members of this body have two determinations to make. First, you must find these facts occurred and, second, you must find that those facts that did occur to your satisfaction rise to the level of removable offense. It is the first part of that determination that is difficult in this case because, as we noted, this is the first modern impeachment that has come to this body without a prior trial. This judge has never been allowed review from a judge. He has never challenged the things that have been said against him. Indeed, most of the things you just heard wouldn't be allowed in a Federal court, and we challenge the factual accuracy, as you will see. But that is part of the value of having criminal charges brought, because usually when this body has looked at a case, it has been siphoned through that filter of process and fairness.

Each Senator does have to establish what he or she will use as a standard of proof. But I have to say, I do not agree

with Mr. SCHIFF when he says it is just up to you, whatever you decide is enough. Where I disagree with Mr. SCHIFF from this morning is where we distinguish between "could" and "should." There is no question you can adopt any standard. The question is whether you should.

Obviously, the Framers did not want people just to take an arbitrary gut check on facts, particularly when there has been no criminal trial. They expected something more from you. What is expected is that you apply some consistent, cognizable standard, and we have talked about that standard applied in the House, which is "clear and convincing." This body, in the past, has talked about a strict standard.

Indeed, Senator ARLEN SPECTER, who was vice chair of the Senate impeachment trial, at an earlier time stated the following to his colleagues—and I commend it to you:

Where you have a judge up for removal, the issue of judicial independence requires a very strict standard. This is not a question of whether you would confirm him if he were before us today. It is not a question of whether we feel comfortable in going before him. But it is a question of whether we are going to oust him from office that comes into play.

What I believe Senator SPECTER was saying is that you do have an obligation to apply some objective standards because this is a legal proceeding. It might not be a criminal case, but you are sitting as the world's most unique jury and judges.

In this case, the Fifth Circuit itself did not consider the allegations in article II and article IV. The reason is simple, as the five judges I mentioned earlier wrote:

Congress lacks jurisdiction to impeach Judge Porteous for any misconduct prior to his appointment as a Federal judge.

Plain and simple. The Federal judges of the Fifth Circuit wrote a detailed, 49-page opinion on the evidence in this case. Those judges declared the following:

This is not one of those rare and egregious cases presenting the possibility of an impeachable offense against the nation.

They didn't approve of the decisions made, but they drew a line, and this fell far on the other side of an impeachable offense. Those judges, which included appellate and district judges, said:

The evidence here does not support a finding that Judge Porteous abused or violated the Federal constitutional judicial power entrusted to him. Instead, the evidence shows that in one case he allowed the appearance of serious improprieties but that he did not commit an actual abuse, in violation of constitutional power entrusted to him.

These appearance controversies are routine in court. They are used here, however, as the basis for removal, to wipe away centuries of precedent. Perhaps for that reason the House managers are quoted in the media as encouraging the adoption of a new standard, to treat the impeachment process as merely an employment termination

case. They would literally have this body adopt the standard Madison rejected, for judges simply to serve at the pleasure of the Senate, similar to at-will employees.

Unfortunately, this case proves one thing, the old military adage that if all you have is a hammer, every problem looks like a nail. It is not enough that Judge Porteous accepted sanctions from his court—unprecedented sanctions. It is not enough that he announced his resignation in a matter of months from the bench. It is not enough that no one has ever been removed for pre-Federal conduct. Staff and resources of impeachment had been committed and the House demanded removal.

Let's look at the basis for removal and let's turn to article I. In article I, the House impeached Judge Porteous on the theory that he deprived the public and litigants of his honest services, as we discussed this morning. We discussed the unique problem of the fact that it was crafted around a theory the Supreme Court rejected. It was a bad bet.

You will notice that in the opening statements again today, both Mr. SCHIFF and Mr. GOODLATTE kept on bringing up kickbacks again. I actually counted up to 20 and then I stopped. I pose the question to you. I don't know how many times you count the word "kickbacks," but I ask you to look at articles and see how many times it is mentioned in the actual Articles of Impeachment, and that number would be zero. They allege a corrupt scheme and then came to you and said: You know what. This is going to be kickbacks.

But the reason the Framers rejected corruption is precisely because of what is occurring right now in front of you in the well of the Senate. Corruption can mean anything. Mr. SCHIFF could have stood and said: You know what this is? This the mail fraud or, you know, actually this is conspiracy. He could have said anything that constitutes corruption and rewrite the article here—not fulfilling the will of the House but fulfilling whatever is the passing will of the managers of the House.

That is a violation of the process the Framers created. In fact, we now hear five references to the signing of financial statements that were inaccurate. I suggest the Members look at the articles. How many times is that mentioned in the articles? Zero. But when you use "corruption" as a term, you just go to the well of the Senate and say: That is what this is all about. What that does for defense attorneys like myself and my colleagues is, we just stand here and try to keep track of what it is, the crime we are supposed to be defending against. It could be anything under the Criminal Code. Anything under the Criminal Code can form corruption.

Now it is financial records. That is why the House has the sole responsibility to articulate those articles.

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When Mr. SCHIFF says they have a lot of discretion, they do. When they use that discretion poorly, Articles of Impeachment get rejected. That is what this body has said repeatedly in history. You cannot bring to us articles that present any possible crime, a crime de jour. That is what you are seeing today.

Notably, in article I, there is one fact that literally all of the House witnesses agree on: Judge Porteous was never bribed. But, more importantly, Judge Porteous was not bribable. Article I seeks to remove a judge based on a decision in a single case, and that decision was a single motion not to recuse himself in 16 years as a Federal judge.

The Lifemark recusal motion was the first and only such motion Judge Porteous was faced with in three decades as a judge. Now, allow me, please, to cut to the chase, and to deal with one allegation in article I which deals with this single gift to Judge Porteous by his longtime friend, Jake Amato. That is, in my view, the most serious allegation in article I. It was a colossal mistake. But I need to correct the record. The House stood up and said, you know, nobody called this a wedding gift except defense counsel. That is news to me.

In the hearing before the committee, Jake Amato described how he and the judge were on a boat on a fishing trip late at night drinking, and the judge got very emotional and was talking about the fact that he could not cover the expenses for his son Timothy's wedding. Amato was very close to Timothy. That was the context of this discussion.

But, more importantly, I asked Amato: In fact, the only money you recall ever going to Judge Porteous was this wedding gift? Right?

Amato's answer was: Correct.

Now, Judge Porteous never disputed that gift. What he disputes is the implications of the gift. Judge Porteous accepted responsibility because it created an appearance of impropriety, and it did. Accepting a very severe punishment by the Fifth Circuit, he publicly apologized and gave his "sincere apology and regret" that his actions had brought the court to address this matter. He also later said he would, in fact, retire from the bench.

Before delving into that gift, let me be clear what we are discussing. I think it is important to call things for what they are or in this case what they are not. This was not a bribe. All of the parties agree. This was not a bribe. It was not a kickback. They do not even allege in article I this was a kickback. So what was it if it was not a bribe and it was not a kickback? It was a gift.

Was it a dumb gift? Was it a gift he should not have accepted? You bet. But the Framers thought it was important to define things as they are. This is not a bribe and it is not a kickback. That is the key thing in looking at this impeachment.

The appearance of impropriety is a standard raised in Federal courts. Not uncommonly, courts of appeals will disagree with trial judges who refuse to recuse themselves. Hundreds of judges are faced with recusal motions. Sometimes they make mistakes. Recusals are usually based upon past relationships, financial interests. They extend under the entire waterfront of conflicts. When a judge gets it wrong, usually that is it; it is just a reversal.

Sometimes you will have a reprimand. Very rarely will you have any discipline at all. But consider the implications of accepting an appearance of impropriety as a standard of removal. This could be so easily used to strip our courts. An appearance of impropriety? Is that what we are going to substitute other high crimes and misdemeanors for, something that hundreds of judges are accused of. All of them would be capable to be brought before this body.

We talked a lot about this Lifemark case. I must tell you, it is exceedingly complex as a commercial case. It is between a subsidiary of a giant corporation called Tenet Healthcare or Lifemark and a family of pharmacists from Louisiana. I will tell you, I see no need to delve into the specifics, which I think you would be happy to know. It is sufficient to say this was a long running dispute between these two parties.

Lifemark was accused of delaying the case at any cost. It bounced from judge to judge and ultimately was assigned to over a dozen judges, one dozen in 3 years. That is the Lifemark case. Then, in 1996, it was randomly assigned to Judge Porteous. Defense witnesses stated, when asked, that Judge Porteous had a reputation for moving cases to verdict. He was a judge from Gretna. He was a State judge. He was a lawyer's judge. They tended to get cases done, and when he looked at this docket and saw a dozen judges in and out of this case and no trial, he promptly announced to the parties: I am the last judge you are going to see in this case. We are going to try this case.

I want to emphasize something. He said that to the parties before any friends were lawyers in this case, before anyone he had a friendship with was counsel in the case.

He said: I will be the last judge in this case, and we are going to go to trial.

So he was. Seven district court judges, three magistrates, and he ended that. They went to trial.

When he said that, lead counsel for Lifemark, Joe Mole, wanted to have him recused and to go to get another judge. He filed a motion to recuse, and he cited the fact that Judge Porteous was close friends with Jake Amato and Lenny Levenson. And indeed he was.

What we heard in testimony from witnesses is in Gretna, a very small town, like many small towns in which lawyers practice, judges preside in, most judges know the attorneys in

their courtroom. If judges had to recuse themselves because they knew a lawyer in the courtroom, there would be no cases in these courts. These are small communities.

In Gretna, judges did not recuse themselves. In fact, our witnesses—actually, not our witnesses. Let me correct that. The House's witnesses said they had never heard of a judge recusing themselves in Gretna because they could not. That was the tradition that Judge Porteous came from, and many judges agree with that—that as long as you acknowledge you have a relationship, the relationship is not being hidden, you do not have to recuse yourself.

He was friends with Amato and Creely and Don Gardner. I will be returning to Mr. Gardner in a second. He was friends with Amato and Creely since the 1970s. Both Amato and Creely said they were best friends. They practiced law together. They hunted and fished together. They knew each other's families.

Timothy testified they were known as Uncle Jake and Uncle Bob. Creely taught him how to fish; Amato taught him how to cook. They were close friends. So was Don Gardner. In fact, Gardner was even closer. Gardner asked Porteous to be the godfather to one of his daughters.

Now, with this uncontested background, I would like to reexamine article I. First, the House asserts that Judge Porteous failed to disclose while he was a State judge that he engaged in a "corrupt" scheme with these attorneys. This is, of course, predicated on the fact that there is a corrupt scheme.

The problem with the House's case is the House's own witnesses denied the scheme. Both at trial and in a Senate deposition, Bob Creely expressly disavowed—expressly disavowed—that he had an agreement with Judge Porteous where he received curatorships in exchange for loans or gifts. Instead, Creely was adamant that there was no relationship between the gifts and the curatorships.

He said: I gave him gifts because we were friends. And he said: I gave him gifts before I ever got curatorships. Not only that, but he said he did not like the curatorships. He said he told Porteous that. Creely was a very successful lawyer. These curatorships were bringing in a few hundred dollars here and there. He said he hated them because they were more trouble than they were worth.

It is true, the House has portrayed Judge Porteous, frankly, as something of a moocher. I mean, that, I guess, was Congressman GOODLATTE's point when he pointed out with great emotion to you, Judge Porteous went to a lot of lunches with these men and he did not pay for his share of the lunches; he just paid for some of them.

Let me ask you, did you ever think you would be sitting on the floor of the Senate trying to decide whether that is

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an impeachable offense, being a moocher? He paid for a few lunches; he did not pay for most of them. The witnesses said judges in Gretna routinely had lunches paid for them. In fact, the House's own witnesses said they could not remember—actually, that is not true, they could remember one judge on one occasion buying her own lunch. That is the record in this case.

So Creely is the guy in the House report who is the linchpin between this alleged scheme, between curatorships, and these gifts. Only problem? Creely came to the Senate and said: There was no agreement. He said he never gave any money to Judge Porteous as a bribe, never gave him a kickback, never expected to receive anything in return for the gifts. They were just friends. Not only that, he said he would have given those gifts without question regardless of the curatorships.

To drive the point further, he said Judge Porteous never asked him for any percentage or return from the curatorships. Not only that, but then the House's own witnesses said: By the way, all the judges in Gretna give curatorships to friends and acquaintances—all of them.

This has been discussed in Louisiana. But the Louisiana officials have decided they would allow that. Judges routinely would give curatorships to former partners, friends, acquaintances. It has been reviewed. We heard from the only expert in this case on Louisiana ethics, and that was Professor Ciolino, Dane Ciolino. He told the Senate: This is perfectly ethical under the rules. It is well known. It is a practice that has existed for a long time, and it still exists today. This does not mean that every judge in Louisiana is corrupt. It is just they do not view this as corruption.

Witnesses said that Judge Porteous gave curatorships to new attorneys, and he gave curatorships to Creely. The House never went and actually found the records of all the curatorships. You will notice, there is no discussion of any other curatorships. They had the ability. They could have come to you and said: Here are all the curatorships that were issued during this period of time. Here are the curatorships that went to Creely—or not. They did not do that.

But even if 100 percent of the curatorships went to his friends, it was perfectly ethical under the rules. The only testimony that the House was able to present attempting to establish a connection between the curatorships and gifts was Jake Amato. What the problem was is Creely saying there was not any relationship. That is a problem because the House report said Creely said that. So they went and got Amato, and Amato said on one occasion many years ago he remembers Creely saying there was a relationship. But the House was not deterred by the fact that Amato was giving this testimony with Creely in Washington denying he ever said that. But that did not deter the

House. They just went ahead and had Amato say what they wanted Creely to say.

Then Amato said these figures that are being thrown around by the House were not figures he came up with. He said they were what he referred to as guesstimates—guesstimates—of the gifts and their relationship to the curatorships.

Now, Amato said actually the number you have heard here today did not come from him, did not come from Creely. In fact, they denied they could recollect. There is no record to establish this conclusively. Amato said the number actually came from FBI Agent Horner, who came up with an estimate of total gifts and just assumed—just assumed—that Porteous must have received half of it. They started pressing them to say: Wouldn't that be accurate?

So there is a Madisonian nightmare for you. The government gets guesstimates from witnesses, based on the figure that was just extracted by one of the investigators without documentary proof.

The second factual allegation in this article is that the judge should be removed for intentional misleading statements at the recusal hearing. I can simply end this by encouraging you: Please read the recusal hearing. It is not very long. Reach your own conclusions. Don't listen to me. Don't listen to the House. I think it speaks for itself. You will see that Judge Porteous actually gives them a hearing. A lot of judges don't. They just deny it. Instead, he gave them a full hearing, told them he understood why he was bringing this issue, acknowledged he had a relationship with these lawyers, and then he went and said: Tell me what I need to do to make sure you can appeal me because you have a right to appeal me, and he stayed the case to allow an appeal. Most judges just won't do that.

He did not say in detail what the relationship was. He understood that Mole was going to appeal. One thing he did want to correct on the record is that Mole said, incorrectly, that he had received campaign contributions from these individuals. He said that is just not true, and he corrected it on the record. He never denied the relationship. From his perspective, having a relationship, a friendship, particularly from his time in Gretna, was not a problem. It was just not a recusable issue. So he left it at that.

The third allegation is that Judge Porteous should be removed from office because he denied Lifemark's recusal motion. That is the most dangerous allegation in article 1 because that would remove a judge for the substance of his decision—in this case, a recusal motion. Can you imagine if you start to remove judges because you disagree with their recusal decisions? Judges are constantly appealed on recusal decisions. Sometimes they are upheld; sometimes they are not. But when you start to remove judges because you dis-

agree with their conclusion, even though many judges share this view of recusal, then you open the Federal bench to virtually unlimited manipulation.

The evidentiary hearing in the Senate I do not want to tell you was a total bust. It was not. For those of you who were looking for a conspiracy, we found one, and it came out in live testimony—a scheme, a very corrupt scheme—but in that scheme Judge Porteous was the subject, not the beneficiary. The hearing saw extraordinary testimony from Mr. Mole, whom you heard the House repeatedly refer to as this paragon of a witness.

Mr. Mole brought this issue that he should recuse himself, and Mr. Mole was shocked he did not. In fact, I think Mr. GORDON said Mr. Mole had no alternative but to proceed the way he did. But the House Members did not mention how Mole proceeded. After he lost the recusal motion, Mole decided he had to get this judge off the case. He was not going to have this West Bank judge rule in this case of Lifemark. It was going to be bounced to get another judge—a 14th reassignment of the case—if Mole had anything to do about it.

So he went and he talked to a guy by the name of Tom Wilkinson. Now, Tom Wilkinson is the brother of the magistrate who was assigned to the Lifemark case. So he went to the brother of the magistrate, and this is the former Jefferson Parish attorney. He was known as someone who could solve problems like this. He was known as the go-to guy to fix a problem with a judge you did not want. Wilkinson is now reportedly under investigation for corruption in Louisiana.

So Mole met with him, and then Wilkinson got Mole to meet with one of Judge Porteous's closest friends, Don Gardner. He went to Gardner and offered him an extraordinary contract, which we have put in the RECORD. That contract promised Mole \$100,000 if he joined the case and offered him another \$100,000 if he could get Porteous to recuse himself—\$200,000. But that was not all. The contract actually said: By the way, once Porteous is gone, you are gone. So if you get him to recuse himself, I will give you \$200,000 and you go away and we can then merrily go on bouncing this case through the court system.

The problem with this scheme by Mr. Mole is that it did not work because Don Gardner said: You do not want to go to Tom Porteous. You do not want me to go to Tom Porteous and tell him to recuse himself because he will react very negatively, and he refused to go—this is his own testimony—refused to go to Porteous to ask for his recusal.

Ultimately, the judge's decision cost his closest friend \$200,000. Mole himself admitted he had never seen a contract like the one he wrote, and witnesses testifying said they were shocked to learn of a contract where someone actually put a bounty on a Federal judge

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and offered \$200,000 if you could get him off the case.

Nevertheless, when Gardner lost that case, he said the judge gave him a fair hearing. He said: Look, this judge is just not bribeable. He gave us a fair hearing. He disagreed with us, and we lost.

By the way, this is not mentioned by the House: Creely also practiced before the judge. By the way, he was not the counsel in Lifemark. But Creely actually did have a couple of cases in front of the judge, and the judge ruled against him and cost him a huge amount of money. In one case where he lost a great deal of money, Creely actually took his best friend on appeal and got him reversed. But his friendship did not stop the judge in one of Creely's biggest cases from ruling against him. He did not feel the need to recuse in those cases, and it did not influence his decision.

The article also talks about "things of value," another general term. These are small, common gifts that both Creely and Amato admitted they gave to Porteous and said were very common in Gresham, as in many small towns. Yes, they had lunch together. They had lunch together for their whole 30-year relationship. A few of those lunches did continue while Lifemark was pending in front of the judge. The judge paid for an occasional meal, but Representative GOODLATTE is absolutely correct. He did not pay for enough meals. The House did not contest the only ethics expert in this case who said those lunches are permitted under State law, and they still are permitted today. Back then, they had the same rule the Senate had. Back then, the Senate allowed Senators to be bought lunches, not because it invited corruption. A lot of Senators did not view it as a source of corruption. Neither did the people of Louisiana when it came to lunches being bought for judges. It was just a courtesy.

There has been talk about Creely attending Tom Porteous's bachelor party in May 1999. I am simply going to note, if you look at the testimony, Creely said he was friends with Timothy. Timothy is a lawyer. He was very close to Timothy, and he had great love for Timothy. He expressed that in a hearing. He went to his friend's wedding. By the way, when he bought the lunch at his table, Porteous was not at the table, and he threw in with the other attorneys at that time.

Now, as I mentioned earlier, the wedding gift is, frankly, the most serious problem. It occurred 3 years after the recusal hearing. I am not trying to excuse it, but I do wish you would keep that in mind because these dates do get blurred. It was 3 years after the recusal hearing when this wedding gift was handed over.

And, yes, he went on this fishing trip. It was a very emotional thing. He was having trouble paying for his son's wedding, and it was a huge mistake. The judge admitted it. It was not a

bribe, not a kickback; it was a gift. It was dumb to be offered, dumb to be accepted. But both Creely and Amato made clear it was not a bribe or a kickback.

In fact, Jake Amato testified he "felt [Judge Porteous] was always going to do the right thing" in the case. He did not see any connection in terms of influencing the outcome of the case.

Now, one question the House has never been able to answer—one which maybe the Senate would want to put to the House—that is, if Judge Porteous could be influenced for \$2,000 and for some other "small things of value," as the House alleges, why did he not just recuse himself so his close friend could collect \$200,000? Why didn't he rule for Creely in those other cases? He had two friends in the case of Lifemark. He cost one \$200,000. Why didn't he accept money like those other judges who were nailed in Wrinkled Robe?

The appearance of impropriety is a dangerous choice for this body to import in the impeachment standards. Professor Ciolino—this is not contradicted by the House—has said that State bars have continued to move away from the appearance of impropriety because they view it as a standard that is virtually meaningless. It basically says: Don't be bad. That is almost a direct quote from what Professor Ciolino said. He is a big critic of that standard. He said State bars are moving away from it at the time the House is asking you to adopt it as an impeachment standard.

Let's turn to article II. Article II, we have already discussed, is the article that is the pre-Federal conduct allegation. I will leave that to your discretion. Since you have not ruled on the motion, I will try to address a few of the facts in this case.

But if the Senate agrees with the defense that a judge cannot be removed for pre-Federal conduct, then most of article II is gone. There is virtually nothing there in terms of Federal conduct. The evidence that is supported in article II in terms of Federal conduct is six lunches—six lunches—that took place over 16 years. So let me make sure we understand that. The evidence in article II of Federal conduct that you can remove a judge for is six lunches.

I should note that Judge Porteous attended several of these lunches, but there is no record that he attended all the lunches, so the six might be a high number. You see, the House had no record that he actually attended some of these lunches, but somebody at the lunch had Absolut vodka. I kid you not. So what the House is saying is that because Judge Porteous drank Absolut vodka, you should just assume he was at those lunches and use that as part of the evidence to remove a Federal judge. I am not overstating that.

Asked the committee just to take judicial notice that Judge Porteous is not the only human being in Louisiana who drinks vodka or even Absolut

vodka. What they are inviting you to do again is to remove a judge on pure speculation.

By the way, the value of these lunches over 16 years was also not mentioned. They are less than \$250 over 16 years. The individual meals benefited Judge Porteous—the average was \$29.

As I mentioned, experts testified in this case, and were not contradicted, that judges were allowed and they are still allowed to have lunches purchased for them in this respect. The most the House could come up with is that by attending these lunches, Judge Porteous "brought strength to the table"—that is one of the statements of their witness, Louis Marcotte, that he "brought strength to the table"—and that is enough. Imagine if that was enough. If you are permitted to have lunches bought for you but someone at the lunch benefited from your being present, a third party, because you "brought strength to the table," that would be enough for a charge of impeachment under this approach. The record shows that Senator John Breaux went to some of these lunches with the Marcottes. Does the House suggest that because Senator Breaux went to a lunch, he should be expelled from this body? That would be ridiculous.

Virtually every witness called by the House and the defense testified that judges dealt exclusively with the Marcottes as bail bondsmen. You heard the House say bail bondsmen would often deal individually with the judges. I just need to correct that. There weren't bail bondsmen—plural—at any practical level. This is a small town, and the Marcottes were it. The witnesses testified that the Marcottes controlled over 90 percent of the bonds. They were the bail bondsmen for Gresham. It is not a huge town. So, by the way, if you think about that, it means that every judge who signed a bond was almost certainly signing it for the Marcottes because they were the only bail bondsmen on a practical level.

Now, here is the thing you might find confusing. At the evidentiary hearing, the House conceded not only that they could not prove a linkage on these bonds but that they did not specifically allege a relationship between the size of the bonds and this relationship with the Marcottes. The House stated:

The House does not allege that Judge Porteous set any particular bond too high or too low.

So all of the references just now about setting things too high and too low, how they benefited the bail bondsmen, the House stated that it was not alleging that they set these things too high or too low. So once again we find that the articles are being redesigned here in the well of the Senate irrespective of what was previously said by the House.

The House does little beyond noting that Judge Porteous often approved bond amounts by the Marcottes, and, as detailed in our brief, the House's

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own witnesses demolish that allegation. The amount of a bond is set to reflect the assets of the defendant. The Senate staff summed this up in its own report in front of you on page 18: In many cases, the highest bond a defendant can afford may also be the socially optimum level so as to eliminate unnecessary detention while providing maximum incentive for the defendant to appear. That is the point of bond. You set it high enough that they are going to come back to court. There was very good reason.

The witnesses in this case testified that Judge Porteous was a national advocate for the use of bonds, and he connected the use of bonds to overcrowded systems. Gretna was subject to a series of Federal court orders that were releasing people, dangerous people, from their jails. Judge Porteous spoke nationally on the need for judges to use bonds, and he was correct. As we submitted in the record, studies have proven him correct, that if you get a bond on an individual, the chances that they will return and not recidivate are much, much higher. And Judge Porteous did speak to every judge he could find to say: Start issuing bonds because people are not showing up. Get them under a bond and they will.

You also saw that the House suggested somehow the Marcottes got special treatment from the judge. The fact is, they were the only bail bondsmen on a practical basis, so if you wanted to get bonds, you got bonds with the Marcottes. But, by the way, his secretary, Rhonda Danos, testified that the judge often told her not to let the Marcottes into his office. She said that on occasion he would say not to let them in. And she said they were not given any special treatment in access to the judge. She said Judge Porteous is a very popular judge and lawyers would gather in his office.

Let's turn very quickly to these two cases. I am afraid I am running short on time, so I will have to ask you or your staff to look at our position in our filing.

I want to note that on the Duhon expungement that has suddenly resurrected like a Phoenix on the floor of the Senate—we thought it was dead. The reason we thought it was dead is because it had been downgraded in the trial, because of testimony from witnesses, where the House simply referred to it as noteworthy. By the end of the trial, it had gone from a matter for removal to a noteworthy case. The reason is that witnesses testified that this was a routine administrative process. The witnesses showed—and there were no witnesses called by the House who were experts in this area. We called witnesses to talk about these types of setasides and expungements, and those witnesses said this was perfectly ethical and appropriate. Not only that, in the Duhon matter, Judge Porteous was following the lead of another judge. That was never revealed to the House. We revealed it in the hear-

ing. It turns out that a prior judge had already taken steps in the case.

Louis Marcotte testified that he wasn't even sure he asked Judge Porteous for assistance on the Duhon matter. Nevertheless, the managers included the allegation in the article.

As for the Wallace setaside, the House could not call any expert to testify that it was improper, and we did call people who said it was perfectly proper. It was both legal and appropriate under Louisiana law.

Now, I want to address one thing about the Wallace setaside. The government, once again, is coming here—the House is coming here and saying: You know, he did this so you wouldn't know about it. He waited to take actions in the Wallace case after he was confirmed. And what do you think of that?

Well, I suggest what you think of that is it is not true. As we said here, this is why we were surprised to find it being mentioned on the floor of the Senate today. It is just not true. The judge held a hearing before confirmation and stated in the hearing: I intend to set aside this conviction. That is a pretty weird way to hide something. Before confirmation, he said, I am going to do this, and I need you to put a motion together. Why? Because it was the right thing to do. It is routine in this area. These types of things are very routine. What the attorney said is they just walk around with these forms in their briefcases.

Do you know what Mr. Wallace said? He said that Judge Porteous was a judge who was known as someone who would give someone a second chance, and he gave Wallace a second chance, and Wallace went on to become a minister and he is now a respected member of his community.

Now, a lot of this turns, of course, on Louis Marcotte, who also, by the way, admitted at trial—this is Louis Marcotte—he explained why he lied on one occasion, and he simply said: Well, I wouldn't have any reason to tell the truth. That is Louis Marcotte. Indeed, one of the witnesses told the committee that the House staff told them that the reason he was being called is because people wouldn't believe Louis Marcotte, that he lacked credibility.

Now, the Marcottes ultimately said that lunches would occur sometimes once a month; car repairs that were discussed here lasted about 6 to 8 months and consisted of a few minor repairs. We suggest you simply look at the testimony. You have to look at the testimony because there are not any documents of exactly what repairs were done. It is all testimonial. So this isn't a debate over the standard of proof; there is no proof.

Finally, the House has continually referred to other State judges who were convicted of crimes, including Judge Green and Judge Bodenheimer. I simply want to note that Judge Porteous, of course, never accepted cash or campaign contributions from the

Marcottes. That put him in a small group, from what I can see. They gave as much as ten grand to judges, including judges who are still on the bench. They never gave Judge Porteous any cash. Why? They handed out cash to other judges. If he was so corrupt, if he was this caricature the House makes him out to be, why didn't he take the cash and run?

Judge Porteous, of course, was never accused of a crime, let alone convicted, and those men, Judge Green and Judge Bodenheimer—you just heard the House say: Look at these people; judge Judge Porteous by their conduct. They were convicted of mail fraud and planting evidence on a business rival.

Article II is a raw attempt to remove a judge for conduct before he was a judge. Article II, I submit to you, is nothing more than what Macbeth described as a "tale full of sound and fury, signifying nothing."

Article III is the only article that does not rely on pre-Federal conduct. What it relies on are a series of errors made in a bankruptcy filing that the judge made with his wife Carmella. I am not going to dwell on the intricacies of the Bankruptcy Code, which may be a relief to many. What the record establishes is not some criminal mastermind manipulating the Bankruptcy Code; it basically shows people who had bad records, little understanding of bankruptcy, which, by the way, is usually the type of people who go bankrupt. They sought a bankruptcy attorney of well-known reputation, Mr. Claude Lightfoot, and they were given bad legal advice.

But one thing the House doesn't mention today and did not mention to House Members when they got the unanimous vote: Judge Porteous paid more in bankruptcy than the average person in this country. He succeeded in bankruptcy. They filed a chapter 13 bankruptcy in 2001, and they paid \$37,000 to the trustee, \$52,000 repaid to their creditors. The only difference is that he was scrutinized a lot more. He had two bankruptcy judges, a chapter 13 trustee, and the Federal Bureau of Investigation and the Department of Justice.

By the way, I mention the FBI and DOJ because they raised these issues you just heard about while the case was pending. They didn't come into this case after it was done; they actually went to see the trustee and raised these issues with the trustee, and the trustee said he didn't feel any action would be appropriate, necessary. So he found that these actions actually wouldn't warrant an administrative action by a bankruptcy trustee, but the House managers would say that is still enough to remove a Federal judge under the impeachment standard.

By the way, after the DOJ and the FBI went to the bankruptcy trustee and said, look at all these things, and the trustee said, I don't think this really warrants any action on my part, the DOJ and FBI didn't take action either. All the sinister stuff about how

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they found this, it was found before the case was closed.

None of Judge Porteous's creditors ever filed a complaint or an objection. That was also not mentioned in the case.

When they retained Mr. Lightfoot, they had never met him before, and it is true that Mr. Lightfoot did suggest that they file with the fake name "Ortous" instead of "Porteous." That was a dumb mistake. To his credit, Mr. Lightfoot said: This was my idea. He said: I was trying to protect him.

Particularly, Judge Porteous's wife was upset about the embarrassment of the bankruptcy and the fact that, at that time, the Times Picayune published everyone's names in bankruptcy in the paper, and she was very embarrassed. And he thought he would help that by using "Ortous," and then that was just for the first filing, correcting it so that no creditor would actually get that document or get that false name, and he did. Roughly 10 to 12 days later, he corrected it, and no creditor did get the misleading information.

By the way, in that first filing, he used the information, including the Social Security number, which is the primary way you track people, so he didn't falsify that.

It was a dumb mistake, but it was a mistake done by Mr. Lightfoot, at his suggestion, because he thought he could avoid embarrassment.

He said he regrets this. But it was his idea. In the fifth circuit, you are allowed to follow the advice of counsel. Should Judge Porteous have followed this advice? No. He should have known better. This is one of those things where yielding to temptation at a time like this was a colossal mistake.

But when the trustee was presented with this, with the FBI and the DOJ coming to his office, he said that he felt this was no harm, no foul. Why? Because nobody was misled, and because they changed it. No creditors were misled. He finished his bankruptcy filing. He did what most people don't do, he succeeded. He paid his creditors.

Henry Hildebrand, who is a standing chapter 13 trustee in Tennessee, said that he has seen bankruptcy petitions filed with incorrect names. He has seen it. He said that what you do is you require them to correct it, and you give notice to the parties. In this case, they didn't have to do that because the creditors already got the correct information.

Former U.S. bankruptcy Judge Ronald Barliant said that on the basis of the facts of that use of the pseudonym Ortous, he would not find any intent to commit fraud or otherwise impair the bankruptcy. He didn't see it. Neither did the trustee, and neither did the FBI or the DOJ, to the extent that they didn't charge it.

The House further alleged other errors and inaccuracies in the bankruptcy schedule as part of this dark and sinister plan to co-opt the bank-

ruptcy system. Two empirical studies that were introduced at trial show that 95 to 99 percent of bankruptcy cases contain certain errors and inaccuracies. In fact, we had testimony from Mr. Hildebrand, who says he actually didn't believe that he had ever seen, in his 28 years as a chapter 13 trustee, a perfect filing.

Bankruptcy law professor Rafael Pardo also said that it has never been the standard to be perfect, that requiring these things to be perfect is unrealistic and unworkable, and that people make errors. The people who are filing bankruptcy are people who couldn't handle their records before. It is not surprising when they file bankruptcy and they have errors.

I want to talk quickly about these errors, where the judge is alleged, in the summer of 2000, to have given Mr. Lightfoot his May of 2000 pay stub, but he did not later supply an updated pay stub. What they left out was that the difference between those two pay stubs was \$173.99 a month. Trustee Beaulieu said that it was such a small amount, and it "would not [have] substantially increased the percentage paid to unsecured creditors."

Mr. Lightfoot's file shows that Judge Porteous actually told his bankruptcy counsel that his net income was higher than listed on the pay stub, but that Mr. Lightfoot was using the information on the stale pay stub. He testified at trial that he failed to ask the Porteouses for the updated pay stub prior to preparing the bankruptcy filings. But now that is going to be part of a basis for the removal of a Federal judge.

Let's talk about that Bank One account. On that one, Mr. Lightfoot testified that he simply asked the Porteouses to approximate how much money they had in their account. The bankruptcy lawyer said, "Give me a ballpark figure," and they did. There was no sinister plan here. How about the Fidelity Homesteads Association checking account just referred to? That account was omitted inadvertently. Judge Porteous testified before the fifth circuit that he thought he told Mr. Lightfoot there was this Fidelity account. However, it is undisputed that the value of that account was \$283.42. That was the account that was mentioned here.

There is also reference to the fact that it said that occurred during the bankruptcy. There is no bar to incurring such debt by statute during bankruptcy. There is no bar to it.

Yes, the House made a great deal out of the fact that the Porteouses gambled. Gambling is legal. It was a problem. For Judge Porteous, it was an addiction. He dealt with it in a public way that few of us would want to deal with. He dealt with his drinking and addiction problems by going to seek professional help. Like many of us, he didn't do that until his life exploded on him. He went and got treatment for depression. Should he have done it be-

fore? Yes. But gambling is not unlawful.

More important, what was described to you about these markers is what the judges, Judge Dennis and his colleagues, objected to when they said that, "Under Louisiana commercial law, markers are considered 'checks' as defined by Louisiana statute."

Markers are uncashed checks, not debts for purposes of bankruptcy.

At trial, an FBI agent called by the House confirmed this interpretation—that a marker was a "temporary check." In other words, these judges, who are not part of the sinister plan to undermine the bankruptcy laws of our country, all said they agreed with the interpretation that this is not debt. Some people might disagree with their interpretation. But at most, it is equi-
poise. They didn't believe it constitutes that, period. Should they have gambled in their bankruptcy? Of course not. That is not a failure as a judge. That was a personal problem that the judge overcame.

Let's move on to the last article. The fourth Article of Impeachment is the deliberate attempt by the House to re-suscitate the pre-Federal charges, by trying to recycle them through the confirmation process. By the way, Senator LEAHY had asked about perjury in the confirmation process. I said that I do believe that perjury is a removable offense. Mr. SCHIFF stood up and said: Aha, then you do believe in the pre-Federal basis for removal. The answer is no. The confirmation process is part of the Federal process. It is part of your service as a judge. It is not pre-Federal in terms of what we are discussing. It is directly related to your being put on the Federal bench.

Obviously, if you acquit Judge Porteous on articles I and II, you have to acquit on IV, because that is basically article I and II recycled—the confirmation issue.

There are three questions that the House focuses on. I want to read you that question from the SF-85: "Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause you an embarrassment to you or the President if publicly known?" That is just one; it is a compound question.

I want you to put yourself in the shoes of Judge Porteous. He just answered 200 questions, and 100 of his closest friends had been interviewed, along with family, neighbors, and colleagues. This was the final question. I would like you to ask yourself how you would answer that question. Is there anything in your life someone could say that could be used to coerce or blackmail you? Would you answer that yes, would you answer it no, because you know you wouldn't be coerced and blackmailed? I am sure all of us have things we are not proud of, or that we don't want to be made public. That is the case with Judge Porteous. But we heard uncontradicted testimony that if

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you just now said no to that question, you would not be alone. The FBI agent who testified said that in his 25 years in the FBI, he had never seen anyone answer yes to that question.

We brought in a leading expert on the confirmation process. He said that he was unaware of a single person ever saying yes to that question. It is so ambiguous that most people just say no. People have to sit there and wonder what would be embarrassing to President Clinton, and you are supposed to say, well, I can think of this or that. Maybe that would embarrass President Clinton. They don't say, look, I don't think my life is embarrassing to people.

These lunches that they keep citing were in public places, not in a house or underneath a car; they were held in open restaurants. He never tried to hide them; they were legal. There was actually a table set aside by the restaurant for lawyers and judges. The witnesses testified they had never seen any judge but one ever pay for those meals.

By the way, this was raised about Porteous's 2000 tax refund check. That was raised regarding things he was trying to hide. I believe the expression was, you know, that the 2000 refund check went right into his pocket. You know what. It is supposed to. Refund checks are not part of a bankruptcy filing in cases such as this. They always go into your pocket.

What they are asking you to do is to assume that Judge Porteous was embarrassed, and then remove him for that. Let me state that again. He was asked that question if anything would embarrass himself or the President, and they want you to say I think he was embarrassed and then you can remove a Federal judge on that basis—even though he didn't hide these things.

They keep on talking about these relationships. They are public relationships. Does that track with the constitutional standard, in your view? It is now down to embarrassment. He didn't hide the Creely relationship because Creely said there was no relationship of gifts to curatorships. Why would he hide that? Creely said it never happened. Once again, they are asking you to assume that and say the assumed facts must have embarrassed him, and therefore his answer to a compound question of "no" must be enough to remove him. This is not new.

All of you have been involved in the confirmation process. There are plenty of circumstances where facts have come forward that were embarrassing to a nominee that were not revealed. We saw that Bernard Kerick, who was nominated to be a member of the Cabinet, was actually criminally charged for saying there was nothing that would be embarrassing. He said: Not to my knowledge. The prosecutor said: You know what, that is a lie; we found something that would be embarrassing. That went to a Federal court and the

Federal court said: "Where a question is so vague as to be fundamentally ambiguous, it cannot be the predicate of a false statement, regardless of the answer given."

The court went on to say: "Plainly, the meaning of the word embarrassing is open to interpretation and that it's hard to believe that a Federal prosecution would follow."

Here's my question: If it is hard to believe that a Federal prosecution would follow, how about an impeachment based on embarrassment? You cannot even use this in that Federal court. The judge cannot even base a charge on it. They are arguing you should now base the removal of a Federal judge on it. A judge in the third circuit was found to have lied in his confirmation hearing, but the third circuit said for discipline to be warranted, there had to be a showing of intent. The House didn't attempt to make that showing.

U.S. District Court James Ware had told people that his brother had been shot and killed in a racially motivated incident in Alabama in 1963. In 1997, when Ware was nominated to the ninth circuit, he listed family members, including Virgil Ware, who existed; it just wasn't his brother. A Ware had been killed, but it wasn't his brother. It was a lie. He was severely reprimanded by the court, and he should have been, but it is not an impeachable offense. He still sits on the district court in California. Also Hugo Black was mentioned.

We have plenty examples in the record. The fact is that if you start to remove judges for embarrassment, there will be no end to it. You will have House Members lining up to this open door to bring forth things that should have been mentioned in confirmations by judges that they disliked—and not just judges, but Presidents, Vice Presidents, and Cabinet members—if that is the standard. If you read the newspapers, you will see what I mean. There are articles in the newspaper, the Washington Post, where you have Members of Congress starting to make their case for the impeachment of Supreme Court Justices Thomas, Roberts, Kagan, and Sotomayor.

In fact, Congressman Peter Fazio said, "They have opened the floodgates, and personally, I am investigating Articles of Impeachment against certain justices."

If that is the standard, a President would have to raise nominees hydroponically in the White House basement if they have any hopes of surviving on the bench. You cannot possibly, I hope, consider replacing the impeachment standards with the wrong answer on that embarrassment question in confirmation.

Article IV is an open demand for Senators to engage in pure conjecture. If Senators can simply assume embarrassment to remove a nominee, there is no standard of proof, our day is over, and there is no standard of removal.

They will serve at your pleasure, just as Madison feared. It is precisely what Adams worried about—uncertain wishes and imagination as a substitute for proof.

Before I sit down and I rest this case in the defense—before my voice gives out—I want to conclude by addressing one thing about this case, and that is the fact that Judge Porteous didn't testify, as some of you may be wondering about that. The reason can be found in the fifth circuit testimony. When the fifth circuit sought to question Judge Porteous about the allegations in article I and article III, Judge Porteous took the stand and did not deny many of the factual allegations. Somehow the House keeps citing that as if that is a major, sinister thing; that he actually said, I am not contesting these facts. And you know what, the House seemed to make fun of the fact that he couldn't remember details about what occurred with the \$2,000. What was the point of that?

You had a judge who had, obviously, addictions. He had depression. He dealt with them. And when he showed up in the fifth circuit, his memory was not clear. But he didn't say that to say, and therefore these things didn't happen. He said the opposite. He said, if I were you, I wouldn't rely on my memory. If Creely and Amato were saying that, they are friends of mine. I don't think they lied. What is bad about that? He just is disagreeing with the implications of these things. So when they quote him and make fun of the fact that he tried to answer what happened with that money, he was doing his best. They seemed to leave out the fact that at the end he said, just assume it occurred and hold me to that standard. Ultimately, he accepted severe discipline from the fifth circuit for his poor decisions, and he announced that he will retire some months from today.

Did he betray his office? No. Maybe he betrayed himself, maybe his family, but not his office. His failings were that of being a human being—a man who was overwhelmed by addiction, the death of his wife, and financial troubles. Did he help bring those on? Perhaps. Whatever Judge Porteous may appear to you during this period, he was and he is proud of his nearly 30 years of public service as judge, but he believes that is for others to judge—judge now. He didn't feel it was appropriate in the fifth circuit to be contesting things that his friends had remembered, and he also doesn't think it is appropriate for him to beg you to excuse any of his actions. He wants you to judge his actions. He believes he can be judged harshly and he was judged harshly. He tainted his own legacy.

Judges are humans, and that humanity can make some of them the best of their generation. The life experiences of jurists such as Thurgood Marshall and Louis Brandeis made them towering symbols for lawyers and law students and the public. Others, such as

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Judge Porteous, that humanity showed frailties and weakness. Some of the men and women who don these robes have those frailties and weaknesses. This is going to happen again. Judges will have bankruptcy problems. They only look inviolate in those robes. We elevate them in the courtroom. But beneath those robes are human beings, and some of them have problems and some of them make mistakes. But they shouldn't end up here on the Senate floor debating whether he was a moocher or whether he paid for enough lunches.

He will let the record stand and you judge him for it. He felt he deserved to be disciplined. Maybe he felt he deserves to be here, I don't know. But he doesn't deserve to be removed. He didn't commit treason, he didn't commit bribery or other high crimes and misdemeanors. He committed mistakes. But in the end, only a U.S. Senator can say what is removable conduct. It comes to you along a road that has been traveled by two centuries of your predecessors—a road that began with people such as James Madison, George Mason.

One Senator who sat where you sit now was Senator Edmund Ross of Kansas, who stood in the judgment of President Andrew Johnson. Many of what Ross's Republican colleagues wanted was Johnson out of office, for good reason. The public demanded his removal. He was viewed as a political enemy by Ross. He was the subject of John F. Kennedy's book "Profiles in Courage." He was one of those profiles. Kennedy explained:

The eleventh article of impeachment was a deliberately obscure conglomeration of all the charges in the preceding articles, which had been designed by Thaddeus Stevens to furnish a common ground for those who favored conviction but were unwilling to identify themselves on basic issues.

Does that sound familiar at all? While the record was filled with abuses and poor judgment by Johnson, Ross was forced to consider whether they amounted to an impeachable offense. And as the recall occurred, he found himself a key vote standing between Johnson and removal from office. Ross described the sensation as,

Almost literally looking down into my open grave . . . as everything that makes life desirable to an ambitious man was about to be swept away by the breath of my mouth, perhaps forever.

He then jumped into that grave and he uttered the words of "not guilty" to the shock of his colleagues. His career ended. He was chastised at home, but he became a profile in courage not just for John F. Kennedy but, I hope, for many people in this Chamber.

No career will be lost with your vote today. Indeed, in a week of votes—of sweeping immigration changes and nuclear treaties—I think the world is in a bit of amazement and awe that we would have so many of you here today to just stop and decide the facts and the future of a Federal judge. It is a

testament to this system. No matter what you do today, Judge Porteous will not return to the bench. He will be convicted or he will retire. No senatorial career will turn on his vote. But of course impeachment has never been about one president or one judge but all presidents and all judges. The Framers understood that.

What will be lost today is not a career but a constitutional standard that has served this Nation for two centuries—a standard fashioned by the very men who laid the foundation of this Republic; a standard maintained by generations of Senators who sat where you now sit in this very Chamber. We ask you to do as they have done and hold the constitutional line.

We ask you to acquit Judge G. Thomas Porteous.

The PRESIDENT pro tempore. Thank you very much, Professor. Representative SCHIFF will conclude the case for the House managers, and the House has 26½ minutes remaining.

Mr. Manager SCHIFF. Mr. President, Senators, let me begin this conclusion by some agreement with my colleague—this is a remarkable proceeding, and the true import of it is demonstrated by the fact of how much you have going on this week and the amount of time we are devoting to this today. It is a reflection of the seriousness, it is a reflection of the fact that these cases come around very rarely, and for good reason. The Constitution sets the bar high. It doesn't want either the House or the Senate to take the process of impeachment lightly. We in the House certainly do not, and we know in the Senate you don't take that responsibility lightly either.

We have set out the facts about why this judge needs to be removed from the bench, and I wish to take this opportunity to rebut some of the points my colleague has made. I think when you go through the evidence, and when you discuss it with the Senators who sat through the trial, you will find, on each of the articles as charged, that G. Thomas Porteous must be removed from office.

Counsel began by stating that the judge wasn't prohibited from being prosecuted for many of these crimes; that he signed tolling agreements with the Department of Justice. But this is what the Department of Justice said in its letter transmitting the case:

Although the investigation developed evidence that might warrant charging Judge Porteous with violations of criminal law relating to judicial corruption, many of those instances took place in the 1990s and would be precluded by the relevant statute of limitations.

The tolling agreements that Judge Porteous signed contained this clause: I understand that nothing herein has the effect of extending or reviving any such period of limitations that has already expired prior to April 5, 2006.

So anything that was gone by then was gone for good, and he made no agreement to revive it. So the case was

referred to the fifth circuit. The fifth circuit had 2 days of hearings and, according to Judge Porteous's counsel, provided unprecedented sanctions on the judge.

Do you know what those unprecedented sanctions are? That he has heard no cases and earned his entire salary for 3 years. He was paid his full salary for doing nothing. That is an enormous sanction that was placed upon him—a sanction I think many Americans would love to have, to be paid a Federal judicial salary for doing nothing. That was the sanction.

Counsel says he offered to retire. Well, why didn't he? Why didn't he 3 years ago retire from the bench? He could have. But the Judge's whole intent—which has been demonstrated throughout the procedural history by changing attorneys and moving for delays and continuances—has been to draw out the clock, to go another month with another Federal paycheck, to see if he can eke it out a little longer until he can get his full salary, his full retirement for life. There was nothing preventing this judge from retiring 3 years ago.

Turning to the claims made by counsel in article 1, that the articles don't charge a kickback scheme, let me read from article 1.

While he was a State court judge in the 24th Judicial District in the State of Louisiana, he engaged in a corrupt scheme with attorneys Amato and Creely whereby Judge Porteous appointed Amato's law partner as a curator in hundreds of cases, and thereafter requested and accepted from Amato and Creely a portion of the curator fees.

It says right here, he sent them the cases and thereafter requested and received a portion of money from those cases. If that is not a kickback, I don't know what is.

I guess counsel's real argument is, well, why didn't they use the term kickback? And because they didn't use the term that counsel would use in the charging instrument, therefore, you must acquit. That is not the law in impeachment cases, that we have to charge using a particular word. What we do have to do is set out the conduct.

Senator LEAHY asked: Well, what about perjury? We don't use the word perjury in the fourth article, but we set out in the fourth article that he made material false statements before the Senate, knowingly, willfully, and deliberately. That is perjury. So we don't use that particular word. We don't have to use that word. We don't have to charge a particular criminal statute. When we do use particular words, counsel takes issue; when we don't use particular words, counsel takes issue. What is the requirement here? That we charge him with high crimes and misdemeanors. And yes, those words do appear in the articles.

Now the gift. The wedding gift, as counsel calls it. You will notice from the portion he read to you, Mr. Amato never calls it a gift. Mr. Turley does, in his question. In fact, after Mr. Turley

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asked those questions, I asked both Creely and Amato: Was this a wedding present? Was this a wedding gift? And their answer was: Of course not.

Counsel has just said: Well, back in the fifth circuit, when Judge Porteous was explaining what happened, he didn't want to contradict his friends, or maybe he didn't have such a good recollection. So 3 years ago, during the fifth circuit when he said—he called it then a loan that he never paid back. But he didn't have as good a recollection 3 years ago as counsel does now when he calls it a wedding gift. Well, no one has ever referred to this as a wedding gift. It was not a wedding present. It wasn't something they registered for.

In fact, the conversation in the testimony at trial was, Amato says: We are out on a fishing trip and he says, look, I invited too many guests to the wedding—this is where the wedding comes in. I invited too many guests to the wedding. I can't afford this. You got to help me out. Can you get me 2,000. Can you give me 2,000. Can you find me a way to get 2,000?

Does that sound like a gift to you? And you don't have to take my word for this or counsel's word. There were 12 Senators who sat through these days of testimony. Ask them if this was a wedding gift.

Counsel says: Well, these were just really close friends of the Judge. This was Uncle Jake and Uncle Bob. These were just close friends. Yet, look at the transcript of that recusal hearing where the judge says—because at that point he wants to distance himself—I don't really know these attorneys. Have we had lunch? Yes. But I have lunch with all the lawyers in the courthouse.

Have I ever been to their house? No. Well, that is odd. This is Uncle Bob and Uncle Jake. They are that close, according to counsel, but the judge has never been to their house? Clearly, from the point of the recusal hearing, where he is trying to show—trying to mislead the parties, he doesn't know these attorneys any better than any other attorneys he has lunch with. Then, it is one thing, but here it is Uncle Bob and Uncle Jake now.

Counsel says Creely denied that this was a relationship between the cash and the curators. That is simply not the case. If you look at Creely's testimony, he says the judge called him and was hitting him up for the curator money. When Creely says—the reason Creely doesn't like calling it a kickback, apart from the very self-serving and obvious reason, is, he says: I didn't ask for these curator cases; therefore, it can't be a kickback because I didn't want them. They were a nuisance. He says: The judge sent them to me because he wanted to hit me up for the money, but because we didn't have an agreement in advance, because he basically forced me to take these cases and then forced me to give him some of the money, therefore, it wasn't a kickback.

I don't think that is how the definition of a "kickback" works.

Plainly, Creely testified that the judge understood the money was coming from the curatorships. Plainly, the judge knew it was a kickback, and if Creely doesn't want to admit it or call it that himself, that is exactly what it was. In fact, Amato testified that Creely came to him and said: Look, the judge is hitting me up for the curator money. What do we do?

Amato said: Well, let's just give it to him.

Basically, it wasn't going to cost them much. They are getting these cases. They are kicking back a portion of it, so they decide to do it.

Counsel makes the suggestion, again, he is being charged with being a moocher, he is being charged with having free lunches. Again, I encourage you to talk to the Senators who were there. As my comments about Senator JOHANNIS earlier make clear, they are not about whether the judge was a moocher or had too many free lunches. This is about getting money from attorneys, this is about setting bonds not with the public interest in mind but to maximize the profit of a bail bondsman and get a lot of gifts and favors and trips and car repairs and everything else out of it.

Counsel makes the astounding claim that everybody in the case agreed that this is the best judge in Louisiana. God, I hope not. If that is the case, we are in much more serious trouble than any of us can imagine. But that was certainly not the testimony in this case.

Counsel says: Why weren't there records produced by the House of the curatorships? They could have gone and gotten the records. This is somewhat inexplicable because we did get the records. We went into the courthouse and got the boxes and found the record of these curator cases and we introduced records of hundreds of curator cases that were, in fact, assigned to Creely that were the subject of these thousands and thousands of dollars that were returned.

Counsel says: Well, the witnesses couldn't specify exactly how much—was it \$20,000, was it \$19,000, was it \$21,000—and, therefore, you can't believe they actually got the money.

The judge himself doesn't deny getting the money. You know why we can't be precise about whether it was \$19,000 or \$21,000 or \$20,000? Because as the witnesses said during the trial, they paid in cash so there would be no paper trail. I guess counsel is saying, if you pay in cash, you can never be charged or impeached because then the government can't prove exactly how many dollars went into your pocket.

Counsel then makes the claim that if you impeach him because he lied and misled people during the recusal hearing, what you are doing is impeaching a judge because of a judicial decision, and that erodes judicial independence, as if it were a disagreement with the

case law on the motion, the case law on the opinion or his judicial philosophy. That is not what this is about. This is about taking money during a case. This is denying a motion, when you know you received money from the attorneys and lying about it. It is not about the merits of the cases you cite or your judicial philosophy or what the standard ought to be.

The judge set the right standard during the hearing. He understood exactly what was required of him. That is what makes it so egregious. He set out the standard, if you read that transcript, perfectly, and he said if anything should come up during the trial that should require me to take myself off the case, I will let you know and give you that opportunity.

So what happens? The case is under submission. As counsel points out, it was under submission for 3 years, and during that period does something happen that would cause an objective person to question his impartiality? Yes. He hits them up for 2,000 bucks and they give it to him. Does he do what he said he would do during that recusal hearing and give the parties a chance to ask him to get off the case? Of course not.

No, instead, counsel paints Porteous as a victim of this conspiracy to go through judge after judge in this hospital case. But, no, he is a hero. He is going to stay in there. He will not recuse himself. He will not let those parties manipulate the system. This is Judge Porteous as hero, occasionally as victim, but never as the abuser of the public trust that, in fact, he is. The fact that the opposing counsel who loses the recusal motion has to bring in another crony of the judge with an agreement that says: If you get the judge off the case, we will give you one hundred—100,000 bucks to start and 100,000 more if you get him off the case, it shows you how the system is corrupted by this judge. The other party has to bring in a crony for his side of the case.

Counsel says Mr. Amato testified that, well, he thought that Porteous was going to do the right thing—as if that makes it OK. I guess you have to ask: Well, what did Mr. Amato think the right thing was? I am sure he thought the right thing was he was going to rule for him. In fact, that is, of course, exactly what Judge Porteous does. He rules for Mr. Amato in an opinion that is excoriated by the court of appeals as being made out of whole cloth.

Counsel asks: Why didn't he recuse himself and that way his other crony would have gotten 100,000 bucks? If he did that, then Mr. Amato would lose \$500,000 to \$1 million because that is how much he stood to make in fees on the case. If he lost the case, he made nothing. If he won the case, he made \$½ million to \$1 million. So here the judge had to decide: Do I favor my one crony who stands to make 100 grand or my other crony who stands to make

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\$500 million. Well, he chose to stand by the crony who would make \$500 million.

Article II, this is about six lunches, counsel claims. This is the same issue that was raised with Senator JOHANNES. This is not about six lunches. Not even the portion of article II which deals with Federal conduct is about six lunches. It is about a judge recruiting his successor into the same corruption scheme he was engaged in while he was a State judge, a recruitment that was successful. Judge Bodenheimer was recruited. He then went to work with the Marcottes, so he wouldn't deal with it until he was vouchered to work by Judge Porteous, and then Judge Bodenheimer goes to jail. This is the character witness Judge Porteous calls during the trial, Judge Bodenheimer, who went to jail for almost 4 years for the same charges. If you look at the charges Judge Bodenheimer pled guilty to, it was having this arrangement with the bail bondsmen, where he would set bonds to maximize the profits of the bondsmen in exchange for these favors and gratuities.

Counsel says: Well, the House has said at one point it was not going to show that any particular bond was set too high or too low. Counsel did not mention the fact that what we were saying is, we weren't going to say this particular bond, in the case of Joe Smith, should have been \$50,000 higher or \$20,000 lower. No, we were not going to say in a particular case. What we were going to say was the arrangement with the bondsmen, as the evidence showed during trial, was that in each of the cases that went before the judge, the bondsman would say: This is where I can make the most money, set it at this point. That is what we said we would prove, and that is what we showed during the trial.

Counsel then says something to the effect that the Duhon expungement was downgraded. I don't know what that means. Mr. Duhon was called to testify. He testified about the fact—just like Wallace, the other expungement—he didn't hire an attorney, Mark Hunt did. He didn't tell the attorney anything. Mark Hunt arranged the whole thing. If you look at the transcripts of the expungements and the set-asides between the judge—when the judge sets aside these convictions of these two Marcotte employees, do you know what is striking about them? There is nothing said during the hearing. There is nothing said. There is no case made about why this person deserves to have their conviction set aside. The lawyer doesn't say: Judge, he has lived a good life, he has never had a problem with the law, he deserves this. It is silent. The judge just says: I am going to do this. I am setting aside this conviction under code section blah, blah, blah. There is no discussion; the judge doesn't want there to be. He doesn't want anybody listening or watching to read the transcript and to know what is going on.

Counsel can say: Well, there is nothing, per se, illegal about setting aside a conviction. In fact, the evidence during the trial showed the judge lacked the power to set aside one of the convictions because Louisiana law says you can't set aside a conviction where the person has already started their sentence, and this person, Wallace, had already finished the sentence. But regardless of that, even if you believe somehow he had the power to ignore Louisiana law, the question is why? Why did he exercise that power? On this issue, counsel has never had an answer. The uncontradicted testimony was, the reason he exercised that power was because Marcotte asked him to, because Marcotte was doing him favors, and more than that, Duhon and Wallace were doing him favors, picking up his car, getting it washed, filling it with gas, and fixing the transmission, leaving \$300 buckets of shrimp for him, when he got back in his car, and bottles of vodka.

That is why he expunged the convictions, because Marcotte asked him to, because he was doing favors for the judge.

Counsel continues to make the assertion, which I can't understand, that somehow the conviction was not set aside after confirmation. The record is plain, that is exactly what happened. The conviction was set aside right after he was confirmed. There is no reason why that couldn't have been done before, except for the fact he didn't want you to find out about it. He didn't want you to know about his relationship with the Marcottes. That is the reason it was delayed, that is the reason it was concealed, that is the reason he said nothing about it, and that is the reason why the record corroborates exactly what Mr. Marcotte testified.

In article III counsel says: Yes, he filed under a false name. Various, during the proceedings earlier, in his written pleadings, counsel calls it a pseudonym. He filed under a pseudonym, as if it is a romance novel and he is using a pen name. During the trial, counsel said it was a typographical error. Now he says it is the lawyer's mistake.

This is not a situation where you have a layperson going to an expert lawyer and being advised of some arcane provision of bankruptcy law. This is a Federal judge with 20 years of experience and the lawyer concocts this scheme: Well, let's use a false name, and why don't you go out and get a P.O. box so we don't have to list your address, and the judge does this.

This is not advice of counsel. This is collusion. What is the judge's explanation for why he is entitled to file under a fake name? He doesn't want to embarrass himself, and I guess he doesn't want to embarrass his wife.

What does this mean; that if you are a Federal judge, you have a right to file under a false name under penalty of perjury because you don't want to be

embarrassed? If you are an ordinary citizen, you don't have that right. Is it only judges who are embarrassed by bankruptcy? You don't think a teacher who files bankruptcy is embarrassed or a banker who files bankruptcy or a baker or anyone else would be embarrassed if their neighbors or their employer or someone else finds out they have had to file bankruptcy? It is a very painful, embarrassing process for anyone, and a Federal judge doesn't have any more right than anyone else to use a fake name.

Counsel says: Well, no harm, no foul because he finished his bankruptcy proceeding and creditors got paid. He didn't want the notice in the paper, but the creditors all found out about it anyway.

Yes, the creditors found out about it because it went public. The hope was it never would. What the judge also wanted, in addition to avoiding the embarrassment, he didn't want the casinos to know. He didn't want the casinos to know because if the casinos knew—and they weren't listed as creditors, even though he continued to hand out his gambling chips and gamble—if they knew, they would deny him credit, and they wouldn't let him keep gambling, which is exactly what he did during the rest of the bankruptcy.

On article IV, counsel concedes that prior conduct can be impeached as long as it is during the confirmation process. So I guess they have waived any objection constitutionally to impeach on prior conduct for the purpose of article IV because, of course, article IV, the lying to the Senate, is during the confirmation process.

He says: Well, these questions were brought out, though. They were about embarrassing facts. He is focused on one word "embarrassing." But when you look at those forms and the questions you asked in the Senate, it is not just about embarrassment, it is: Are you aware of any negative information that may affect your confirmation? He answers: To the best of my knowledge, I am not aware of any negative information that might affect my confirmation. That is what he told you, and it will be your decision: Is that truth or is that a lie?

Now, counsel implies that it is impossible to know what that question really means. So I asked his own expert this during the trial: If information came out before confirmation that a candidate for judge took kickbacks from attorneys in exchange for the official act of sending curator cases, would, in your expert opinion, that be unfavorable information that would affect that nomination?

This was Professor Mackenzie:

If it were true, yes, it would be.

Question. It would kill the nomination, wouldn't it?

Answer. I think it probably would, yeah.

Question. And a reasonable person would understand that, wouldn't they?

Answer. Yes, I think so.

Question. That wouldn't require a level of insight of which no ordinary person is capable?

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No, I agree with that. Yeah.

Question. If information came up before confirmation that the candidate set bail at amounts to maximize the profits of a bail bondsman—at cetera

Same answer to each of those questions. Their own expert said plainly that information is called for by that question. Their expert said: You have no right to lie. If you do not want to suffer the humiliation of revealing that you are corrupt, you know what you do—you withdraw your nomination. And, in fact, that is why these cases are rare. It is rare, frankly, that you do not find this information during the vetting process. But when it comes out, when the White House nominates someone and it comes out that there is a problem, do you know what happens? They withdraw. Now, they may withdraw and say, I have had second thoughts, or, I want to spend more time with my family, or for whatever reason. They do not have to say why. But that is what happens.

The confirmation process should not be a game of hide and seek with the Senate where if you can keep your illicit conduct or your corruption hidden from the Senate and get by that confirmation hearing, you are set for life. That is not the precedent we want to set. That was the view, the unanimous view, of the House of Representatives.

It will be for all of you to decide to what degree you want nominees in the future to feel that they can mislead the Senate, that they can conceal information about corrupt activity; if they can just get through the confirmation, they will be home free, they will be beyond the reach of impeachment. I think that is a careless path to go down as well.

When counsel summed up, he asked: Did he betray his office? I think that is the right question. I think hitting up attorneys, when you have a pending case worth millions, for \$2,000 cash, that is betraying your office. I think recruiting other judges into a corrupt scheme is betraying your office. I think lying to the Senate is a betrayal. I think lying to the bankruptcy court is a betrayal.

In the most plain terms, what does this mean, to violate the public trust? Let's say you do not impeach. What is someone walking into Judge Porteous's courtroom or any other judge in New Orleans or California or anywhere else to think? Do they think: Well, I guess I can file something under a false name because the judges do and that is all right. I guess maybe I need to see if I can pay the judge some cash or fill up his car or fix his radiator if I want them to rule in my favor.

Can anyone seriously go into Judge Porteous's courtroom after this without wondering those very things? Is that not the kind of abuse of the public trust the Framers intended to provide a remedy for so that we would not have to continue to suffer someone on the bench who would damage the institution in that way?

We believe this conduct is beneath the dignity of anybody to serve on the bench. That is not only toward Judge Porteous, but it is toward all who serve with him and has raised profound questions certainly in one courthouse and probably many others about just who is sitting on the bench.

The remedy of impeachment is not punitive. It is not designed to punish Judge Porteous. Instead, it is designed to protect the institution. And I believe, on behalf of the House, it is not possible to protect the institution by deciding that this level of corruption is OK, that solicitation of cash is OK, that striking deals with bail bondsmen that don't take official acts in the public's best interest or public trust but on how to enrich the judge is OK. These things are not OK. These things are not just an appearance problem, as counsel suggests. This is unethical. This is criminal. And for the purposes of an impeachment proceeding, it is also a high crime and misdemeanor warranting removal.

Thank you.

The PRESIDENT PRO TEMPORE. All time has expired.

Questions have been submitted in writing. The clerk will now report the questions.

The legislative clerk read as follows: Senator Franken to Mr. Turley: Isn't what happened before he was a Federal judge relevant if he subsequently lied about it?

Mr. TURLEY. Senator FRANKEN, what I would say is that we have agreed that if those lies occurred during a confirmation hearing, it was an act of perjury, then certainly you would have a potential impeachable offense.

I think that the line being drawn here is—I think this may be the thrust of your question—that if it is pre-Federal conduct, the answer is no. This body has stated in cases like Archbald that it will not consider pre-Federal conduct for a very good reason. The Constitution guarantees life tenure for good behavior in office. That is how the Framers defined it.

If you allow for the House to go back in this case three decades—three decades—and say: Look at all of these things you did before you became a judge, we are going to have a do-over. We think that now you should be removed because of those things, not because of what you did as a Federal judge. And I think there is a distinction. I believe that if there was perjury in the confirmation hearing—I don't think Mr. SCHIFF and I would disagree on that point. But there is a big difference. That is the constitutional Rubicon. That is where this body has never gone. And I do believe, if you look at it objectively, you can see that the perils on that path are obvious and that this body should not go there. There are articles here that refer to Federal conduct, and you have every right to judge this man, but you should judge him as a judge for what he did to the office you gave him, and I think that is what the Framers intended.

The assistant legislative clerk read as follows:

Senator SPECTER to Mr. Turley: Why did Judge Porteous waive the statute of limitations? Did he think the move was a realistic possibility that he would have been exonerated?

Mr. TURLEY. Thank you, Senator SPECTER. I want to emphasize that with regard to statute of limitations, he waived the statute of limitations he was requested to waive. And the House has come forth and said—they said they still could not proceed in this area or that area. As I mentioned, they were able to do that with Bodenheimer. The statute of limitations was not a limitation.

The reason he did it is the same reason he went to the Fifth Circuit and said: I am not going to contest these facts. Whether I remember specifically how the money was given to me, as I recall, I was given money, and it was a gift, and it was a mistake. He said: I am not going to contest that. I am not going to fight that because it was wrong. And the same thing with the statute of limitations. He said: I am a judge, and if you can find a crime to charge me with, then you should do it.

That is the point of waiving a statute of limitations. There is no other point of waiving a statute of limitations. You take a risk. And, you know, you yourself, as a well-known defense attorney—well, a well-known litigator, I should say, as are many people in this room, usually you encourage people not to waive a statute of limitations because you don't know where it will lead. This judge decided he would. And ultimately, the Justice Department found that, in looking at all of the evidence, they couldn't bring a charge, and they certainly could not secure a verdict on that basis.

But I don't think there was anything sinister about waiving a statute of limitations. I mean, to the extent that you believe he waived it because he didn't think he could be charged with a crime, the answer, I think, is yes, he doesn't think he did commit a crime, and he waived it.

The legislative clerk read as follows:

Senator MERKLEY to Mr. Turley. Judge Porteous, while he had the Lifemark case under advisement, solicited a cash gift from an attorney (Amato) who represented one side of the dispute. He then accepted a \$2,000 gift from this attorney.

You have referred to this gift as only an appearance of a conflict of interest. How can parties to a case expect fair treatment from a judge if the judge solicits and receives a gift from an attorney on one side in a case?

Doesn't such a solicitation during a trial constitute a complete abandonment of impartiality and a fundamental abuse of the judge's position and a betrayal of the public trust?

Mr. TURLEY. Senator, first of all, I believe I agree with the sentiments that were expressed in that question. He should not have accepted the gift. That is why he accepted discipline. But it was an appearance of impropriety. That is how the court treated it. You

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can read the opinion by the dissenting judges and look into whether an appearance of impropriety should be an impeachable offense.

There is no suggestion it was a bribe. It is not alleged it was a bribe. And so what you have then is something that is classified as an appearance of impropriety, and an appearance of impropriety does all of the things that the question suggests. That is why you do not want appearances of impropriety, because it makes people uncertain as to whether the judge is being fair and unbiased. And he admitted to that. It was a mistake. But it was not during the trial. The trial was long over. This was years after the trial. But it was still a mistake. The case was still pending. And he should have realized that.

And, yes, we do refer to it as a wedding gift. I am not so sure why we are having the dispute because it was Amato who said—he raised the fact that he needed money to pay for his son's wedding, and the result of that is that Amato and Creely gave him \$2,000 cash. And it is true that they are friends with Timothy. It is true, you know—I am not surprised to hear a suggestion that Creely—that there might be an overstatement of the relationship. I suggest that you read the record. But they were very close to Timothy. But it does not excuse anything. That is why he accepted the punishment.

But words mean things in impeachments. You know, Mr. SCHIFF points out, why did we have to actually say “kickback”? Why are you making us say “kickback”? Just look at how these words hold together. Is this not what a kickback is? Well, yeah. And it can also be conspiracy, it could be mail fraud, it could be wire fraud, it could be a number of other things when you talk about corruption.

The reason we want you to say “kickback” or “bribe” is because it is a specific allegation. And one of those is mentioned actually in the Constitution itself.

By the way, the House managers knew that the issue before the Supreme Court was whether you are going to allege a kickback. So they knew that courts, in fact, turn down honest services for the failure to allege kickbacks, and they still did not mention it. Why? Because they wanted to use corruption.

So the point is, in answer to this question, that if it is not a kickback and it is not a bribe, it is what the Court said it was in the Fifth Circuit—an appearance of impropriety. And that is not good. And Mr. SCHIFF and I will agree on this. No attorney wants a judge to do what was done in this case, and that is why he was disciplined, and he was disciplined harshly. That is the most severe discipline this court has handed down.

Mr. SCHIFF might, in fact, say: What is that? You do not get to be a judge? That is a lot because you are reprimanded by your colleagues. You are

held up for ridicule. And I got to tell you, it is not something most people would want for themselves. It was an appearance of impropriety, and he was severely disciplined for it.

The PRESIDENT pro tempore. Are there any more questions?

The Chair recognizes the majority leader.

CLOSED SESSION

Mr. REID. Mr. President, I move that pursuant to impeachment rule 10, the Senate now close its doors to commence deliberations on the motions and impeachment articles and ask unanimous consent that floor privileges during the closed session be granted to the individuals listed on the document I now send to the desk.

The PRESIDENT pro tempore. Without objection, it is so ordered.

The list is as follows:

IMPEACHMENT CLOSED SESSION

FLOOR PRIVILEGES

Parliamentarians: Alan Framin, Elizabeth MacDonough, Peter Robinson, Leigh Hildebrand.

Legislative Clerks: Kathie Alvarez, John Merlino, MaryAnne Clarkson.

Journal Clerks: Scott Sanborn, William Walsh, Ken Dean.

Official Reporters: Valentin Mihalache, Pam Garland, Joel Breitner, Mark Stuart, Rebecca Eyster, Patrick Renzi, Julie Bryan and Paul Nelson.

Executive Clerk's Office: Jennifer Gorham. Majority Leader: Gavin Parke, Mike Castellano, Serena Hoy, Gary Myrick.

Republican Leader's Office: John Abegg. Democratic Secretary's Office: Tim Mitchell, Tricia Engle, Meredith Melody.

Republican Secretary's Office: Laura Dove, Jody Hernandez.

The PRESIDENT pro tempore. The Senate will now close its doors and only Members and staff granted floor privileges shall remain.

The Sergeant at Arms will ensure the Chamber, the galleries, and the adjoining corridors are cleared of unauthorized persons.

(At 5:45 p.m., the doors of the Chamber were closed.)

At 7:56 p.m., the doors of the Chamber were opened, and the open session of the Senate was resumed.



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No. 161

Senate

IMPEACHMENT OF JUDGE G. THOMAS PORTEOUS, JR.

Mr. REID. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 8]

Akaka	Bennett	Bunning
Alexander	Bingaman	Burr
Barraso	Bond	Cantwell
Bayh	Boxer	Cardin
Beahm	Brown (MA)	Cleary
Bennet	Brown (OH)	Chambliss

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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Coburn Inhofe Nelson (NE)
Cochran Inouye Nelson (FL)
Collins Jackson Reid
Conrad Johnsons Reid
Coons Kerry Risch
Corker Klobuchar Roberts
Cornyn Kohl Schumer
Crapo Kyl Shaheen
DeMint Landrieu Shelby
Dorgan Leahy Snowe
Durbin LeMieux Specter
Ensign Levin Tester
Finn Lieberman Thune
Feingold Lugar Udall (CO)
Feinstein Manchin Udall (NM)
Franken McCain Vitter
Gillibrand McCaskill
Graham McConnell Voinovich
Grassley Menendez Webb
Greech Merkley Whitehouse
Hagan Murkowski Wicker
Harkin Murray Wyden

Mr. REID. Mr. President, is a quorum present?

The PRESIDENT pro tempore. A quorum is present. Senators will be seated.

COURT OF IMPEACHMENT

Under the previous order, a quorum having been established, the Senate will resume its consideration of the Articles of Impeachment against Judge G. Thomas Porteous, Jr.

(The House Managers, Judge Porteous, and counsel proceeded to the seats assigned to them in the well of the Chamber.)

The PRESIDENT pro tempore. The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Terrance W. Gainer, made the proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States Articles of Impeachment against G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana.

The PRESIDENT pro tempore. The majority leader.

Mr. REID. Mr. President, the Senate deliberated yesterday evening for a long time on the Articles of Impeachment against Judge Porteous and related motions. We meet today to vote on the articles.

Before proceeding to vote on each of the articles, however, the Senate has agreed to vote on a motion that notwithstanding impeachment rule No. XXIII, the Senate shall disaggregate the Articles of Impeachment by holding preliminary votes on individual allegations in the articles.

Can the Chair confirm, for the benefit of Senators, that a "yes" vote is a vote to disaggregate the articles sought by Judge Porteous and a "no" vote is a vote to proceed directly to voting on the four Articles of Impeachment.

The PRESIDENT pro tempore. Before I proceed, will the panel be seated.

The majority leader is correct. The Senate will now vote on the motion to disaggregate the articles. Granting the motion requires a majority of Senators present.

VOTE ON MOTION TO DISAGGREGATE

The question is on agreeing to the motion.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Delaware (Mr. CARPER), the Senator from Connecticut (Mr. DODD), the Senator from Arkansas (Mrs. LINCOLN), and the Senator from Vermont (Mr. SANDERS) are necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kansas (Mr. BROWNBACK).

The result was announced—yeas 0, nays 94, as follows:

(Rollcall Vote No. 260)

NAYS—94

Akaka Feingold Merkley
Alexander Feinstein Mikulski
Barrasso Franken Markowski
Baucus Gillibrand Murray
Bayh Graham Nelson (NE)
Begich Grassley Nelson (FL)
Bennett Gregg Pryor
Bennett Hagan Reid
Bingaman Harkin Risch
Bord HATCH Hutchison
Boxer Inhofe Roberts
Brown (MA) Inouye Rockefeller
Brown (OH) Jackson Schumer
Bunning Johnson Sessions
Burr Johnson Shaheen
Cantwell Kerry Shelby
Cardin Kerry Shaheen
Casey Klobuchar Snowe
Chambliss Kohl Specter
Coburn Landrieu Stabenow
Cochran Lautenberg Thune
Collins Leahy Udall (CO)
Coons LeMieux Udall (NM)
Corker Levin Vitter
Cornyn Lieberman Voinovich
Crapo Lugar Warner
DeMint Manchin Webb
Dorgan McCain Whitehouse
Durbin McCaskill Wicker
Ensign Menendez Wyden
Finn

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—5

Brownback Dodd Lincoln
Carper Kirk Sanders

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. REID. Mr. President, I move to reconsider that vote.

Mr. McCONNELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDENT pro tempore. The majority leader.

Mr. REID. Mr. President, before proceeding to the final vote on the Articles of Impeachment, I ask unanimous consent that Senators may be permitted, within 7 days from today, to have printed in the RECORD opinions or statements explaining their votes and that the secretary be authorized to include these statements along with the record of the Senate's proceedings in a Senate document printed to complete the documentation of the Senate's handling of these impeachment proceedings.

The PRESIDENT pro tempore. Hearing no objection, it is so ordered.

The majority leader.

Mr. REID. Mr. President, I remind all Senators to remain in their seats during voting on all four Articles of Impeachment. Under impeachment rule XXII, once we have begun voting on

the first article, voting will proceed on each of the Articles of Impeachment. When their name is called, Senators shall rise from their seat and cast their vote. This will ensure that a decorum of the Senate is maintained while these grave proceedings are underway. These proceedings affect not only Judge Porteous but also the Senate and our system of government.

The Chair will shortly instruct the Members of the Senate on the question to be put and the manner of response.

The PRESIDENT pro tempore. The clerk will read the first Article of Impeachment.

The legislative clerk read as follows:

ARTICLE I

G. Thomas Porteous, Jr., while a Federal judge of the United States District Court for the Eastern District of Louisiana, engaged in a pattern of conduct that is incompatible with the trust and confidence placed in him as a Federal judge, as follows:

Judge Porteous, while presiding as a United States district judge in Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, denied a motion to recuse himself from the case, despite the fact that he had a corrupt financial relationship with the law firm of Amato & Creely, P.C. which had entered the case to represent Liljeberg. In denying the motion to recuse, and in contravention of clear canons of judicial ethics, Judge Porteous failed to disclose that beginning in or about the late 1980s while he was a State court judge in the 24th judicial district in the State of Louisiana, he engaged in a corrupt scheme with attorneys, Jacob Amato, Jr., and Robert Creely, whereby Judge Porteous appointed Amato's law partner as a "curator" in hundreds of cases and thereafter requested and accepted from Amato and Creely a portion of the curatorship fees which had been paid to the firm. During the period of this scheme, the fees received by Amato and Creely amounted to approximately \$40,000, and the amounts paid by Amato and Creely to Judge Porteous amounted to approximately \$20,000.

Judge Porteous also made intentionally misleading statements at a recusal hearing intended to minimize the extent of his personal relationship with the two attorneys. In doing so, and in failing to disclose to Lifemark and its counsel the true circumstances of his relationship with the Amato & Creely law firm, Judge Porteous deprived the Fifth Circuit Court of Appeals of critical information for its review of a petition for writ of mandamus, which sought to overrule Judge Porteous's denial of the recusal motion. His conduct deprived the parties and the public of the right to the honest services of his office.

Judge Porteous also engaged in corrupt conduct after the Lifemark v. Liljeberg bench trial, and while he had the case under advisement, in that he solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash. Thereafter, and without disclosing his corrupt relationship with the attorneys of Amato & Creely PLC or his receipt from them of cash and other things of value, Judge Porteous ruled in favor of their client, Liljeberg.

By virtue of this corrupt relationship and his conduct as a Federal judge, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

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Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

The PRESIDENT pro tempore. The Chair will read, for the benefit of everyone present in the Chamber, paragraph 6 of rule XIX of the Standing Rules of the Senate, which states as follows:

Whenever confusion arises in the Chamber or the galleries, or demonstrations of approval or disapproval are indulged in by occupants of the galleries, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator.

The Chair would deeply appreciate the cooperation of everyone in the Chamber and in the galleries in maintenance of order.

VOTE ON ARTICLE I

The Chair reminds the Senate that each Senator, when his or her name is called, will stand in his or her place and vote guilty or not guilty. Under the Constitution, conviction requires a vote of two-thirds present on any article.

The question is on the first article.

Senators, how say you? Is the respondent, G. Thomas Porteous, Jr., guilty or not guilty?

The rollcall is automatic. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Connecticut (Mr. Dodd) and the Senator from Arkansas (Mrs. LINCOLN) are necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kansas (Mr. BROWNBACK).

The PRESIDENT pro tempore. Are there any other Senators in the Chamber desiring to vote?

The result was announced—guilty 96, not guilty 0, as follows:

[Rollcall Vote No. 261]

GUILTY—96		
Akaka	Eni	Menendez
Alexander	Feingold	Merkley
Barrasso	Feinstein	Mikolajski
Baucus	Franken	Murkowski
Bayh	Gillibrand	Murray
Begich	Graham	Nelson (NE)
Bennet	Grassley	Nelson (FL)
Bingaman	Gregg	Pryor
Boxer	Hagan	Reid
Brown (MA)	Harkin	Reid
Brown (OH)	Hatch	Risch
Bunning	Hutchinson	Roberts
Burr	Inouye	Rockefeller
Cantwell	Isakson	Sanders
Cardin	Johnson	Schumer
Casper	Kerry	Sessions
Casey	Klobuchar	Shaheen
Chambliss	Kohl	Shelby
Coburn	Kyl	Specter
Cochran	Landrieu	Stabenow
Collins	Laurenberg	Tester
Conrad	Leahy	Thune
Coons	LeMieux	Udall (CO)
Corker	Levin	Udall (NM)
Cornyn	Lieberman	Vitter
Crapo	Lugar	Warner
DeMint	Manchin	Webb
Dorgan	McCain	Whitehouse
Durbin	McCaskill	Wicker
Ensign	McConnell	Wyden

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—4

Brownback	Kirk
Dodd	Lincoln

The PRESIDENT pro tempore. On this article of impeachment, 96 Senators have voted guilty, no Senator has voted not guilty. Two-thirds of the Senators present having voted guilty, the Senate accordingly adjudges that the respondent, G. Thomas Porteous, Jr., is guilty as charged in this article.

The Chair now asks the clerk to read the second article of impeachment.

The assistant legislative clerk read as follows:

ARTICLE II

G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court judge. That conduct included the following: Beginning in or about the late 1980s while he was a State court judge in the 24th JDC in the State of Louisiana, and continuing while he was a Federal judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail bondsman Louis M. Marcotte, III, and his sister Lori Marcotte. As part of this corrupt relationship, Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted the Marcottes. These official actions by Judge Porteous included, while on the State bench, setting, reducing, and splitting bonds as requested by the Marcottes, and improperly setting aside or expunging felony convictions for two Marcotte employees (in one case after Judge Porteous had been confirmed by the Senate but before being sworn in as a Federal judge). In addition, both while on the State bench and on the Federal bench, Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench.

Accordingly, Judge G. Thomas Porteous, Jr., has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office.

VOTE ON ARTICLE II

The PRESIDENT pro tempore. Senators, how say you? Is the respondent, G. Thomas Porteous, Jr., guilty or not guilty?

The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Connecticut (Mr. Dodd) and the Senator from Arkansas (Mrs. LINCOLN) are necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kansas (Mr. BROWNBACK).

The result was announced—guilty 69, not guilty 27, as follows:

[Rollcall Vote No. 262]

GUILTY—69

Barrasso	Franken	Nelson (NE)
Baucus	Gillibrand	Nelson (FL)
Bayh	Grassley	Pryor
Begich	Hagan	Risch
Bennet	Inhofe	Roberts
Bingaman	Isakson	Rockefeller
Boxer	Johnson	Sanders
Bunning	Johnson	Schumer
Cantwell	Kerry	Sessions
Cardin	Klobuchar	Shaheen
Casper	Kohl	Shelby
Casey	Kyl	Snowe
Coburn	Landrieu	Specter
Cochran	Laurenberg	Stabenow
Conrad	Leahy	Tester
Coons	Levin	Thune
Crapo	Lugar	Udall (CO)
DeMint	McCain	Udall (NM)
Dorgan	McConnell	Vitter
Durbin	Mendez	Voinovich
End	Merkley	Warner
Feingold	Mikolajski	Webb
Feinstein	Murray	Wyden

NOT GUILTY—27

Akaka	Corker	LeMieux
Alexander	Cornyn	Lieberman
Ensign	Ernst	Manchin
Bond	Graham	McCaskill
Brown (MA)	Gregg	Murkowski
Brown (OH)	Harkin	Reid
Burr	Hatch	Reid
Chambliss	Hutchinson	Whitehouse
Collins	Inouye	Wicker

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—4

Brownback	Kirk
Dodd	Lincoln

The PRESIDENT pro tempore. On this Article of Impeachment, 69 Senators have voted guilty, 27 Senators have voted not guilty. Two-thirds of the Senators present having voted guilty, the verdict on article II is guilty.

The Chair now calls upon the clerk to read the third article.

The assistant legislative clerk read as follows:

ARTICLE III

Beginning in or about March 2001 and continuing through about July 2004, while a Federal judge in the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., engaged in a pattern of conduct inconsistent with the trust and confidence placed in him as a Federal judge by knowingly and intentionally making material false statements and representations under penalty of perjury related to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case. Judge Porteous did so by—

No. 1, using a false name and post office box address to conceal his identity as a debtor in the case;

No. 2, concealing assets;

No. 3, concealing preferential payments to certain creditors;

No. 4, concealing gambling losses and other gambling debts; and,

No. 5, incurring new debts while the case was pending in violation of the bankruptcy court's order.

In doing so, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

VOTE ON ARTICLE III

The PRESIDENT pro tempore. The question is on the third Article of Impeachment. Senators, how say you? Is

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the respondent, G. Thomas Porteous, Jr., guilty or not guilty?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Connecticut (Mr. DODD) and the Senator from Arkansas (Mrs. LINCOLN) are necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kansas (Mr. BROWNBACK).

The result was announced—guilty 88, not guilty 8, as follows:

[Rollcall Vote No. 263]

GUILTY—88

Alexander	Ensign	Mikulski
Barrasso	Enzi	Murkowski
Baucus	Feingold	Murray
Bayh	Feinstein	Nelson (NE)
Beahm	Gillibrand	Nelson (FL)
Bennet	Graham	Pryor
Bennett	Grassley	Reed
Bingaman	Gregg	Risch
Bond	Hagan	Roberts
Boxer	Harkin	Rockefeller
Brown (MA)	Hatch	Sanders
Brown (OH)	Inhofe	Schumer
Bunning	Inouye	Sessions
Burr	Ishakson	Shahen
Cantwell	Johnson	Shelby
Cardin	Kerry	Snowe
Carpenter	Klobuchar	Specter
Casady	Kohl	Stabenow
Chambliss	Kyl	Tester
Coburn	Landrieu	Thune
Cochran	Lautenberg	Udall (CO)
Collins	Leahy	Udall (NM)
Conrad	LeMieux	Vitter
Coons	Levin	Voironich
Corker	Lugar	Warner
Cornyn	McCaill	Webb
Crapo	McConnell	Whitehouse
DeMint	Menendez	Wicker
Dorgan	Merkley	Wyden

NOT GUILTY—8

Akaka	Lieberman	Reid
Franken	Manchin	Wicker
Hatch	McCaskill	

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—4

Brownback	Kirk
Dodd	Lincoln

The PRESIDENT PRO TEMPORE. On this Article of Impeachment, 88 Senators have voted guilty, 8 Senators have voted not guilty. Two-thirds of the Senators present having voted guilty, the verdict on article III is guilty.

The Chair now calls upon the clerk to read the fourth Article of Impeachment.

The assistant legislative clerk read as follows:

ARTICLE IV

In 1994, in connection with his nomination to be a judge of the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., knowingly made material false statements about his past to both the United States Senate and to the Federal Bureau of Investigation in order to obtain the office of United States District Court Judge. These false statements included the following:

No. 1. On his Supplemental SF-86, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that would cause an embarrassment to Judge Porteous or the President if publicly known. Judge Porteous answered "no" to these questions and signed

the form under the warning that a false statement was punishable by law.

No. 2. During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.

No. 3. On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees", Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did not know of any unfavorable information that may affect [his] nomination. Judge Porteous signed that questionnaire by swearing that "the information provided in this statement is, to the best of my knowledge, true and accurate".

However, in truth and in fact, as Judge Porteous then well knew, each of these answers was materially false because Judge Porteous had engaged in a corrupt relationship with the law firm Amato & Creely, whereby Judge Porteous appointed Creely as a "curator" in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm and also had engaged in a corrupt relationship with Louis and Lori Marcotte, whereby Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefited the Marcottes. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench. Judge Porteous's failure to disclose these corrupt relationships deprived the United States Senate and the public of information that would have had a material impact on his confirmation. Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

VOTE ON ARTICLE IV

The PRESIDENT PRO TEMPORE. The question is on agreeing on the fourth Article of Impeachment. Senators, how say you? Is the respondent, G. Thomas Porteous, guilty or not guilty?

The clerk will call the roll.

The legislative clerk called the roll. Mr. DURBIN. I announce that the Senator from Connecticut (Mr. DODD) and the Senator from Arkansas (Mrs. LINCOLN) are necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kansas (Mr. BROWNBACK).

The result was announced—guilty 90, not guilty 6, as follows:

[Rollcall Vote No. 264]

GUILTY—90

Akaka	Bunning	Crapo
Alexander	Burr	DeMint
Barrasso	Cantwell	Dorgan
Baucus	Casper	Ensign
Bayh	Casey	Enzi
Beahm	Chambliss	Feingold
Bennet	Coburn	Feinstein
Bennett	Cochran	Gillibrand
Bingaman	Collins	Graham
Bond	Conrad	Grassley
Boxer	Coons	Gregg
Brown (MA)	Corker	Hagan
Brown (OH)	Cornyn	Hatch

Hatchison	McCain	Sessions
Inhofe	McCaskill	Shahen
Inouye	McConnell	Shelby
Ishakson	Menendez	Snowe
Johanna	Merkley	Specter
Johnson	Mikulski	Stabenow
Kerry	Murkowski	Tester
Klobuchar	Murray	Thune
Kohl	Nelson (NE)	Udall (CO)
Kyl	Nelson (FL)	Udall (NM)
Landrieu	Pryor	Vitter
Lautenberg	Reed	Voironich
Leahy	Risch	Warner
LeMieux	Roberts	Webb
Lieberman	Rockefeller	Whitehouse
Lugar	Sanders	Wicker
Manchin	Schumer	Wyden

NOT GUILTY—6

Cardin	Franken	Levin
Darbin	Harkin	Reid

ABSENT, NOT VOTING OR EXCUSED FROM VOTING—4

Brownback	Kirk
Dodd	Lincoln

The PRESIDENT pro tempore. On this Article of Impeachment, 90 Senators have voted guilty, 6 Senators have voted not guilty. Two-thirds of the Senators present having voted guilty, the verdict on article IV is guilty.

The Chair directs judgment to be entered in accordance with the judgment as follows: The Senate having tried G. Thomas Porteous, Jr., U.S. District Judge for the Eastern District of Louisiana, upon full Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senate present having found him guilty of the charges contained in articles I, II, III, and IV, it is therefore ordered and adjudged that said G. Thomas Porteous, Jr., be and is hereby removed from office.

The majority leader.

Mr. REID. Mr. President, it is my understanding that Judge Porteous is forever disqualified to hold and enjoy any office of trust, honor, or profit of the United States; is that true?

The PRESIDENT pro tempore. The leader is correct.

Mr. REID. Mr. President, I have an order at the desk. I ask that it be stated.

The PRESIDENT pro tempore. The clerk will report.

The legislative clerk read as follows:

Ordered, that the Secretary be directed to communicate to the Secretary of State, as provided by rule XXIII of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials, and also to the House of Representatives the judgment of the Senate in the case of G. Thomas Porteous, Jr. and transmit a certified copy of the judgment to each.

The PRESIDENT pro tempore. Without objection, the order will be entered.

The majority leader is recognized.

Mr. REID. Mr. President, I move that the Senate, sitting as a court of impeachment for the Articles of Impeachment on G. Thomas Porteous, Jr., adjourn sine die and that when we return to legislative session, Senators McCaskill and Hatch, the two managers of this legislation, be recognized for 5 minutes each.

The PRESIDENT pro tempore. The motion is agreed to.

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The Senate sitting as a court of impeachment is adjourned sine die.

Mr. REID. Mr. President, I therefore move that this man, Judge Porteous, be disqualified from holding office at any time in the future in the United States.

The PRESIDENT pro tempore. Is there debate on the motion? If not, the question is on agreeing to the motion to disqualify Judge Porteous from any further office.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Connecticut (Mr. DODD), and the Senator from Arkansas (Mrs. LINCOLN) are necessarily absent.

Mr. KYL. The following Senator is necessarily absent: the Senator from Kansas (Mr. BROWNBACK).

The result was announced—yeas 94, nays 2, as follows:

[Rollcall Vote No. 265]

YEAS—94

Alaska	Feingold	Nikulski
Alexander	Feinstein	Murkowski
Barrasso	Franken	Murray
Baucus	Gillibrand	Nelson (NE)
Bayh	Graham	Nelson (FL)
Beach	Grassley	Payor
Bennet	Gregg	Reed
Bennett	Hagan	Reid
Bond	Harkin	Rich
Borah	Hatch	Roberts
Brown (MA)	Hatchinson	Rockefeller
Brown (OH)	Isakoff	Sanders
Bunning	Inouye	Schumer
Burr	Isakson	Summers
Cantwell	Johanns	Shahen
Cardin	Johnson	Shelby
Carpenter	Kerry	Snowe
Casey	Klobuchar	Specter
Chambliss	Kohl	Stabenow
Coburn	Kyl	Tester
Cochran	Landrieu	Thune
Collins	Leahy	Udall (CO)
Conrad	Leahy	Udall (NM)
Coons	Levin	Vitter
Corker	Lugar	Voinovich
Cortez	Manchin	Warner
Crapo	McCaain	Webb
DeMint	McCaskill	Whitehouse
Dorgan	McConnell	Wicker
Durbin	Menendez	Wyden
Ensign	Merkley	
Ernst		

NAYS—2

Biagman Lieberman

ABSENT, NOT VOTING, OR EXCUSED
FROM VOTING—4

Brownback Kirk
Dodd Lincoln

The PRESIDENT pro tempore. On this vote, the yeas are 94, the nays are 2. The Senate having tried G. Thomas Porteous, Jr., U.S. district judge for the Eastern District of Louisiana, upon four Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the charges contained in articles I, II, III and IV of the Articles of Impeachment, it is therefore ordered and adjudged that the said G. Thomas Porteous, Jr., be, and he is hereby, removed from office, and that he be, and is hereby, forever disqualified to hold and enjoy any office or honor, trust, or profit under the United States.

The Chair will clarify that it requires a motion that the convicted official be

disqualified from ever holding an office of honor, trust, or profit under the United States. The Senate has just adopted such motion.

Mr. REID. Mr. President, I send an order to the desk and ask that it be stated.

The PRESIDING OFFICER. The clerk will state the motion.

The legislative clerk read as follows:

Ordered that the Secretary be directed to communicate to the Secretary of State, as provided by rule XXIII of the rules of procedure and practice in the Senate when sitting on impeachment trials, and also to the House of Representatives, the judgment of the Senate in the case of G. Thomas Porteous, Jr., and transmit a certified copy of the judgment to each.

The PRESIDENT pro tempore. Without objection, the order will be entered.

The majority leader is recognized.

Mr. REID. Mr. President, I renew the request I made previously that the Senate, sitting as a court of impeachment for the Articles of Impeachment against G. Thomas Porteous, Jr., adjourn sine die, and as soon as we go to legislative session, Senator McCaskill be recognized.

The PRESIDENT pro tempore. Without objection, the motion is agreed to, and the Senate, sitting as a court of impeachment, is adjourned sine die.

Mr. REID. Mr. President, I ask unanimous consent that the order previously entered be vitiated directing that the Senate recess subject to the call of the Chair.

The PRESIDENT pro tempore. Without objection, it is so ordered.

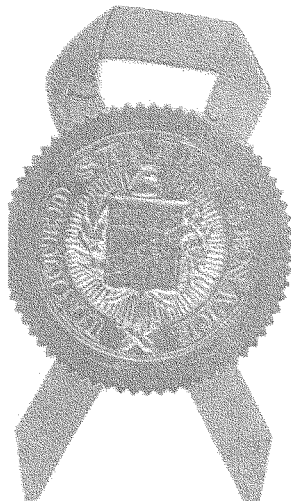
Mr. REID. I thank the Chair.

In the Senate of the United States,*December 8, 2010.***JUDGMENT**

The Senate having tried G. Thomas Porteous, Jr., U.S. District Judge for the Eastern District of Louisiana, upon four Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the charges contained in (Article I / Article II / Article III / and Article IV) of the Articles of Impeachment: It is, therefore,

Ordered and adjudged, That the said G. Thomas Porteous, Jr., be and he is hereby, removed from office; and that he be, and he is hereby, forever disqualified to hold and enjoy any office or honor, trust, or profit under the United States.

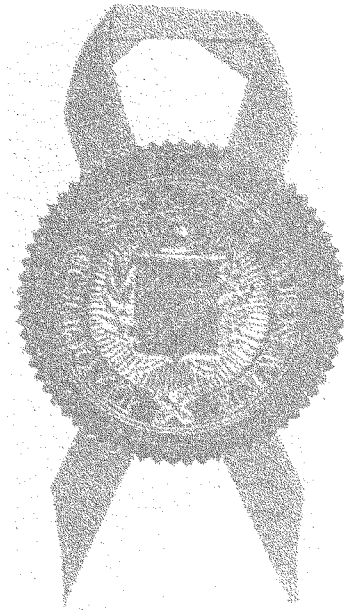
Attest:

*Secretary.*

In the Senate of the United States,*December 8, 2010.*

Ordered, That the Secretary be directed to communicate to the Secretary of State, as provided by Rule XXIII of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, and also to the House of Representatives, the judgment of the Senate in the case of G. Thomas Porteous, Jr., and transmit a certified copy of the judgment to each.

Attest:

*Secretary.*

**STATEMENTS OF SENATORS REGARDING THE
IMPEACHMENT TRIAL OF
JUDGE G. THOMAS PORTEOUS, JR.**

Mr. REID. Mr. President, before proceeding to the final vote on the Articles of Impeachment, I ask unanimous consent that Senators may be permitted, within 7 days from today, to have printed in the RECORD opinions or statements explaining their votes and that the secretary be authorized to include these statements along with the record of the Senate's proceedings in a Senate document printed to complete the documentation of the Senate's handling of these impeachment proceedings.

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and listened to the arguments and deliberated extensively about this impeachment should be reassuring to every American. I think the results are interesting in that it reflects that each Senator made an individual decision about the Articles of Impeachment. There was some unanimity on some of the counts, but on others it was Republicans and Democrats, conservatives and progressives, on both sides of the question. I think that shows the extent to which everybody made an independent judgment and took their responsibility very seriously.

I want to take a few minutes now to thank some people who are unsung heroes. Obviously, I thank the distinguished vice chairman, the Senator from Utah, for his support, experience, and wisdom in discharging the committee's duties. He was essential to this process and a great rock for me to lean on at many turns during this process. I also thank the 10 other members of the Impeachment Trial Committee for their devotion and diligence and commitment to this important work.

Then I want to take a couple of minutes to talk about the staff. I want to begin with Derron Parks, who is seated with me on the floor of the Senate. Derron walked into my office and was hired to be a legislative assistant for health care, in the middle of some pretty difficult times on health care. Then I said to him, "By the way, can you run an impeachment of a Federal judge, also?"

As a brandnew member of my staff, he took on incredible responsibilities. All of the thanks I have received belong to him because he worked hard, he worked smart, he was a great leader, and he did a remarkable job of marshaling a bunch of Senators, a bunch of staff, a bunch of witnesses, a bunch of evidence, a bunch of legal research, and he did it in a way that I think the Senate can be very proud.

Also, I thank Tom Jipping, Senator HATCH's staff person, who helped with this as the deputy staff director for the Impeachment Trial Committee. He also put in an incredible amount of work and gave a very valuable contribution.

Justin Kim, counsel, was very important because whenever there was a disagreement about what was the right road to take in terms of historical precedence, rule of law, decisions on motions, he was always a good sounding board. There was always more than one smart lawyer in the room so that the ideas could be bounced back and forth and somehow we could come up with the right answer based on the law, the Constitution, and historical precedent.

Rebecca Seidel was also very valuable to the committee. She is another counsel who was essential in this process.

Erin Johnson, deputy counsel and chief clerk, did, frankly, some of the most difficult work, and that was making sure we had a quorum during the trial, which was hard, as you can imagine. Keeping Senators in one seat for

ORTEOUS IMPEACHMENT

Mrs. McCASKILL. Mr. President, our Constitution is a glorious thing. It is in fact the envy of the world. One of the most effective and elegant elements of the foundation of our government is the provisions that provide for the checks and balances of our three branches of government.

It has been an incredible honor to participate in the impeachment process that was devised by very wise people very long ago, which actually provides the American people the reassurance that the Constitution is working the way it was designed to work when it comes to the checks and balances of the three branches of government.

The responsibilities of the modern Congress, both the House and Senate, are extensive. I don't need to spend much time talking about how busy we are right now. But the fact that we set aside everything that we were doing and came together and sat as a Senate

an extended period of time is tough. She managed to make sure that we always had the quorum the law demanded.

Lake Dishman, another member of the staff, did a wonderful job.

Susan Navarro Smelcer, an analyst on the Federal judiciary, CRS, did wonderful work for us in terms of allowing us some help on the research of the historical precedence and decisions that guided our way.

Morgan Frankel, Senate legal counsel, was on the floor for the conclusion of this impeachment matter. Like Senator HATCH, this wasn't his first time to deal with impeachment matters, so he was a wealth of information and wonderful help to us.

Pat Mack Bryan also did great work.

Grant Vinik and Tom Cabayero were also from the Senate legal counsel staff.

All of the committee members had staff people who helped. I will not put all of their names on the record now, but they will be made part of my entire statement. I will have more comments on the impeachment proceedings that I will insert in the RECORD.

I will conclude by saying that I am very proud to be a Senator today. There are days when that is not as easy to say. There are times when this place is pretty dysfunctional. But I am very proud of the Senate and how we conducted ourselves during this very important and grave proceeding. I think the responsibility was handled as the Founders would have wanted us to handle it, and I think we should all be proud of that.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. BENNETT). The Senator from Utah.

Mr. HATCH. Mr. President, I wish to personally thank the distinguished chairwoman of this committee. I have been in the Senate a pretty long time, and she has done one of the best jobs I have ever seen done. There aren't very many impeachments—or should I say trials of impeachment, but of the ones I have seen, she ranks right up there in the top. All I can say is she ran a very good committee. She made very good decisions, she wasn't afraid to rule, she treated everybody with dignity and respect. She expected a lot of the members of the committee, which has to be the way, and she is a very intelligent and articulate and knowledgeable person. It has been my privilege to be able to serve with her and under her as vice chairman of this committee.

This is when you realize how important the Senate is, when all the Senators come together and they make decisions such as this, pro and con. Nobody should misjudge not guilty votes or guilty votes. I think every Senator voted the way he or she felt they should vote, and that was important.

I think much of the credit for the way this was all handled should go to the distinguished chairwoman, Senator McCASKILL. She is an excellent human being, a wonderful leader on this com-

mittee, and, frankly, I am very proud of her for what she was able to do because this is not easy, and it does take a lot of time. It is similar to herding cats, trying to make sure you can get all these busy people on the committee or at least a quorum every time to be able to do business on the committee. She was able to do that.

I wish to compliment every member of the committee. Every member showed up and did a lot of work on this committee—some more than others, of course. But every one of the members of this committee worked to try to be fair and do what is right and to do justice in this matter.

Having said all that, I wish to pay tribute to Derron Parks myself. This young man deserves a lot of credit. To be thrown into an impeachment committee, when his main job was to work on health care, tested the legal acumen of this young man. I have to say he was one of the kindest, most decent, most honorable, most knowledgeable, and most intelligent people I have worked with in the Senate. He is a terrific person and I am very proud of him.

Thomas Jipping, on my staff. There are very few people around who have the experience Tom has. He is a very good lawyer. He was a constant guide and provided me with leadership. I don't think either Senator McCASKILL or I could have done this without these two leaders on the committee.

The others were equally important to us and did very good work: Justin Kim, a wonderful human being; Rebecca Seidel. She worked with me long ago on the Judiciary Committee, is a very experienced lawyer and did a terrific job. Erin Johnson and Susan Smelcer were both critical to the work on the committee; Lake Dishman, who is on our staff and a very fine young man, who was willing to go every extra mile he could—as were all these other folks on the staff—to do what was right; Morgan Frankel and Pat Bryan from the Senate legal counsel's office. We couldn't have asked for better people, with more knowledge or more ability to lead and assist us.

Impeachment committees—or should I say the trial committee and the hearing of this is a very difficult undertaking. You are dealing with people's lives, you are dealing with people's reputations, and you have to do this in a completely fair and honest way, which I believe we did. This is one of the most important tasks the Senate does—extremely important—and I think the Senate acquitted itself very well today.

Every Senator voted his or her conscience today and, in some instances, that wasn't easy. Nobody should misjudge anybody's vote. Judge Porteous was convicted on all four articles and the vast majority of our Members felt that was proper.

At that point, I have to compliment the attorneys from the House. They were terrific. I have complimented them personally, and they know how I feel toward them, but the counsel for

the House were very respectful, very knowledgeable, tremendously articulate in what they did and, frankly, acquitted themselves with great dignity and deserve all our respect. We should respect counsel representatives. It is not easy to impeach somebody in this day and age, but they did, and these folks did a terrific job and their counsel as well.

They are Alan Baron, Harold Damelin, Mark Dubester, and Kirsten Konar.

Having said that, the defense counsel did the very best job they could. Jonathan Turley is an imminent professor at George Washington University. I have known him for a long time. He is very innovative and creative. Some thought, in this particular matter, he was quite innovative and creative as well. But let me say he is a very intelligent and very knowledgeable man. His other cocounsel deserve great recognition for what they did here.

I feel sorry for Judge Porteous. To rise to the dignified position of a Federal district court judge and then have this happen, after 30 years in public service or more, I am sure is absolutely painful and a problem and damaging to his reputation. I wish him well. I hope he will analyze these things and make some changes in his life that will be better for him and for his family and others. He has a lot of friends down there in Louisiana, and I think probably earned a lot of friendship, but the Senate has ruled properly in this matter and the impeachment should be upheld.

He should have been convicted of at least one of these articles, if not all four. I don't believe he should have been convicted on two of them—and there were good legal reasons for not going that far in the case of the chairman and myself—but, nevertheless, I respect the votes of all my colleagues on the floor. I know they paid strict attention, sat through almost all the proceedings and the closed session as well, and I commend them.

Finally, I wish to commend our two leaders. The two leaders conducted these proceedings with dignity and with respect, upholding the highest standards of the Senate. You can't ask for more than that, and I am very proud of both our leaders and others as well.

It has been a privilege for me to serve on this committee. I have tried to do the best I possibly could, and I believe the result today is an honest and just result. I just hope this sends a message to all our judges on the Federal bench, and others as well, that it is important to live up to our responsibilities and to do the things we know we should be doing.

Having said all this, I wish to again thank the staff on this committee. What a tremendous bunch of young people, who did a terrific job and who deserve the bulk of the credit of any credit that is due. I am just grateful to have been able to know them and work

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with them and to love them for the work they have done.

This is one of the most important things the Senate can engage in, and I wish to thank our Parliamentarians. Many times people don't realize how important the Parliamentarians are in the Senate. We couldn't function without them. We are very blessed to have the Parliamentarians whom we have helping us in the Senate. They go unrecognized many times but not by me. I have a great deal of admiration for them. They keep us out of a lot of difficulties. Sometimes they get us into some difficulties—because of the rules, not because of them. But I want to pay tribute to them as well.

This was a just result. It is what I think had to be done. The country will be better for it. It does send an appropriate message, or messages, I should say, and I feel blessed to have been able to participate on this committee and on this Senate floor. It is a great honor to serve in the Senate. Days such as this help bring that home to me, and I wanted everybody to know it.

I wish to again thank the distinguished chairwoman and tell her how much I appreciate her work.

With that, I yield the floor.

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PORTEOUS IMPEACHMENT

Mrs. McCASKILL. Mr. President, I ask unanimous consent that a joint statement by myself and Senator HATCH regarding the Porteous impeachment be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JOINT STATEMENT OF SENATOR CLAIRE McCASKILL, CHAIRMAN AND SENATOR ORRIN G. HATCH, VICE CHAIRMAN, U.S. SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE G. THOMAS PORTEOUS, JR. OF THE EASTERN DISTRICT OF LOUISIANA

Because the Senate deliberated in closed session, this statement is the only opportunity during the formal impeachment trial process to formally explain our votes and to offer some views on certain issues for future consideration. We independently evaluated the articles of impeachment brought by the House of Representatives and the motions filed by Judge Porteous. Because we came to the same conclusions and share many of the same views regarding the articles and motions, we thought it most useful to file a joint statement for the record.

The unique nature of impeachment, what it is and what it is not, is an essential guiding principle for the impeachment trial process. Impeachment is a legislative, not a judicial, process for evaluating whether the conduct of certain federal officials renders them unfit to continue in office. Our impeachment precedents give some general definition to the kind of conduct that may meet this standard. The Senate, for example, convicted and removed U.S. District Judge Halsted Ritter in 1933 for bringing his court into "scandal and disrepute." Similarly, during the impeachment trial of U.S. District Judge Alice Hastings, the President Pro Tempore stated that the question is whether the defendant "has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States."

A consistent focus on the essential nature of impeachment helps answer many of the questions that arise in the impeachment trial process. For example, it sets impeachment apart from the civil or criminal justice processes. Federal officials may be impeached for conduct covered by the criminal law for which they have been convicted, acquitted, or not prosecuted, as well as for conduct that is not criminal at all. Standards of proof that apply in those contexts do not necessarily apply in an impeachment trial; in fact, there exists no single or uniform standard of proof that the Senate as a body must apply.

There also exists no rigid standard for the form that articles of impeachment must take. The Constitution gives the "sole power of impeachment" to the House of Representatives, which necessarily includes substantial authority to frame articles of impeachment. As it did in the Hastings impeachment, this may result in articles that each alleges an individual act. But other cases, like the present one, may involve distinct sets or categories of conduct. Just as impeachments arise out of different sets of facts, impeachment articles may take more than one form. In every case, however, the House must prove that the conduct alleged in the articles that it frames and exhibits to the Senate justifies removing a federal official from office.

In July, Judge Porteous filed with the Senate Impeachment Trial Committee a motion to dismiss the articles of impeachment as "unconstitutionally aggregated." Before the full Senate, he revised this motion to request

that the Senate take a preliminary vote on each allegation, a total by his count of approximately 25, contained in the articles. The Committee denied the original motion to dismiss and we joined the Senate in unanimously defeating the revised motion. Even though the articles of impeachment include multiple allegations, we believe that each meets the standard established by the Senate Impeachment Trial Committee during the impeachment of U.S. District Judge Walter Nixon and adopted in the present case. Each article presents a coherent and intelligible accusation that properly serves as the basis for the impeachment trial. The need for proving individual elements of an offense is appropriate for the criminal law but, as mentioned earlier, impeachable offenses need not be prohibited by the criminal law at all. Requiring a separate vote on every allegation contained within an impeachment article effectively re-drafts that article, with the result that the Senate would vote on an impeachment matter that the House did not adopt. Finally, Rule 23 of the Senate's impeachment rules explicitly prohibits dividing articles of impeachment for the purpose of voting "at any time during the trial."

Unless absolutely necessary, impeachment trials should be decided not on the basis of motions that make broad statements or set broad precedents, but on the merits of individual cases and articles of impeachment as the House frames and exhibits them. In this case, each article of impeachment alleged not a collection of unrelated acts but coherent patterns or sets of conduct. The question for the Senate was whether the conduct alleged in each article justified removing Judge Porteous from the bench.

One somewhat novel issue raised in this case was whether a federal official may be impeached on articles that allege conduct occurring before he took federal office. The proper focus on the essential nature of impeachment is again important here. Judge Porteous argued for an absolute, categorical rule that would preclude impeachment and removal for any pre-federal conduct. That should not be the rule any more than allowing impeachment for any pre-federal conduct that is entirely unrelated to the federal office or the individual's conduct in that office.

Pre-federal conduct should not itself ordinarily be the primary basis for impeachment. Particularly egregious pre-federal conduct that, by itself, would justify impeachment and removal would likely have prevented an individual's appointment in the first place. In most cases, therefore, the question is whether a federal official's conduct since taking office warrants removal from that office. That is the question in the present case because none of the articles of impeachment against Judge Porteous is based entirely on pre-federal conduct.

The conduct alleged in Article I contained substantial pre-federal and federal conduct. The House framed the article to include a kickback scheme whereby the law firm of Jacob Amato and Robert Creely would receive curatorship case appointments from Judge Porteous in exchange for Creely and Amato paying some of the fees back to Judge Porteous through the hands of Creely. All parties agree that there was no explicit agreement regarding these cases, but it is estimated that approximately half of the fees went back to Judge Porteous. The curatorship kickback scheme, by definition, could only have occurred during Judge Porteous's time on the state bench. When Judge Porteous, after his appointment to the federal bench, could no longer assign curatorship cases to Amato and Creely, the money stopped coming to Judge Porteous from Amato and Creely.

This pre-federal conduct flowed into Judge Porteous's federal service in two documented instances. First, Amato was brought on as counsel for Liljeberg in a multi-million dollar lawsuit named *Lifemark v. Liljeberg*. Judge Porteous was scheduled to try the case without a jury approximately six weeks from Amato's entry into the case. Counsel for Lifemark filed a motion to recuse Judge Porteous because of the close relationship between Amato and Judge Porteous. While opposing counsel did not know of the curatorship kickback scheme, Judge Porteous did. Judge Porteous clearly should have recused himself or disclosed the scheme. Instead, he chose to misrepresent his relationship with Amato during the recusal hearing. Second, after trial in the Lifemark case, Judge Porteous took the case under advisement. During this period, Judge Porteous solicited money from Amato and received \$2,000 in cash, split equally by Amato and Creely from the firm's account. There is no legitimate reason that a federal judge would solicit and accept cash from a lawyer with a case in front of him. We believe that soliciting and receiving a \$2,000 cash payment from a lawyer in a case currently before him would alone have been enough to warrant Judge Porteous's impeachment and removal. When viewed with the additional factors, including the kickback scheme, the fact that the lawyer stood to make hundreds of thousands of dollars through a contingency fee if he won, that the judge misrepresented his relationship during the recusal hearing, and that the appeals court found that parts of the judge's decision in favor of this lawyer's client were "apparently constructed out of whole cloth," Judge Porteous's conduct deserved the unanimous rebuke of the United States Senate and removal from the federal bench.

The allegations in Article II were very serious and no doubt tainted Judge Porteous's ability to serve on the bench. They involve Judge Porteous's relationship with a bail bonds company and its owners, Louis and Lori Marcotte. This article is, primarily though not exclusively, based upon Judge Porteous's actions prior to his service on the federal bench. The fact that this conduct is pre-federal is not alone a bar to removal, though it is a significant factor to consider when evaluating this and future articles.

We decided to vote against conviction on Article II not only because most of the alleged conduct occurred before Judge Porteous became a federal judge, but also because we were not convinced that the conduct sufficiently proven by the House rose to the level of a high crime or misdemeanor. The Marcottes, who are felons convicted of manipulating the Louisiana justice system for profit, are the only source of evidence against Judge Porteous. Unlike the evidence presented on Article I, there are limited receipts and other documentary evidence supporting the claims made by the Marcottes. We found that the timelines laid out by Louis Marcotte, Lori Marcotte, Jeffrey Duhon, and Aubrey Wallace to be inconsistent with one another and with the documentary evidence that does exist regarding this article.

The most prominent example of the inconsistent timelines deals with the allegation that Judge Porteous improperly set aside or expunged the convictions of Jeffrey Duhon and Aubrey Wallace as a favor to Louis Marcotte. Louis Marcotte testified that his corrupt relationship with Judge Porteous did not really begin until after September 1993. The Duhon conviction was expunged in 1992. In addition, Judge Porteous only performed a ministerial step in expunging the conviction. Another judge performed most of the responsibilities in setting aside and

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expunging both of Duhon's convictions. Louis Marcotte testified that he hounded Judge Porteous for weeks about setting aside the conviction of Aubrey Wallace. Marcotte stated that Judge Porteous said he would set aside the conviction but not until after he had secured his "lifetime appointment." As we discuss below in relation to Article IV, this statement may reflect Judge Porteous's awareness that certain decisions or actions might impede his confirmation to the federal bench. The documentary evidence shows, however, that Judge Porteous actually took some of the steps towards removing the Wallace conviction, including a hearing on the set aside motion, before his Senate Judiciary Committee confirmation hearing. In addition to the conflicting timelines, the House failed sufficiently to establish that Judge Porteous's actions with respect to the Duhon or Wallace convictions were illegal or even improper under state law.

The House alleges that Judge Porteous was the Marcottes' "go-to" judge and would sign almost any bond that they requested. However, the House conceded that they could not point to any individual bond that was set either too high, too low, or improperly in any other way for the benefit of the Marcottes. Additionally, Judge Porteous's former criminal minute clerk suggests the opposite. The clerk indicated that Judge Porteous or a member of his staff was diligent about calling the jail for information about a prisoner for whom Marcotte requested a bond be set, instead of just taking Marcotte's word for it.

The remaining conduct alleged in Article II, that Judge Porteous used his prestige as a federal judge to recruit new state judges for the Marcottes to corrupt, was also not sufficiently proven. The House was able to document six lunches over a ten year period where Judge Porteous is alleged to have helped the Marcottes recruit and train judges. The only evidence that the House presented that Judge Porteous was present at some of these lunches was the fact that there was a reference to Absolut Vodka on the receipt and Judge Porteous was known to drink Absolut Vodka. One of the judges who was allegedly recruited by Judge Porteous, Ronald Bodenheimer, stated that Judge Porteous never told him what to do in relation to the Marcottes, nor did Bodenheimer feel that Judge Porteous ever used his position as a federal judge to pressure Bodenheimer to work with the Marcottes or to issue any bonds. Judge Porteous simply told Bodenheimer that he could trust the Marcottes when it came to providing information related to a particular offender.

While we do not take the position that any of these witnesses was lying, we believe that the House must clear a high bar in proving the guilt of a federal official in an impeachment trial. The House did not meet its burden with respect to the conduct alleged in Article II.

Three features of Article III distinguish it from the others. Article III is the only one alleging conduct that occurred entirely after Judge Porteous was appointed to the federal bench, that conduct was unrelated to either his office or his official conduct in that office, and Article III raises significant factual disputes. Unofficial conduct may constitute the "high crimes and misdemeanors" that justify impeachment and removal, but that conclusion must be clearly established after giving Judge Porteous the benefit of the doubt regarding remaining factual disputes.

There is no dispute that Judge Porteous filed his initial bankruptcy petition under a false name, signing the declaration "under penalty of perjury that the information provided in this petition is true and correct." If there was any evidence that he intended to

defraud creditors, this alone might be sufficient for impeachment and removal from office. But the evidence is to the contrary. He used the false name only to avoid the embarrassment of his real name appearing in the newspaper's listing of bankruptcies.

The false name existed for only 12 days, and he filed an amended petition with correct information the day after the false name appeared in the newspaper. The amended petition, with the correct identifying information, was then sent to creditors. The fact that so few creditors who were contacted with the correct information actually filed claims suggests that no one was prevented from filing a claim because a false name was on file for less than two weeks. Ironically, if the petition had been filed precisely the same way and the false name had been entered inadvertently rather than deliberately, it likely would not have been discovered and rectified until later in the process.

There is also no dispute that Judge Porteous's bankruptcy petition and accompanying schedules omitted certain assets and debts and inaccurately valued others. This fact might be more serious if Chapter 13 bankruptcies typically are filed without such omissions or inaccuracies. Judge Porteous introduced evidence, however, that the opposite is true, that nearly 100 percent of Chapter 13 bankruptcies contain multiple inaccuracies. For these problems to constitute "high crimes and misdemeanors," there must be clear and convincing evidence that the inaccuracies and omissions were intentional or fraudulent. The record does not contain such evidence. The House forcefully presented a theory that Judge Porteous hid assets so that he would have more money to gamble away, but a theory unsupported by real evidence is not enough to remove a federal judge from office.

Several allegations in Article III raised the question whether "markers" used to obtain chips in casinos are checks or credit. This distinction is significant because Judge Porteous was prohibited from obtaining more credit while his bankruptcy plan was in effect. But there was far from clear and convincing evidence settling that question.

On the one hand, gamblers fill out a credit application before they obtain markers. On the other hand, casinos redeem markers by presenting them at the gambler's bank. On the one hand, markers are checks under Louisiana commercial law. On the other hand, Judge Porteous's bankruptcy attorney and the bankruptcy trustee in his case considered them to be credit. Experts testifying before the Committee at the evidentiary hearing strongly and directly disagreed. This dispute, as important as the issue may be, was simply not settled with sufficient clarity to direct a conclusion either way. As such, Judge Porteous deserves the benefit of the doubt.

Finally, Judge Porteous not only successfully completed what is considered a large Chapter 13 bankruptcy, even after the bankruptcy judge nearly doubled his monthly payment, but he actually paid more than the plan called for. That is not the conduct of someone bent on bankruptcy fraud. The question, then, is whether the allegations in Article III that the evidence clearly showed to be intentional acts were sufficient to remove Judge Porteous from the bench. We do not believe so and, therefore, voted to acquit on that article.

We looked at Article IV with particular interest because the conduct by Judge Porteous that it alleged directly implicated the Senate and the judicial confirmation process. One of us not only serves on the Judiciary Committee, but was its Ranking Member when Judge Porteous was confirmed in 1994.

In FBI interviews, as well as in questionnaires before and after his nomination, Judge Porteous was asked whether anything in his personal life could be used by someone else to intimidate or influence him, could be publicly embarrassing to him or the President, or could affect his nomination. He signed both questionnaires, which included the statement that the information provided was "true and accurate." Those questions are still asked and still appear in those questionnaires as part of the confirmation process today. Judge Porteous argues that his negative answers to these questions were true because he did not believe that anything he had done, including in the relationships described in Article I and II, to be improper or embarrassing. But Judge Porteous was never asked whether he personally thought anything in his personal life was improper or embarrassing. There would be little value in asking such a question. Judge Porteous was asked whether anything in his personal life could be viewed by others, or by the public, as embarrassing or, more importantly, affect his nomination. Not only is that important information for the confirmation process, but it is information that in most cases can come only from the candidate or nominee.

What Judge Porteous may have lacked in personal scruples, he possessed in political instincts about matters that could be confirmation obstacles. Louis Marcotte testified, for example, that when he urged Judge Porteous to clear the criminal record of a Marcotte employee, Judge Porteous said he would do so only after the Senate confirmed his nomination. He did not want it coming out in the newspaper and said that he would not let anything stand in the way of his lifetime appointment. Judge Porteous waited until after his confirmation, but before he took the oath of office, to set aside one of those criminal convictions.

The propriety of setting aside that conviction is not the issue. This example simply shows Judge Porteous' awareness that perceptions of his actions might affect his appointment to the federal bench. His instinct, it turns out, was accurate because the New Orleans newspaper reported that Judge Porteous had unlawfully set aside the conviction and the Justice Department would later conclude that his decision was contrary to law. Or consider another example. Judge Porteous' financially interactive relationship with his friends Jacob Amato and Bob Creely may not have bothered him, but it certainly bothered them. While on the state court bench, Judge Porteous began assigning unsolicited curatorship cases to Creely after Creely refused to give him money. Having provided a new source of revenue, Judge Porteous began requesting, and Creely and Amato began providing, a portion of the fees generated by those cases. Amato believed that this arrangement was unethical, a kind of kickback, and warned Creely that it was going to turn out badly. Amato did not disclose it at the recusal hearing in the Lifemark case because he believed he might be disbarred and that Judge Porteous might be removed from the bench. At our evidentiary hearing, the House's judicial ethics expert opined that this conduct violated the ABA model code of judicial conduct, and even Judge Porteous' own expert suggested that it was ethically troubling.

If his own best friend thought disclosing this financial relationship might get Judge Porteous removed from the bench, it is simply not credible that Judge Porteous believed disclosure of that relationship could not affect his appointment to the bench. Instead, he apparently answered those questions in the negative for the same reason that he put off setting aside that criminal

conviction, to avoid any obstacles to a lifetime appointment. This dishonest participation in the confirmation process undermined the integrity of that process and possibly deprived the Senate of information that would have mattered in considering his nomination. His negative answers to questions he was actually asked were material and demonstrably false. For that reason, we voted to convict on Article IV.

The Senate was correct in removing Judge Porteous from the bench. He argued that it was unclear that his actions violated the public trust and warranted removal. The message from the Senate is clear that the privilege of serving the American people comes with a responsibility to be fair, honest, and to behave in a manner that inspires confidence in the courts and our system of justice.

Mr. LEAHY, Mr. President, for just the eighth time in this country's history, the Senate has voted to impeach and remove a Federal judge from the bench. Impeachment is a serious, constitutional act intended not as a form of punishment, but rather as means of protecting the integrity of our system of government. This is particularly true when we consider the impeachment of members of the judiciary. Public confidence in our courts is fundamental to the functioning of our democracy. When a judge engages in conduct that grossly violates the public trust, he or she not only becomes incapable of fulfilling the responsibilities of the office, but also brings disrepute to the entire judicial system.

Prior to the Senate's vote on December 8, I voted three times to convict a Federal judge. In each instance, I carefully considered the facts in the case, as well as my constitutional obligations and the precedent being set for future generations. I have no doubt that just as we looked back to past impeachments to guide our actions in this proceeding, we now leave new precedent that others will look to for guidance and wisdom. For this reason, I wanted to elaborate on the constitutional issues presented during this impeachment trial and explain my decision to vote to convict Judge Porteous on all four Articles of Impeachment.

First, I should note that the impeachment trial against Mr. Porteous was bipartisan, and, I believe, unquestionably fair. The Senate Impeachment Trial Committee held 5 days of evidentiary hearings, with testimony received from 26 fact and expert witnesses. The record before the Senate is well developed, and most of the facts underlying the allegations against Mr. Porteous are uncontested. These facts demonstrate that Mr. Porteous engaged in conduct that compromised the administration of justice, brought disrepute to his office, and required his removal from the bench.

The first article of impeachment alleges that as a Federal judge, Mr. Porteous failed to recuse himself in the bench trial of Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, despite having previously engaged in a corrupt scheme with one of the attorneys before the court. The

House managers established that as a State judge, Mr. Porteous assigned curatorship cases to two attorneys, one of whom was before him in the Liljeberg case, and had a portion of the fees, totaling approximately \$20,000, funneled back to him. Not only did Mr. Porteous fail to disclose these facts or recuse himself from the case, he proceeded to solicit and accept \$2,000 cash from those attorneys while the Liljeberg case was still under his advisement.

Out of concern for the public's confidence in our court system, I have frequently expressed disappointment about the lack of recusals by judges with conflicts of interest. There should be no doubt that recusals go to the heart of a judge's impartiality. In gross violation of his judicial ethics, Mr. Porteous engaged in a corrupt scheme with attorneys, solicited and accepted money from attorneys with pending matters before his court, and deprived the public and litigants of his honest services by failing to recuse himself.

The defense argued that article I should be dismissed because of the Supreme Court's recent ruling in *Skilling*. I am familiar with the Court's ruling, and have authored legislation in response to it. The Supreme Court's holding was about a specific criminal statute, not judicial conduct or impeachment standards. No reasonable judge would believe that soliciting and accepting cash payments from an attorney with a pending case would be allowable or would not be an obvious ground for recusal.

The notion that was raised by the defense that corrupt judges could not be impeached ignores the purpose of impeachment as it relates to public confidence in our justice system. The Constitution did not list a specific set of conduct that would result in impeachment. Instead, Senators should determine for themselves what conduct renders one unfit to hold public office. We must consider the type of duties that the impeached official is called upon to perform and whether the conduct engaged in impairs the official's ability to perform those duties. This analysis differs depending on the office and responsibilities of the official before us.

Article II alleges that as a State court judge, Mr. Porteous took numerous things of value and accepted personal services from a bail bondsman, while setting favorable bonds for his company. As a Federal judge, Mr. Porteous continued to receive things of value in exchange for using "the power and prestige of his office" to help these bondsmen form corrupt relationships with State court judges. The evidence showed a pattern before and after his Federal confirmation of capitalizing on his position of power to receive improper gifts. Moreover, as Professor Michael Gerhardt, who served as Special Counsel to the Senate Judiciary Committee during the last two Supreme Court confirmations, testified before the House Task Force on Judicial Im-

peachment, the Constitution does not state that improper conduct must be committed during the tenure of the Federal office; rather, "[t]he critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function [as a Federal judge]." I agree with Professor Gerhardt on this fundamental question.

Certainly if the Senate learned after confirmation that a judge killed someone before he or she was confirmed, the Senate should not be prevented from later removing that judge. Similarly, the Senate should not be foreclosed from removing a judge for serious misconduct not revealed during the confirmation process that goes to the role of the judge. A lifetime appointment to the Federal judiciary does not entitle those unfit to serve to a lifetime of Federal salary and benefits. As chairman of the Judiciary Committee, I reject any notion of impeachment immunity if misconduct was hidden, or otherwise went undiscovered during the confirmation process, and it is relevant to a judge's ability to serve as an impartial arbiter.

With regard to the third article of impeachment, it is clear that Mr. Porteous knowingly and intentionally made material false statements and representations—including signing and filing under the name "G.T. Orteous"—under penalty of perjury on his personal bankruptcy court filing. It is hard to imagine stronger evidence that this judge believed the law did not apply to him. A judge who lies under oath in court filings is unable to continue in an office that requires him to administer oaths and sit in judgment. Mr. Porteous's actions in his bankruptcy proceedings demonstrate a flagrant disregard for the courts as an institution, making him unfit to serve as a respected member of the judiciary.

The last article of impeachment against Mr. Porteous relates to his actions before the Senate Judiciary Committee. As chairman of the Senate Judiciary Committee, I take the word of judicial nominees that come before our committee very seriously. The process for aiding the Senate in considering these lifetime appointments relies on being able to trust and evaluate the information provided to us by nominees, so it requires their utmost candor.

Mr. Porteous knowingly made material false statements about his past to the Senate by responding "no" to questions on his Senate Judiciary Committee questionnaire, and to the FBI in connection with his background review, in order to obtain office. His defense to article IV is that his conduct was "business as usual" in New Orleans and, therefore, he believed his responses to be true. Whether he made false statements is not purely a subjective inquiry; and most certainly not where his "belief" in the truth of his

nees also fill out SF-86 personnel forms as part of the executive branch's review of a potential nomination. One question on the form asks—under oath—whether:

There [is] anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details . . .

The FBI also asks potential nominees whether they are concealing any activity or conduct that could be used to influence, pressure, coerce or compromise them in any way or that would impact negatively on their character, reputation, judgment or discretion. Judge Porteous answered no to all of these questions.

I am concerned about the vagueness and catchall nature of these questions and its responses being the basis of an Article of Impeachment. I could understand an Article of Impeachment based on a response that hides information that if discovered later would be the basis of impeachment and where a separate Article of Impeachment using these specific facts was not presented to the Senate by the House of Representatives. Also, I would have understood if the statements in article IV were included as part of article I. Such was not the case here.

For this reason, I voted not guilty on article IV.

PORTEOUS IMPEACHMENT

Mr. CARDIN. Mr. President, one of the most solemn obligations of Senators is try impeachments. The Constitution provides that the Senate shall have the "sole power to try all impeachments," and that "all civil officers of the United States shall be removed from office on impeachment" for various offenses. Senators also take a special oath when hearing an impeachment case before the Senate holds an impeachment trial.

I recently heard evidence in the case of Judge Porteous, who would have lifetime tenure under the Constitution unless he resigns or is removed by the Senate. The House of Representatives impeached Judge Porteous on four different articles. After deliberation, I voted to convict Judge Porteous of three of the four articles, but voted against conviction on one of the articles. I rise to explain my not guilty vote on one of the articles.

Article I stated that Judge Porteous engaged in a pattern of conduct that is incompatible with the trust and confidence placed in him as a Federal judge. The Senate voted that Judge Porteous was guilty on this count by a unanimous vote of 96 to 0.

Article IV stated that Judge Porteous knowingly made material false statements about his past both to the U.S. Senate and to the Federal Bureau of Investigation, in order to obtain the office of U.S. district court judge. The Senate voted to convict Judge Porteous on this count by a vote of 90 to 6.

I voted against article IV because, in my view, it was duplicative of article I.

As a member of the Senate Judiciary Committee, I regularly review the questionnaire and nomination materials for Federal judicial nominees who are nominated for lifetime appointments. One question we ask nominees on our committee questionnaire—under oath—is whether there was "any unfavorable information that may affect your nomination." Judicial nomi-

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Article II of the U.S. Constitution gives the "sole Power to try all Impeachments" to the Senate, and we take this role very seriously. Judges may be impeached and, if convicted, removed for "Treason, Bribery, or other high Crimes and Misdemeanors." Neither the Constitution nor statute define "other high Crimes and Misdemeanors." So it is up to each one of us to determine what actions reach the level of impeachable offenses egregious enough to remove a Federal officer such as a district court judge.

It is important that the judges that we confirm to lifetime appointments have the utmost integrity. Anything less would undermine public confidence in the judicial system which has such a major impact on the lives of Americans. These votes are among the most important and difficult that we cast.

Today I will vote to convict Judge Porteous on the basis of articles I through III. Those articles allege that Judge Porteous engaged in corrupt behavior with a law firm, had significant financial ties to that firm, but failed to recuse himself in a case where that same law firm represented one of the parties, improperly and unethically solicited and received a financial gift from a lawyer while he had that lawyer's case under advisement, and solicited favors from a bail bondsman and the bail bondsman's sister while using the power and prestige of his office to provide assistance to them and their business and made material false statements in conjunction with his personal bankruptcy filing.

I believe that Judge Porteous is guilty of the actions outlined in those three articles which prove and that he is unfit to serve as a U.S. district court judge.

I cannot, however, vote to convict Judge Porteous on the basis of article IV. Unlike the previous three articles that allege objective behavior to prove impeachable offenses, article IV is subjective: It requires us to determine Judge Porteous' state of mind—what he was thinking and how he felt about his past behavior. Article IV alleges that Judge Porteous "knowingly made material false statements about his past to both the United States Senate and to the Federal Bureau of Investigation in order to obtain the office of United States District Court Judge."

Specifically, article IV states that Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known. Judge Porteous answered "no" to those questions. During his background check, Judge Porteous told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character,

reputation, judgment, or discretion. Finally, Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered "no," to the best of his knowledge.

Did Judge Porteous believe those answers were true when he made them? I do not believe that we should impeach and convict a person based on his or her beliefs or his or her state of mind. If we did, we would be removing someone from office without evidence he was intentionally lying, not about an objective fact but about what he believed at the time of his statement. Beyond that, it is a statement about a subjective issue. Judge Porteous may have believed that none of his conduct, if known, would be embarrassing to the President, or that nothing in his past could be used to improperly influence him, even if the Senate disagrees with that belief. We should remove someone from office based on his conduct or on his objectively false material statements of fact, not on subjective statements about subjective judgments.

Assume that a candidate for the Federal bench in an answer to a question of the Judiciary Committee or Department of Justice said that nothing in his past would embarrass the President if known. After he is confirmed as a judge, he is involved in a messy divorce and it is discovered that the judge had had a series of extramarital affairs in the few years before he answered the questionnaire that he knew of nothing in his past that would embarrass the President. Assume further that in the judgment of the House, that behavior does embarrass the President. Under the theory of article IV, the judge's answer would constitute an impeachable offense. Article IV creates a precedent that is too potentially dangerous for me to support.

To quote from page 60 of the Report of the Impeachment Trial Committee, "Professor Mackenzie also testified that while the compromise-or-coercion question is asked 'routinely' of 'virtually everybody who is interviewed,' he could not recall any candidate who had ever responded affirmatively to this question. Nor was he aware of any individual who has ever responded affirmatively to a question that asks the candidate to 'advise the Committee of any unfavorable information that may affect your nomination' or any nominee who had ever been prosecuted or removed from office for falsely answering such a question."

It is our solemn responsibility to protect the integrity of the Federal judiciary and the public trust in our judicial system. Today we will fulfill that role.

Mr. BINGAMAN. Mr. President, the Senate has found G. Thomas Porteous, Jr. guilty of the charges contained in four articles of impeachment and removed him from office as a Federal district judge. In addition, it has adopted a motion disqualifying Mr. Porteous from ever holding any office of honor, trust, or profit under the United

PORTEOUS IMPEACHMENT

Mr. LEVIN. Mr. President, today we are involved in one of the most important functions of the U.S. Senate, and one of the most rare. Only 11 impeachment trials have been completed over the 221-year history of the Senate.

States. Although I voted guilty on all four articles of impeachment, I voted against the motion to disqualify Mr. Porteous from future office. Although the Constitution clearly gives the Senate the power to disqualify a person from holding future federal office upon impeachment, I do not believe that sanction was justified in this case, viewed in light of previous judicial impeachments.

Under our Constitution, impeachment is a remedial measure, not a penal one. Its purpose is to not to punish wrongdoers, but to protect our government against official misconduct by removing corrupt officials from office. As Justice Story put it, impeachment "is not so much designed to punish an offender, as to secure the state against gross official misdemeanors."

The Framers of our Constitution borrowed the idea of impeachment from Great Britain. But in Britain, in the centuries before the adoption of our Constitution, impeachments were used to punish as well as to remove from office. Impeachment by the British Parliament could result in fines, imprisonment, and even death. The Framers of our Constitution wanted none of that. They wove safeguards against legislative punishments throughout the Constitution, in the prohibitions against bills of attainder and ex post facto laws, in an independent judiciary, and in the due process clause of the fifth amendment. Most clearly, they spelled out their design in the impeachment clause itself, which states that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."

Although united in a single sentence, "removal from Office" and "disqualification to hold . . . Office" are separate and distinct remedies. They are treated as separate and distinct in our rules and in our precedents. Removal from office follows automatically upon conviction. It does not require a separate motion or vote. Disqualification from holding office in the future is discretionary. A separate motion and a vote on the motion are required.

Like removal, disqualification is remedial. It protects the integrity of our government by declaring persons found guilty of corrupt behavior unfit for Federal office. It is not unique to impeachment, but can be found in a number of federal statutes that disqualify persons convicted of certain crimes, typically involving official misconduct. As the Supreme Court has said, it is "a familiar legislative device," and "Federal law has frequently and of old utilized" it. This is from *De Veau v. Braisted*, 383 U.S. 144, 158–159, 1960.

But disqualification also has a punitive dimension to it. In the same paragraph of his Commentaries on the Constitution in which Justice Story said that impeachment is not "designed to punish an offender," he referred to

"the punishment of disqualification." The Supreme Court also said that "Disqualification from office may be punishment, as in cases of conviction upon impeachment." This is from *Cummings v. Missouri*, 77 U.S. 277, 320, 1867—stating that disqualifications in Missouri's Constitution "must be regarded as penalties—they constitute punishment".

Because of the punitive aspect of disqualification and because the Senate's decision to disqualify a person is not subject to judicial review, see *Nixon v. United States*, 506 U.S. 224, 1993, the Senate's decision to impose disqualification is an especially grave one. The Senate has historically treated it as such. Out of the seven previous impeachment cases that resulted in a conviction since the Nation's founding, the Senate has imposed disqualification in only two cases, one involving West Humphreys in 1862 and the other involving Robert Archbald in 1913. A motion was also made to disqualify Halsted Ritter following his conviction in 1936, but the Senate voted unanimously not to disqualify him. Thus, the Senate has not imposed the grave sanction of disqualification for nearly a century, between the impeachment of Mr. Archbald in 1913 and that of Mr. Porteous this week. None of the three judges convicted and removed from office in recent times—Harry Claiborne in 1986, Alcee Hastings in 1989, or Walter Nixon, also in 1989—have been disqualified.

As Judge Sporkin said in connection with the impeachment of Judge Hastings, "Impeachment must be invoked and carried out with solemn respect and scrupulous attention to fairness. Fairness and due process must be the watchword whenever a branch of the United States government conducts a trial, whether it be a criminal case, a civil case or a case of impeachment." This is from *Hastings v. United States*, 802 F. Supp. 490, 492, D. D.C. 1992, vacated on other grounds, 988 F.2d 1280, D.C. Cir. 1993.

Fairness, I believe, requires proportionality. As the Supreme Court has often said, "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." This is from *Weems v. United States*, 217 U.S. 349, 367, 1910. There are two dimensions to proportionality. The first, rooted in Magna Carta, is that the punishment should fit the crime, and the harshness of the penalty should be proportionate to the gravity of the offense. Unquestionably, the impeachment charges upon which the Senate convicted Mr. Porteous are serious and, measured by the gravity of the offense alone, conviction on these charges might well warrant the sanction of disqualification.

But proportionality ought also to be measured against the punishments imposed on others impeached and convicted of comparable offenses. See *Graham v. Florida*, 130 S.Ct. 2011, 2040–2041, 2010, Chief Justice Roberts, concurring. Here, I think it is hard to jus-

tify disqualifying Mr. Porteous from holding future office when the Senate imposed no such disqualification on any of the other judges impeached and convicted for misconduct over the past 97 years. If there were considerations in this case that justify disproportionate punishment that were not present in the previous impeachments, they were not made clear at the trial.

As Chief Justice Roberts recently wrote, "the whole enterprise of proportionality review is premised on the 'justified' assumption that 'courts are competent to judge the gravity of an offense, at least on a relative scale.'" This is from *Graham v. Florida*, 130 S.Ct. 2011, 2042, 2010, Chief Justice Roberts, concurring. Although the Senate sits as a "court of impeachment" to "try" impeachment cases, we are not sentencing judges and are not bound by judicial principles of proportionality. We possess what Alexander Hamilton described in *Federalist* No. 65 as the "awful discretion . . . to doom" people "to infamy." Our judgments are not subject to judicial review. But for this very reason, I believe that we should only impose the punishment of disqualification with what Judge Sporkin called "scrupulous attention to fairness," and some reasonable sense of proportion relative to previous, comparable impeachments. I do not believe that disqualification was a proportionate punishment in this case, and for that reason, I voted against the motion to disqualify Mr. Porteous.

Mr. WHITEHOUSE. Mr. President, while serving on the impeachment trial committee, I heard evidence that convinced me that Judge Thomas Porteous had a long history of corrupt behavior, deceived this body during the pendency of his nomination to serve on the federal bench, failed to meet the ethical standards we expect of Federal judges, and should be removed from the bench. The Senate was right to convict him and to bar him from future Federal office.

In light of the precedents this body inevitably sets in deciding to remove a Federal judge from office, the Senate must be thoughtful about the implications of our decisions on future impeachments. In this case, I believe that is particularly true with respect to the issue of aggregation of the Articles of Impeachment. Although the outcome of this trial may not turn on that question, it is fairly raised here, and calls to mind the prospect that in the future, House impeachment managers might be tempted to package a disparate bill of complaints against a President or Supreme Court Justice into a single article—hoping that added together, the charges will attract the votes of enough Senators to convict. I believe we should mark in this proceeding our view that the House of Representatives must be scrupulous about properly crafting Articles of Impeachment in all future cases.

Senators who have served as prosecutors will know that, under the "duplication" doctrine, a prosecutor cannot join

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together two or more distinct offenses into a single count of a criminal indictment. Thus, a single count cannot charge a criminal with kidnapping and murder. Instead, each charge must be placed in a different count so that the jury can vote separately on each count of the indictment.

This prohibition against aggregated or duplicative counts in an indictment protects a defendant's constitutional due process rights, including rights to fair notice and to a unanimous jury verdict. The First Circuit Court of Appeals has explained that this prohibition "arises primarily out of a concern that the jury may find a defendant guilty on a count without having reached a unanimous verdict on the commission of any particular offense." The Third Circuit explained, in *United States v. Starks*: "there is no way of knowing with a general verdict on two separate offenses joined in a single count whether the jury was unanimous with respect to either."

An impeachment trial is not a criminal proceeding. The charges against Judge Porteous are described in Articles of Impeachment, not counts in an indictment. The constitutional rules of criminal procedure do not bind this body sitting in an impeachment trial. Rather, the Senate works with the constitutional standard of "Treason, Bribery, or other high Crimes and Misdemeanors," the latter language of which does not define the specific elements of a removable offense. Because of numerous important differences between an article I Senate impeachment trial and an article III criminal trial, I think Articles of Impeachment need not be divided into distinctive counts to the full extent that a criminal indictment must.

Nonetheless, there are principles of fairness at the heart of the doctrine of duplicity that should be honored. Article I, section 3 of the Constitution requires a two-thirds vote of the present Members of this body to convict a defendant during an impeachment trial. This suggests that there should be in the Senate a minimum level of agreement on the offense—67 votes, to be exact of which the defendant is convicted.

It would strike me as suspect, for example, to convict a defendant of a single article that alleged that the defendant had committed treason and, 10 years later, had committed bribery. In that case, 30 Senators might believe he was guilty of bribery, and 40 Senators might believe he was guilty of treason. That would add up to 70 votes to convict even though 70 Senators believed he had not committed bribery, and 60 believed he had not committed treason. Surely that was not the Founders' intent.

Under another scenario, however, an article of impeachment might allege that a defendant, on one tax return, failed to disclose income from an investment, failed to disclose another investment entirely, and took a false de-

duction on yet a third investment, and then lied to IRS investigators during the following audit. I believe the Senate should be able to convict such a defendant for a single high crime or misdemeanor of willful tax evasion.

I understand the school of thought that the only procedural protection an impeachment defendant enjoys is the supermajority requirement of 67 votes, and that it acts as a catch-all: Whatever procedural concerns there might be are swept away if a two-thirds supermajority agrees. Under this view, the duplicity concern, or any other, simply doesn't matter. Sixty-seven votes solves that—and every other procedural problem. I am not comfortable with that view.

Instead, it is clear to me that there should come a point where an Article of Impeachment must be rejected for inappropriate aggregation of multiple offenses. That line falls in a different place in the impeachment context than it does in the criminal justice context, but exactly where it falls and how to define it is no easy question.

Each Senator must arrive at his own standard for what conduct may be aggregated within a single article. However, as a general rule, I would suggest that the distinction between an unacceptably aggregated Article of Impeachment and an imperfectly drafted, yet ultimately acceptable, article turns on whether, at bottom, the article is alleging a single core offense. And I believe the appropriate remedy when a Senator concludes that an article is improperly aggregated is for the Senator to vote "not guilty" on that article.

I voted against the defense's motion to dismiss the articles on the basis that they improperly aggregated multiple factual charges that belong in separate articles, and its incorporated request that the Senate carve up the Articles of Impeachment brought by the House into small pieces for the purposes of voting. I don't think that is our role. The House chose to draft the articles as it did, and the Senate—in the role of adjudicator—should not be in the business of rewriting the prosecutor's charging sheet. The House was entitled to an up-or-down vote on each article, not on only portions of each article. It sets a bad precedent to put the Senate in the position of drafting or altering the charging document on which it must vote.

In contrast, I voted against the second Article of Impeachment. It alleges multiple separate and distinct offenses, united by a common thread: the judge's "corrupt relationship" with the Marcottes, which spanned over 20 years. The aggregation of multiple distinct offenses within the article, tied by only a "relationship," creates significant uncertainty about what the Senate is voting on. Some Senators might find Judge Porteous guilty on allegations of corrupt bond-setting. Others might believe that the Judge did not set bonds improperly, but acted

corruptly in expunging the sentences of employees of the Marcottes. Still other Senators might believe that this pre-Federal conduct was not proven, but that the Judge should be convicted based on a series of lunches he participated in as a federal judge, or setting the Marcottes up with a successor judge. Put simply, this body could conceivably find Judge Porteous guilty of article II without agreeing which of multiple separate offenses linked by a long-term relationship was the ground for the conviction. The aggregation of charges in this article falls too close to the line for me, and so I voted "not guilty" on article II.

The remaining articles raised no comparable concerns, so I have voted to convict on each.

The first article of impeachment alleges that Judge Porteous improperly denied the recusal motion in the Lifemark case; in the course of doing so, failed to disclose his relationships with attorneys practicing before him; failed to disclose that he had improperly solicited and accepted thousands of dollars from those attorneys while the case was under advisement; and ultimately resolved the case in a manner suggesting that his decision was affected by his financial and personal relationship with the attorneys. Fundamentally, these allegations can be considered together to constitute a single impeachable offense of corruptly handling a single case; indeed, at its heart, a single motion to recuse. I believe that the House proved these allegations, and so voted to find Judge Porteous guilty on this article.

Article III makes several allegations related to Judge Porteous's bankruptcy. But these can be grouped together under the single rubric of bankruptcy fraud related to a single filing: the false name, failure to disclose assets, and assumption of unlawful debt were all part of a single scheme to defraud the creditors in his own bankruptcy proceeding. I am comfortable that the House proved these claims, and so voted to convict Judge Porteous on article III.

Similarly, although article IV alleges that the Judge failed to disclose various types of conduct at various stages of the confirmation process, this conduct is fairly characterized as establishing a single high crime or misdemeanor of knowingly making material false statements in order to secure Senate confirmation. All of these allegations relate to a single confirmation, and the preparation of a single confirmation package for Senate review. Again, I believe that evidence supports these allegations and that Judge Porteous should be convicted of article IV.

Having voted to convict on these three Articles of Impeachment, I voted to bar Judge Porteous from future federal office.

Mr. LEAHY. Mr. President, for just the eighth time in this country's history, the Senate has voted to impeach and remove a Federal judge from the bench. Impeachment is a serious, constitutional act intended not as a form of punishment, but rather as means of protecting the integrity of our system of government. This is particularly true when we consider the impeachment of members of the judiciary. Public confidence in our courts is fundamental to the functioning of our democracy. When a judge engages in conduct that grossly violates the public trust, he or she not only becomes incapable of fulfilling the responsibilities of the office, but also brings disrepute to the entire judicial system.

Prior to the Senate's vote on December 8, I voted three times to convict a Federal judge. In each instance, I carefully considered the facts in the case, as well as my constitutional obligations and the precedent being set for future generations. I have no doubt that just as we looked back to past impeachments to guide our actions in this proceeding, we now leave new precedent that others will look to for guidance and wisdom. For this reason, I wanted to elaborate on the constitutional issues presented during this impeachment trial and explain my decision to vote to convict Judge Porteous on all four Articles of Impeachment.

First, I should note that the impeachment trial against Mr. Porteous was bipartisan, and, I believe, unquestionably fair. The Senate Impeachment Trial Committee held 5 days of evidentiary hearings, with testimony received from 26 fact and expert witnesses. The record before the Senate is well developed, and most of the facts underlying the allegations against Mr. Porteous are uncontested. These facts demonstrate that Mr. Porteous engaged in conduct that compromised the administration of justice, brought disrepute to his office, and required his removal from the bench.

The first article of impeachment alleges that as a Federal judge, Mr. Porteous failed to recuse himself in the bench trial of Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, despite having previously engaged in a corrupt scheme with one of the attorneys before the court. The

House managers established that as a State judge, Mr. Porteous assigned curatorship cases to two attorneys, one of whom was before him in the Liljeberg case, and had a portion of the fees, totaling approximately \$20,000, funneled back to him. Not only did Mr. Porteous fail to disclose these facts or recuse himself from the case, he proceeded to solicit and accept \$2,000 cash from those attorneys while the Liljeberg case was still under his advisement.

Out of concern for the public's confidence in our court system, I have frequently expressed disappointment about the lack of recusals by judges with conflicts of interest. There should be no doubt that recusals go to the heart of a judge's impartiality. In gross violation of his judicial ethics, Mr. Porteous engaged in a corrupt scheme with attorneys, solicited and accepted money from attorneys with pending matters before his court, and deprived the public and litigants of his honest services by failing to recuse himself.

The defense argued that article I should be dismissed because of the Supreme Court's recent ruling in Skilling. I am familiar with the Court's ruling, and have authored legislation in response to it. The Supreme Court's holding was about a specific criminal statute, not judicial conduct or impeachment standards. No reasonable judge would believe that soliciting and accepting cash payments from an attorney with a pending case would be allowable or would not be an obvious ground for recusal.

The notion that was raised by the defense that corrupt judges could not be impeached ignores the purpose of impeachment as it relates to public confidence in our justice system. The Constitution did not list a specific set of conduct that would result in impeachment. Instead, Senators should determine for themselves what conduct renders one unfit to hold public office. We must consider the type of duties that the impeached official is called upon to perform and whether the conduct engaged in impairs the official's ability to perform those duties. This analysis differs depending on the office and responsibilities of the official before us.

Article II alleges that as a State court judge, Mr. Porteous took numerous things of value and accepted personal services from a bail bondsman, while setting favorable bonds for his company. As a Federal judge, Mr. Porteous continued to receive things of value in exchange for using "the power and prestige of his office" to help these bondsmen form corrupt relationships with State court judges. The evidence showed a pattern before and after his Federal confirmation of capitalizing on his position of power to receive improper gifts. Moreover, as Professor Michael Gerhardt, who served as Special Counsel to the Senate Judiciary Committee during the last two Supreme Court confirmations, testified before the House Task Force on Judicial Im-

peachment, the Constitution does not state that improper conduct must be committed during the tenure of the Federal office; rather, "[t]he critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function [as a Federal judge]." I agree with Professor Gerhardt on this fundamental question.

Certainly if the Senate learned after confirmation that a judge killed someone before he or she was confirmed, the Senate should not be prevented from later removing that judge. Similarly, the Senate should not be foreclosed from removing a judge for serious misconduct not revealed during the confirmation process that goes to the role of the judge. A lifetime appointment to the Federal judiciary does not entitle those unfit to serve to a lifetime of Federal salary and benefits. As chairman of the Judiciary Committee, I reject any notion of impeachment immunity if misconduct was hidden, or otherwise went undiscovered during the confirmation process, and it is relevant to a judge's ability to serve as an impartial arbiter.

With regard to the third article of impeachment, it is clear that Mr. Porteous knowingly and intentionally made material false statements and representations—including signing and filing under the name "G.T. Porteous"—under penalty of perjury on his personal bankruptcy court filing. It is hard to imagine stronger evidence that this judge believed the law did not apply to him. A judge who lies under oath in court filings is unable to continue in an office that requires him to administer oaths and sit in judgment. Mr. Porteous's actions in his bankruptcy proceedings demonstrate a flagrant disregard for the courts as an institution, making him unfit to serve as a respected member of the judiciary.

The last article of impeachment against Mr. Porteous relates to his actions before the Senate Judiciary Committee. As chairman of the Senate Judiciary Committee, I take the word of judicial nominees that come before our committee very seriously. The process for aiding the Senate in considering these lifetime appointments relies on being able to trust and evaluate the information provided to us by nominees, so it requires their utmost candor.

Mr. Porteous knowingly made material false statements about his past to the Senate by responding "no" to questions on his Senate Judiciary Committee questionnaire, and to the FBI in connection with his background review, in order to obtain office. His defense to article IV is that his conduct was "business as usual" in New Orleans and, therefore, he believed his responses to be true. Whether he made false statements is not purely a subjective inquiry; and most certainly not where his "belief" in the truth of his

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statements is in direct conflict with the factual knowledge on which it is based. I am convinced that Mr. Porteous's responses on the Senate questionnaire were material because had his solicitation and acceptance of cash and gifts from parties with matters before him been known to the Senate, he would not have been confirmed.

During the impeachment trial proceedings, I asked both the House managers and Mr. Porteous's defense attorneys the following question: "The Senate Judiciary Committee requires a sworn statement as part of a detailed questionnaire by a nominee. Until this questionnaire is filed, neither the Judiciary Committee nor the Senate votes to advise and consent to the nomination. Would not perjury on that questionnaire during the confirmation process be an impeachable offense?" Both sides unequivocally answered that perjury on the Senate questionnaire and during the confirmation process would be an impeachable offense.

As chairman of the Senate Judiciary Committee, I am particularly offended by Mr. Porteous's intentional dishonesty and disrespect for the office to which he was confirmed, and for the entire confirmation process. When a judicial nominee testifies before the Senate Judiciary Committee, they must be completely forthright and honor the promises or statements they make to us. Once confirmed, Federal judges have lifetime appointments. Impeachment is a drastic measure, but one we must take when a nominee conceals serious wrongdoing.

The House managers presented uncontested facts that Mr. Porteous engaged in conduct that violated the public trust and is now unfit to be a district court judge, or hold any other public office. Both sides were well represented in this proceeding, and I thank them for their advocacy and professionalism.

Mr. UDALL of New Mexico. Mr. President, as a member of the Impeachment Trial Committee, I had the privilege of carrying out a constitutional duty that fortunately is a rare occurrence. I commend the work of Chair McCASKILL and Vice-Chair HATCH, as well as the staff of the committee, Senate legal counsel, and CRS. They have done an excellent job of making a complex and time-consuming process as clear and straightforward as possible.

I began the impeachment process with the belief that my legal background would help guide my judgment as to whether or not Judge Porteous is guilty. As the attorney general of New Mexico for 8 years and a former assistant U.S. attorney, I saw the impeachment process as closely analogous to a criminal trial. It turns out, however, that the two are very different in many key aspects.

Unlike a criminal trial, our role is not to punish the guilty, but is instead to protect the integrity of the judi-

ary. The U.S. Judicial system is the greatest in the world, but it can only remain so as long as the integrity and impartiality of our judges is never in doubt. Judge Porteous's actions were so contrary to everything we demand of our judges that I have no hesitation in voting to convict him on each article.

One of the primary aspects that make an impeachment trial unique from a criminal trial is the standard of proof. I began the impeachment process believing that the House must prove its case beyond a reasonable doubt in order for a conviction. This is not the case.

Obviously Judge Porteous would like all of us to use the standard of "beyond a reasonable doubt," while the House managers would prefer a "preponderance of the evidence standard." Some scholars have urged a middle ground, suggesting that the appropriate standard of proof should be "clear and convincing evidence." But the fact is that we each have to make our own decision.

I believe that the "beyond a reasonable doubt" standard is too high. The Senate does not have the authority to take away Judge Porteous's liberty but only the authority to remove him from a position of public trust. I also believe that whether you use a clear and convincing evidence standard or a preponderance of the evidence standard, the House managers have met their burden.

Another important question each of us must decide is what constitutes an impeachable offense. Judge Porteous's attorneys argue that much of his conduct is not impeachable because it does not meet the constitutional standard of "high crimes and misdemeanors." They also argue that most of his conduct occurred prior to his confirmation to the Federal bench or was not related to his duties as a Federal judge, and therefore not grounds for impeachment. I do not believe any of these arguments are persuasive.

I initially thought of "high crimes and misdemeanors" in the context of a criminal trial. My prosecutor experience made me ask what elements had to be proven in order to convict on each article. But now I understand that an impeachment is so fundamentally different than a criminal trial that such comparisons do not work.

Alexander Hamilton wrote that impeachable offenses "proceed from . . . the abuse or violation of some public trust" and "relate chiefly to injuries done immediately to the society itself." The Framers also did not use the term "misdemeanor" to mean a minor crime, as it is used today. At the time of the Constitution's drafting, a misdemeanor referred to the demeanor or behavior of a public official.

Judge Porteous's counsel made several references to the fact that the judge was not criminally charged for his actions. But this is not a relevant consideration. The 1989 report on the

impeachment of U.S. District Judge Walter Nixon provides us with guidance as to what constitutes an impeachable offense. It states:

The House and Senate have both interpreted the phrase other high Crimes and Misdemeanors broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined [the phrase] to be serious violations of the public trust, not necessarily indictable offenses under the criminal law.

Thus, the question of what conduct by a Federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidences in the integrity and impartiality of the judiciary. When a judge's conduct calls into question his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.

We are also faced with deciding whether impeachable offenses are limited to acts occurring after an individual became a Federal official. According to the Congressional Research Service, "it does not appear that any President, Vice President, or other civil officer of the United States has been impeached by the House solely on the basis of conduct occurring before he began his tenure in the office held at the time of the impeachment investigation, although the House has, on occasion, investigated such allegations."

I do not see how we can restrict our authority to impeach and convict a Federal official to conduct that only occurred after he or she took office. To do so would lead to a perverse result, one in which, as the House managers argue, "makes the position of federal judge a lifetime safe harbor for someone who is able to hide his misdeeds and defraud the Senate into confirming him."

In considering whether pre-Federal conduct should be considered as a basis for impeachment, Professor Michael Gerhardt testified before the House that, "[t]he critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function" as a Federal judge.

I believe this is an appropriate standard, and I believe Judge Porteous's conduct as a State court judge was incompatible with the trust we place in our Federal judges. Had his pre-Federal conduct been serious, but outside of the scope of his role as a State judge, I might have been more hesitant to consider it as a basis for impeachment. In this case, however, his corrupt conduct was directly connected to his duties as a judge. In arguing against considering pre-Federal conduct, Judge Porteous is essentially telling the Senate that although he was a corrupt State court judge, that conduct should not be considered in determining his fitness to continue as a Federal judge. I do not find this argument the least bit persuasive.

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A final question is whether impeachable offenses should be limited to official acts that are directly related to his duties as a judge. Just as I don't believe pre-Federal conduct must be excluded as a basis for impeachment, I do not feel that nonofficial conduct must be excluded.

In fact, Judge Porteous's own attorney, Jonathan Turley, wrote in a law review article that "Congress repeatedly rejected the view that impeachable conduct was limited to official acts or abuses of authority. Impeachable conduct often included acts that were incompatible with continuing to hold an office of authority, including crimes or misconduct outside the official realm."

I believe the question to ask when considering nonofficial acts is the same as that for pre-Federal acts: does the misconduct demonstrate a lack of integrity and judgment that are required in order for him to continue to function as a Federal judge? Once again, I found Judge Porteous's nonofficial conduct to reach the level of an impeachable offense. We expect a Federal judge to have the utmost respect for the rule of law, but Judge Porteous knowingly filed for bankruptcy under a false name, an act that he knew was illegal. His attorneys argue that this act was insignificant; he filed amended forms a few weeks later and none of his creditors were harmed. But this argument misses the point that a Federal judge had so little respect for the legal process that he would commit perjury in order to avoid embarrassment. Such actions make him unfit for a lifetime appointment to the Federal bench.

For the reasons discussed above, I voted guilty on each of the four Articles of Impeachment.

Mrs. SHAHEEN. Mr. President, it has been a privilege to serve as a member of the Senate Impeachment Trial Committee over the past year. We have been part of a rare event in the history of this Congress and our country and it has been fascinating to watch this process unfold. I want to join my fellow committee members in thanking Chairman McCaskill and Vice-Chairman Hatch for leading a fair, effective, and efficient operation. They provided remarkably decisive leadership on complex legal issues while also respecting the rights and the interests of both parties to this matter.

I am proud of the report our bipartisan committee produced, and I would like to once again thank and recognize the trial committee's staff for their hard work. Their efforts were an indispensable part of this unique and historic undertaking.

Judging Articles of Impeachment drawn up by the House of Representatives is one of the more solemn duties given to Senators by our Constitution. After spending more than a week with my fellow committee members hearing the evidence against Judge Thomas Porteous, and after reviewing the parties' final submissions, I concluded

that he should be convicted on all four articles and removed from office. I would like to explain the principles I used to reach this conclusion and touch on some of the evidence that supported conviction.

There has been much discussion by the parties about the standard of proof to be employed in an impeachment proceeding, and what constitutes an impeachable offense. The Constitution provides us with limited guidance on these issues. Ultimately, in keeping with precedent established by this body in the past, each Senator must individually decide what conduct is impeachment-worthy and how much proof is necessary to reach that conclusion.

In my opinion, the question before us is whether Judge Porteous's conduct calls his integrity and impartiality into question and whether we must remove him from office to protect the reputation of the judiciary and preserve the public's trust in it. Our courts are the places where citizens expect to receive a fair and legitimate resolution of their disputes. This is a cornerstone of civil society. Any conduct by a judge—whether on the job or off that causes people to seriously question his honesty and basic willingness to dispense justice fairly is a violation of the public trust.

Unfortunately, I think any reasonable citizen walking into Judge Porteous's courtroom would have ample reason to question his commitment to doing justice. This is a judge who used his judicial offices at both the State and Federal levels to routinely obtain personal perks, including meals, alcohol, a bachelor party for his son, trips, and eventually cash kickbacks totaling some \$20,000.

Any reasonable citizen would also doubt this judge's ability to be impartial. The House presented substantial evidence related to a multimillion dollar piece of litigation in which Judge Porteous had an obvious conflict of interest but failed to recuse himself. He took thousands of dollars in cash gifts from a lawyer friend representing a party to the case during the course of his deliberations. He then turned around and issued a decision favoring his friend's client. Judge Porteous's ruling was overturned in an absolutely scathing opinion by the Fifth Circuit Court of Appeals, which called his decision "inexplicable" and "close to being nonsensical," among other rebukes.

While on the State bench, the Judge maintained close relationships with bail bondsmen working for defendants in his courtroom. The evidence showed that he continuously set favorable bail levels that while perhaps within the bounds of his legal discretion had been suggested by the bondsmen to maximize their profits. For this, the judge enjoyed complimentary steak lunches, midday martinis, at least one trip to Las Vegas, as well as home and car repairs.

I was totally unpersuaded by the defense team's argument that Judge

Porteous's "pre-Federal" conduct should be outside the scope of our deliberation. I do not believe the act of being confirmed to a Federal judgeship by the Senate erases or excuses an individual's conduct up to the point of confirmation.

Had the Senate known in 1994 what we know now about Porteous's conduct as a State judge, it would have undoubtedly disqualified him from becoming a Federal judge. No judge at any level should accept gifts that would even appear to be designed to affect his judgment or influence his decisions. Yet there is no doubt Judge Porteous did just that.

It is unfortunate that those charged with investigating Judge Porteous's fitness for office in 1994 did not raise more flags about his history. This does not eliminate our duty to act. I see no reason not to remove him from office today when these events still bear on his integrity and impartiality. Plain and simple, the judge perjured himself before this body during his confirmation by representing that nothing in his history would cast doubt on his fitness to hold office.

Finally, Judge Porteous also perjured himself during his own personal bankruptcy proceedings. The House presented evidence that he failed to disclose gambling debts during his bankruptcy, failed to disclose a number of assets, and made other willful misrepresentations in his filings like using a false name in his initial petition. I understand that this conduct may not have been a direct abuse of the judge's office, but his deception during this period reflected a lack of respect for the law and an unwillingness to follow it. A sitting Federal judge should have erred on the side of overdisclosure. Instead, I believe the House has shown that Judge Porteous repeatedly committed perjury.

Serving as a judge is a privilege, and it demands strict adherence to the highest ethical standards. The evidence in this case, taken as a whole, showed that Judge Porteous failed this test routinely over the course of some 15 years. The House presented ample credible evidence to support the charges in each of the articles, and I felt compelled to vote to convict on all four to protect the integrity of the judiciary and its credibility in the eyes of the public.

Mr. KOHL. Mr. President, I want to first commend my colleagues on the Senate Impeachment Trial Committee for the outstanding work they have done to receive and report the evidence in this case to the full Senate. Led by Senators McCaskill and Hatch, the committee's dedication to impartiality and integrity is something of which we can all be proud.

The Constitution gives the Senate "the sole power to try all impeachments." The Senate acts as the factfinder in impeachment proceedings and determines, as individuals and as a body, whether the respondent is guilty

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of "high crimes and misdemeanors" so as to require removal from office.

After carefully reviewing the evidence, I voted to convict Judge Porteous on each Article of Impeachment. On articles I and II, the evidence showed that Judge Porteous used his judicial office for financial gain by failing to recuse himself in a nonjury civil case and engaging in corrupt relationships with Jacob Amato, Robert Creely, and Louis Marcotte. The House managers proved by clear and convincing evidence that Judge Porteous deprived litigants of a fair trial and undermined his sworn judicial duties.

On articles III and IV, I found Judge Porteous guilty because of his dishonesty and gross misconduct. The facts were clear. He filed his bankruptcy petition under a false name, concealed assets and debt to finance his gambling habit and lied to the FBI to obtain Senate confirmation of his judicial appointment.

Finally, I voted against Judge Porteous's motion to disaggregate the articles. I did so because each article contained a series of events that sufficiently related to the charged allegation. The case against Judge Porteous can be distinguished from those of Judge Nixon and President Clinton. Here, the House presented specific, indivisible articles of misconduct which provided a clear record for us to evaluate.

As with each judicial impeachment, the Senate is faced with difficult and novel issues. However, the Constitution makes clear that impeachment is a remedial provision that cures our institutions when officials violate the public's trust and confidence. I do not come to my decision lightly, but removal and disqualification of Judge Porteous is necessary. As required by the Constitution, Judge Porteous no longer enjoys the privilege of sitting on the Federal bench or holding any Federal position "of honor, trust or profit." I thank and appreciate my colleagues for their commitment and collegiality during this process.

Mr. NELSON of Florida. Mr. President, I rise today to discuss the impeachment of Judge Thomas Porteous and specifically to offer my thoughts on the Articles of Impeachment.

First, let me say as a general matter that when we as a body consider the nomination of a Federal judge, we do so with the hope and expectation that the individual being considered will uphold the law and treat people appearing in his or her courtrooms with fairness and impartiality. The lengthy record presented by the House managers demonstrated that Judge Porteous has had an ongoing pattern of conduct that does not comport with the trust that the Senate placed in him when it confirmed Judge Porteous as a U.S. district court judge in 1999.

The managers also presented sufficient evidence for me to vote in favor of each of the Articles of Impeachment. Because of the lengthy, ongoing, and

egregious nature of the judge's conduct, I also voted to disqualify Judge Porteous from any future Federal office.

The most compelling evidence presented for each article was as follows:

Article I—The record demonstrated that Judge Porteous, while presiding as a U.S. District Judge, denied a motion to recuse himself in the case of Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, despite the fact that he had a corrupt financial relationship with the law firm representing Liljeberg Enterprises. The record also demonstrated that Judge Porteous engaged in corrupt conduct after the Lifemark v. Liljeberg bench trial, and while he had the case under advisement. Judge Porteous solicited and accepted things of value from both Mr. Amato and his law partner, Mr. Creely, including a payment of thousands of dollars in cash, then ruled in favor of the law firm's client, Liljeberg Enterprises.

Article II—The record demonstrated that while Judge Porteous was a U.S. district judge for the Eastern District of Louisiana, he engaged in a corrupt relationship with bail bondsman Louis M. Marcotte, II and his sister, Lori Marcotte. The record also demonstrated that, as part of this corrupt relationship, Judge Porteous solicited and accepted numerous things of value for his personal use and benefit, including meals, trips, home repairs, and car repairs, while at the same time taking official actions that benefitted the Marcottes.

Article III—The record demonstrated that Judge Porteous knowingly and intentionally made material false statements and representations under penalty of perjury related to his personal bankruptcy filing, and that he repeatedly violated a court order in his bankruptcy case.

Article IV—The record demonstrated that Judge Porteous knowingly made numerous material false statements about his past to both the U.S. Senate and the Federal Bureau of Investigation in order to obtain the office of U.S. district court judge. The record demonstrated that these statements included the following:

1. On his Supplemental SF-86, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known. Judge Porteous answered no to this question and signed the form under a warning that a false statement was punishable by law.

2. During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way that would impact negatively on his character, reputation, judgment or discretion.

3. On the Senate Judiciary Committee's Questionnaire for Judicial Nominees, Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that to the best of his knowledge, he did "not know of any unfavorable information that may affect [his] nomination." Judge Porteous signed that questionnaire by swearing that the information provided in the statement is, to the best of my knowledge, true and accurate."

Mr. UDALL of Colorado. Mr. President, I rise to explain my votes in relation to the impeachment of Judge G. Thomas Porteous, Jr. I take my role in the rare process of impeachment seriously, and welcome the opportunity to explain my reasoning for voting guilty on all four Articles of Impeachment and to clarify for the record the limited precedential value that I believe the conviction on Article IV should provide.

When considering the evidence presented by the House and Judge Porteous, I first had to establish what standard of proof I would use to determine his guilt or innocence on each Article of Impeachment, passed by the House of Representatives. The Senate has never adopted a standard of proof like 'beyond a reasonable doubt' from the criminal context or 'a preponderance of the evidence' from a civil dispute context; rather, the Senate has allowed individual Senators to decide for themselves what standard is most appropriate. I ultimately settled on the standard suggested by the House Manager, that I be convinced of the truthfulness of the allegations and that they rise to a level of high crimes and misdemeanors.

Mr. President, our founders granted Congress the power of impeachment to protect the institutions of government from those judged to be unfit to hold positions of trust. In Federalist 65, Alexander Hamilton wrote of the jurisdiction to impeach an official: "There are those offenses which proceed from the misconduct of public men or, in other words, from the abuse or violation of some public trust." This captures the standard I applied to reach a determination of guilt on each Article of Impeachment. I was convinced that Judge Porteous, through each action and through his pattern of behavior, undermined the public's faith in him as a government official and in the institution that he represented—the United States Federal Court.

With respect to Articles I, II and III, I am confident that the evidence of specific acts and the pattern of behavior displayed by Judge Porteous justifies my determination that he was guilty of high crimes and misdemeanors. Article IV, however, gives me pause. While I believe that the guilty vote on Article IV was correct, I have reservations about the precedent that scholars and future Senators might find in this impeachment. The questionnaire the judicial nominees fill out for the Senate

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Judiciary Committee provides an opportunity for those nominated to answer questions about their past activities and involvement in and with the law. From these questionnaires, we are able to learn of a nominee's legal experience, find information about past statements and generally assess the fitness of the nominee for the federal bench.

On his questionnaire, Judge Porteous was asked whether any unfavorable information existed that could affect his nomination, and he answered that he did not know of any. I believe that Judge Porteous engaged in a pattern of behavior prior to, during and after his nomination to the federal district court that undermined the public's faith in him as a government official, and that this pattern of behavior rose to the level of an impeachable offense that met the standard of high crimes and misdemeanors. Having said that, I do not believe that future nominees should be subject to impeachment simply for a failure to answer a subjective, open-ended question on the Senate Judiciary Committee's questionnaire.

Judge Porteous abused the questionnaire process, misrepresented his background and misled the Senate in an egregious manner that was unique to this specific situation. However, I can imagine a scenario whereby a nominee could falsely affirm that no negative information affecting his nomination existed, yet I might not find that false answer to be an impeachable offense. I do not wish to see the nomination process become even more difficult for qualified men and women of good character, solely because of an onerous application process. Many of us have things in our backgrounds that we might miss when asked open ended questions, and the Senate should not hang the cloud of impeachment over every nominee's head because of such oversights alone—otherwise, we will find ourselves without any nominees.

As a Senator who is not a lawyer, I would like to thank my colleagues who took on the historic task of preparing and presenting this impeachment trial. Specifically, Senator CLARE McCASKILL and Senator ORRIN HATCH who shared the role of chair of the Special Impeachment Trial Committee. I came away from this experience with a renewed respect for the Senate as an institution. When given the opportunity, Senators can work in a productive and civil manner, and I am sure that if he were able to see the dignity and respect with which the Senate treated this impeachment, Alexander Hamilton would be very proud.

Mr. COONS, Mr. President, as a result of today's vote on the four Articles of Impeachment against Judge G. Thomas Porteous, the Senate has fulfilled its constitutional duty to remove a threat to the public's trust and confidence in the Federal judiciary.

The conduct set forth in the first Article of Impeachment alone justifies the Senate's conviction of Judge

Porteous. By coercing his former law partners to participate in a kickback scheme while a state judge, by failing to properly disclose this corrupt relationship when warranted as a federal judge in a recusal hearing and by obtaining further improper cash payments from them while taking their case under advisement, Judge Porteous misdeemeaned himself in a manner that is directly contrary to the essential public trust of his office. Federal judges cannot solicit improper gifts, and they certainly cannot lie to litigants who appear before them.

The conduct described in the remaining three Articles of Impeachment is, likewise, wholly repugnant to the office of a U.S. judge. Counsel for Judge Porteous argued that the Senate's unprecedented conviction on these counts would weaken the judiciary to political attacks. I do not dismiss these arguments lightly. With only 12 impeachment trials having been completed in our Nation's history, however, novelty of the particular offenses charged is no absolute defense. My votes to convict—whether for conduct on the State bench, as a private citizen, or before the Judiciary Committee—were compelled because they revealed corruption and duplicity that, if countenanced, would destroy the integrity of the federal judiciary. While counsel argued that the behavior charged in the final three articles did not concern Judge Porteous' conduct as a Federal judge, each article charged conduct that bore an essential nexus to his Federal service.

Judge Porteous set bail bonds for the purpose of maximizing the profits of the bail bonds company, rather than protecting the public safety and guaranteeing the defendant's presence at trial. He carried out this scheme to cultivate improper benefits from the bail bonds company, trading official judicial action for personal gain. This behavior was not an isolated lapse in judgment. It lasted for more than a year, stopping only when Judge Porteous was confirmed to be a Federal judge.

Judge Porteous also lied during his bankruptcy while serving as a Federal judge. His only defense was that such conduct was not related to his service as a judge and included only acts taken as a private citizen. A judge cannot repeatedly demean a Federal court by lying to it, as here, in an attempt to avoid embarrassment and to continue to amass more gambling debts.

Likewise, Judge Porteous' lies and deceptions during his confirmation process reflect a willingness to subvert the truth, under penalty of perjury, for personal gain. His claim that any mistakes were inadvertent is simply not credible. The evidence demonstrates that Judge Porteous actively concealed the corrupt bail bonds scheme from FBI investigators, and failed to disclose much more corrupt behavior.

Our Federal courts are an enduring symbol of our national commitment to

equal justice under the law. Judge Porteous' long history of corruption, deceit, and abuse of power renders him incompatible with that commitment. His removal strengthens our judiciary and confirms the integrity of those who remain a part of it.

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ways emphasize character, integrity, mental and emotional health, and high morals.

PORTEOUS IMPEACHMENT

Mr. SESSIONS. Mr. President, I would like to address two matters concerning the impeachment of Judge Porteous. As a former Federal prosecutor and State attorney general, I have reviewed and drafted a number of indictments. I do not believe that evidence of acts committed before confirmation should be withheld from consideration in the impeachment process or that it is inappropriate to aggregate claims together.

The Constitution does not require that all conduct be committed post Federal appointment nor does it stipulate at all when the conduct must occur. Whether treason or bribery occurs before or after confirmation is not the question, but whether or not it occurred. If this were not so, individuals like Judge Porteous, who are very capable of practicing the art of deception and are confirmed, could not be removed from office.

I believe that all four counts against Judge Porteous were well drafted. The Senate has previously stated that "the House has substantial discretion in determining how to aggregate related alleged acts of misconduct in framing Articles of Impeachment and has historically frequently chosen to aggregate multiple factual allegations in a single impeachment article . . . Judge Porteous engaged in a number of elaborate schemes. Having prosecuted fraud, conspiracy, and racketeering cases, I understand that the facts in these types of cases can be extensive and can build up over a period of years. What we should look at is whether the events are sufficiently related so as not to produce prejudice. Each of these counts told a complete story of wrongdoing that was coherent and was held together logically.

Finally, let me say that Judge Porteous's behavior should serve as a reminder to the President of the critical importance of vetting his nominees and as a reminder to this body that a thorough confirmation process is imperative. The process should al-

**OTHER PROCEEDINGS REGARDING THE PORTEOUS
IMPEACHMENT**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE G. THOMAS PORTEOUS, JR.)

The United States Senate
Washington, D.C. 20510,

Applicant.)
_____)

Case: 1:10-mc-00443
Assigned To : Friedman, Paul L.
Assign. Date : 7/23/2010
Description: Miscellaneous

APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND
OTHER INFORMATION PROVIDED BY JACOB AMATO, JR.

1. The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. applies to this Court for an order, pursuant to 18 U.S.C. §§ 6002 and 6005, immunizing, from use in prosecutions, testimony and other information provided by one of its potential witnesses, Jacob Amato, Jr., at proceedings of the Impeachment Trial Committee.

2. The presiding officer of the Senate has appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Impeachment Trial Committee to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr. at such times and places as the Committee may determine. A copy of Senate Resolution 458, as agreed to on March 17, 2010, is attached as Exhibit A; a copy of Impeachment Rule XI is attached as Exhibit B.

3. On July 15, 2010, by a vote of eight of its twelve members, the Impeachment Trial Committee adopted a resolution directing the Senate Legal Counsel to apply for an order immunizing testimony and other information provided by the witness at its proceedings. The Committee's resolution is attached as Exhibit C.

4. It is anticipated that the witness would invoke his constitutional privilege against self-incrimination if subpoenaed to testify.

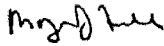
5. In accordance with 18 U.S.C. § 6005, we notified the Attorney General on July 15, 2010, of the Impeachment Trial Committee's intention to request this order. A copy of the notice to the Attorney General is attached as Exhibit D. A certificate of service of Exhibit D is attached as Exhibit E.

6. By letter dated July 22, 2010, the Department of Justice stated it has no objection to the proposed order to compel the testimony of Jacob Amato, Jr., and that the Attorney General will waive the ten-day notice to which he is entitled under 18 U.S.C. § 6005(b)(3). A copy of the Department of Justice's letter is attached as Exhibit F.

Wherefore, the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., respectfully requests that this Court issue an order immunizing from

use in prosecutions testimony and other information provided by Jacob Amato, Jr. at
proceedings of the Committee.

Respectfully submitted,



Morgan J. Frankel, Bar #342022
Senate Legal Counsel

Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: July 23, 2010

Exhibit A

S. Res. 458***In the Senate of the United States,****March 17, 2010.*

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members, including a chairman and vice chairman, respectively, to the Presiding Officer for appointment to the committee.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the

Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6(a). The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

(b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimburs-

+SRES 458 ES

able, basis the services of personnel of any such department or agency.

SEC. 7. The committee appointed pursuant to section one of this resolution shall terminate no later than 60 days after the pronouncement of judgment by the Senate on the articles of impeachment.

SEC. 8. The Secretary shall notify the House of Representatives and counsel for Judge G. Thomas Porteous, Jr. of this resolution.

Attest:

A handwritten signature in cursive script, appearing to read "Nancy Breaker".

Secretary.

*SRES 458 ES

Exhibit B

RULES OF PROCEDURE AND PRACTICE IN THE SENATE
WHEN SITTING ON IMPEACHMENT TRIALS

* * * * *

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Exhibit C

111th CONGRESS
2nd SESSION

RESOLUTION

of the Senate Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

To immunize from use in prosecution the testimony of,
and other information provided by,
Jacob Amato, Jr.

July 15, 2010

MRS. McCASKILL, the Chairman of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., submitted the following resolution to the Committee, which approved it by a vote of 8 of its twelve members on the 15 day of July, 2010.

Whereas, the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. has been appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr.;

Whereas, the Committee may require Jacob Amato, Jr. to testify and/or provide other information at proceedings before or ancillary to the Committee;

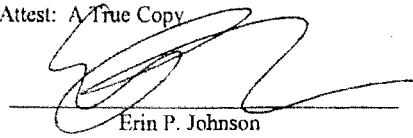
Whereas, the Committee anticipates that Jacob Amato, Jr. may refuse to testify and/or provide other information at proceedings before or ancillary to the Committee on the ground of self-incrimination; and

Whereas, pursuant to 18 U.S.C. §§ 6002 and 6005, a committee of the Senate may seek, by two-thirds vote, a court order immunizing testimony and/or other information provided by a witness at proceedings before or ancillary to a committee from use in prosecutions

other than for perjury, giving a false statement, or otherwise failing to comply with the court order: Now, therefore, be it

Resolved, That the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., pursuant to 2 U.S.C. §§ 288b(d) and 288f, directs the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by, Jacob Amato, Jr. at proceedings before or ancillary to the Committee.

Attest: A True Copy



Erin P. Johnson
Chief Clerk

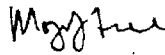
Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

Exhibit D

**NOTICE OF INTENTION TO REQUEST
ORDER CONFERRING IMMUNITY**

**TO: The Honorable Eric H. Holder, Jr.
 The Attorney General of the United States
 Washington, D.C. 20530**

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against G. Thomas Porteous, Jr., will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, Jacob Amato, Jr. at proceedings of the committee.



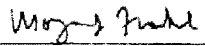
**Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435**

Dated: July 15, 2010

Exhibit E

CERTIFICATE OF SERVICE

I certify that on July 15, 2010, in accordance with 18 U.S.C. § 6005(b)(3), notice of the intention of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas, Porteous, Jr. to seek an order conferring immunity upon Jacob Amato Jr. was sent by electronic mail to the Office of Legislative Affairs of the Department of Justice.



Morgan J. Frankel

July 19, 2010

Exhibit F



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 22, 2010

Mr. Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Frankel:

This responds to your letter, dated July 15, 2010, notifying the Department that, in connection with the impeachment proceedings pending in the United States Senate against Judge G. Thomas Porteous, Jr., the Senate Impeachment Trial Committee, pursuant to Title 18, United States Code, Section 6005, intends to apply for orders from the United States District Court for the District of Columbia granting use immunity to Jacob J. Amato, Jr. and Robert C. Creely to compel their Senate testimony. You also requested that the Department waive the ten-day notice period provided under that statute.

The Department has no objection to the Committee's application for these orders and further agrees to waive the ten-day statutory notice period under 18 U.S.C. § 6005(b)(3).

We hope this information is helpful. Please do not hesitate to contact us if we may provided additional assistance with this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Weich".

Ronald Weich
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10-mc-00443 (PLF)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICATION FOR ORDER IMMUNIZING TESTIMONY
AND OTHER INFORMATION PROVIDED BY JACOB AMATO, JR.

The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., appointed pursuant to Senate Resolution 458 of the 111th Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, is applying to this Court for an order immunizing testimony and other information which may be provided to the Committee by Jacob Amato, Jr. The application is presented pursuant to 18 U.S.C. § 6005, which provides, in relevant part:

§ 6005. Congressional proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee . . . of either House, . . . a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

(1) * * * *

(2) in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

This law provides the mechanism by which a witness before a congressional committee receives "use immunity" for testimony.¹ The immunized witness remains subject to prosecution for the transactions about which he or she testifies if the government sustains the burden of proving at trial that it did not use the immunized testimony or its fruits in the prosecution. *See Kastigar v. United States*, 406 U.S. 441, 459-62 (1972). Because the court's inquiry on an application for an immunity order is narrow and its tests are mechanical, the application may be decided *ex parte* without a hearing.

¹ The witness who is the subject of this application was previously granted use immunity pursuant to this law for his testimony before the House of Representatives Committee on the Judiciary in the impeachment proceedings preceding the House's instigation of impeachment articles against Judge Porteous for trial by the Senate. *In re Application of House Committee on the Judiciary*, Misc. No. 09-424 (RCL) (D.D.C. Aug. 12, 2009). Because that order immunized testimony only at proceedings before the House Judiciary Committee, a separate, companion order is necessary to confer use immunity for testimony at forthcoming proceedings before or ancillary to the Senate Impeachment Trial Committee.

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).²

Section 6005 sets out the two requirements for an immunity order, both of which have been met here.³ First, “in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee.” 18 U.S.C. § 6005(b)(2). The Impeachment Trial Committee’s resolution (Exhibit C to the application) shows that the Committee approved this request for an order by a vote of eight of its twelve members on July 15, 2010.⁴

Second, the Attorney General has waived the requirement that “ten days or more prior to the day on which the request for such an order was made,” he have received “notice of an intention to request the order.” 18 U.S.C. § 6005(b)(3). It is settled that “the Department [of Justice] may waive the ten-day notice requirement.” *Cammisano*, 655 F.2d at 1236. After being informed of the Committee’s interest in immunizing this

² The court noted in *Ryan* that “nothing in the statute bars the court . . . from notifying the witness, . . . or hearing any objections,” but “these procedures are not required by the constitution or by the immunity statute.” *Id.* at 540.

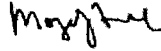
³ The Impeachment Trial Committee may apply for this order prior to summoning the witness to testify or provide information at one of its proceedings. *In re Application of United States Senate Permanent Subcommittee on Investigations (Camisano)*, 655 F.2d 1232, 1236-38 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

⁴ This Court has immunized witnesses to testify before Senate Impeachment Trial Committees in connection with prior judicial impeachment trials. *See In re Application of Senate Impeachment Trial Committee (Hastings)*, Misc. No. 89-129 (D.D.C. June 27, 1989); *In re Application of Senate Impeachment Trial Committee (Nixon)*, Misc. No. 89-175 (D.D.C. Aug. 15, 1989).

witness (Exhibit D), on July 22, 2010, the Department of Justice waived (Exhibit F) the requirement that ten days have elapsed before the filing of the application for an immunity order.

Accordingly, the Impeachment Trial Committee requests that the Court issue an order immunizing the testimony and other information which Jacob Amato, Jr. may provide at the Committee's proceedings.

Respectfully submitted,



Morgan J. Frankel, Bar #342022
Senate Legal Counsel

Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: July 23, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**FILED**

JUL 27 2010

Clerk, U.S. District & Bankruptcy
Courts for the District of ColumbiaIMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE G. THOMAS PORTEOUS, JR.)The United States Senate)
Washington, D.C. 20510,)

Applicant.)

Misc. No. 10-0443 (PLF)

ORDER

Upon consideration of the application by the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 27th day of July, 2010,

ORDERED that JACOB AMATO, JR., may not refuse to testify and provide other information at proceedings before or ancillary to the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., on the basis of his privilege against self-incrimination; and it is

FURTHER ORDERED that no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against JACOB AMATO, JR., in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

SO ORDERED.

DATE:

7/27/10

Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge
U.S. District and Bankruptcy Courts
for the District of Columbia

By *Angela D. Caesar*
ANGELA D. CAESAR, Clerk
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE G. THOMAS PORTEOUS, JR.)

The United States Senate
Washington, D.C. 20510,

Applicant.)
_____)

Case: 1:10-mc-00444
Assigned To : Urbina, Ricardo M.
Assign. Date : 7/23/2010
Description: Miscellaneous

APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND
OTHER INFORMATION PROVIDED BY ROBERT CREELY

1. The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. applies to this Court for an order, pursuant to 18 U.S.C. §§ 6002 and 6005, immunizing, from use in prosecutions, testimony and other information provided by one of its potential witnesses, Robert Creely, at proceedings of the Impeachment Trial Committee.

2. The presiding officer of the Senate has appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Impeachment Trial Committee to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr. at such times and places as the Committee may determine. A copy of Senate Resolution 458, as agreed to on March 17, 2010, is attached as Exhibit A; a copy of Impeachment Rule XI is attached as Exhibit B.

3. On July 15, 2010, by a vote of eight of its twelve members, the Impeachment Trial Committee adopted a resolution directing the Senate Legal Counsel to apply for an order immunizing testimony and other information provided by the witness at its proceedings. The Committee's resolution is attached as Exhibit C.

4. It is anticipated that the witness would invoke his constitutional privilege against self-incrimination if subpoenaed to testify.

5. In accordance with 18 U.S.C. § 6005, we notified the Attorney General on July 15, 2010, of the Impeachment Trial Committee's intention to request this order. A copy of the notice to the Attorney General is attached as Exhibit D. A certificate of service of Exhibit D is attached as Exhibit E.

6. By letter dated July 22, 2010, the Department of Justice stated it has no objection to the proposed order to compel the testimony of Jacob Amato, Jr., and that the Attorney General will waive the ten-day notice to which he is entitled under 18 U.S.C. § 6005(b)(3). A copy of the Department of Justice's letter is attached as Exhibit F.

Wherefore, the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., respectfully requests that this Court issue an order immunizing from

use in prosecutions testimony and other information provided by Robert Creely at
proceedings of the Committee.

Respectfully submitted,



Morgan J. Frankel, Bar #342022
Senate Legal Counsel

Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: July 23, 2010

Exhibit A

S. Res. 458***In the Senate of the United States,****March 17, 2010.*

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members, including a chairman and vice chairman, respectively, to the Presiding Officer for appointment to the committee.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the

Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6(a). The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

(b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimburs-

*SRES 458 ES

able, basis the services of personnel of any such department or agency.

SEC. 7. The committee appointed pursuant to section one of this resolution shall terminate no later than 60 days after the pronouncement of judgment by the Senate on the articles of impeachment.

SEC. 8. The Secretary shall notify the House of Representatives and counsel for Judge G. Thomas Porteous, Jr. of this resolution.

Attest:



Secretary.

ESRES 458 ES

Exhibit B

RULES OF PROCEDURE AND PRACTICE IN THE SENATE
WHEN SITTING ON IMPEACHMENT TRIALS

* * * * *

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Exhibit C

111th CONGRESS
2nd SESSION

RESOLUTION

of the Senate Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

To immunize from use in prosecution the testimony of,
and other information provided by,
Robert Creely

July 15, 2010

MRS. McCASKILL, the Chairman of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., submitted the following resolution to the Committee, which approved it by a vote of 8 of its twelve members on the 15 day of July, 2010.

Whereas, the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. has been appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr.;

Whereas, the Committee may require Robert Creely to testify and/or provide other information at proceedings before or ancillary to the Committee;

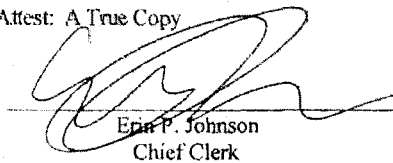
Whereas, the Committee anticipates that Robert Creely may refuse to testify and/or provide other information at proceedings before or ancillary to the Committee on the ground of self-incrimination; and

Whereas, pursuant to 18 U.S.C. §§ 6002 and 6005, a committee of the Senate may seek, by two-thirds vote, a court order immunizing testimony and/or other information provided by a witness at proceedings before or ancillary to a committee from use in prosecutions

other than for perjury, giving a false statement, or otherwise failing to comply with the court order: Now, therefore, be it

Resolved, That the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., pursuant to 2 U.S.C. §§ 288b(d) and 288f, directs the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by Robert Creely at proceedings before or ancillary to the Committee.

Attest: A True Copy



Erin P. Johnson
Chief Clerk

Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

Exhibit D

**NOTICE OF INTENTION TO REQUEST
ORDER CONFERRING IMMUNITY**

**TO: The Honorable Eric H. Holder, Jr.
The Attorney General of the United States
Washington, D.C. 20530**

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against G. Thomas Porteous, Jr., will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, Robert Creely at proceedings of the committee.



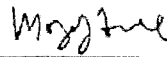
**Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435**

Dated: July 15, 2010

Exhibit E

CERTIFICATE OF SERVICE

I certify that on July 15, 2010, in accordance with 18 U.S.C. § 6005(b)(3), notice of the intention of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas, Porteous, Jr. to seek an order conferring immunity upon Robert Creely was sent by electronic mail to the Office of Legislative Affairs of the Department of Justice.



Morgan J. Frankel

July 19, 2010

660

Exhibit F



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 22, 2010

Mr. Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Frankel:

This responds to your letter, dated July 15, 2010, notifying the Department that, in connection with the impeachment proceedings pending in the United States Senate against Judge G. Thomas Porteous, Jr., the Senate Impeachment Trial Committee, pursuant to Title 18, United States Code, Section 6005, intends to apply for orders from the United States District Court for the District of Columbia granting use immunity to Jacob J. Amato, Jr. and Robert C. Creely to compel their Senate testimony. You also requested that the Department waive the ten-day notice period provided under that statute.

The Department has no objection to the Committee's application for these orders and further agrees to waive the ten-day statutory notice period under 18 U.S.C. § 6005(b)(3).

We hope this information is helpful. Please do not hesitate to contact us if we may provided additional assistance with this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Weich", is positioned above the printed name.

Ronald Weich
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10-MC-00444 (RMU)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICATION FOR ORDER IMMUNIZING TESTIMONY
AND OTHER INFORMATION PROVIDED BY ROBERT CREELY

The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., appointed pursuant to Senate Resolution 458 of the 111th Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, is applying to this Court for an order immunizing testimony and other information which may be provided to the Committee by Robert Creely. The application is presented pursuant to 18 U.S.C. § 6005, which provides, in relevant part:

§ 6005. Congressional proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee . . . of either House, . . . a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

(1) * * * *

(2) in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

This law provides the mechanism by which a witness before a congressional committee receives "use immunity" for testimony.¹ The immunized witness remains subject to prosecution for the transactions about which he or she testifies if the government sustains the burden of proving at trial that it did not use the immunized testimony or its fruits in the prosecution. See *Kastigar v. United States*, 406 U.S. 441, 459-62 (1972). Because the court's inquiry on an application for an immunity order is narrow and its tests are mechanical, the application may be decided *ex parte* without a hearing.

¹ The witness who is the subject of this application was previously granted use immunity pursuant to this law for his testimony before the House of Representatives Committee on the Judiciary in the impeachment proceedings preceding the House's instigation of impeachment articles against Judge Porteous for trial by the Senate. *In re Application of House Committee on the Judiciary*, Misc. No. 09-424 (RCL) (D.D.C. Aug. 12, 2009). Because that order immunized testimony only at proceedings before the House Judiciary Committee, a separate, companion order is necessary to confer use immunity for testimony at forthcoming proceedings before or ancillary to the Senate Impeachment Trial Committee.

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).²

Section 6005 sets out the two requirements for an immunity order, both of which have been met here.³ First, “in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee.” 18 U.S.C. § 6005(b)(2). The Impeachment Trial Committee’s resolution (Exhibit C to the application) shows that the Committee approved this request for an order by a vote of eight of its twelve members on July 15, 2010.⁴

Second, the Attorney General has waived the requirement that “ten days or more prior to the day on which the request for such an order was made,” he have received “notice of an intention to request the order.” 18 U.S.C. § 6005(b)(3). It is settled that “the Department [of Justice] may waive the ten-day notice requirement.” *Cammisano*, 655 F.2d at 1236. After being informed of the Committee’s interest in immunizing this

² The court noted in *Ryan* that “nothing in the statute bars the court . . . from notifying the witness, . . . or hearing any objections,” but “these procedures are not required by the constitution or by the immunity statute.” *Id.* at 540.

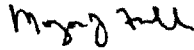
³ The Impeachment Trial Committee may apply for this order prior to summoning the witness to testify or provide information at one of its proceedings. *In re Application of United States Senate Permanent Subcommittee on Investigations (Camisano)*, 655 F.2d 1232, 1236-38 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

⁴ This Court has immunized witnesses to testify before Senate Impeachment Trial Committees in connection with prior judicial impeachment trials. *See In re Application of Senate Impeachment Trial Committee (Hastings)*, Misc. No. 89-129 (D.D.C. June 27, 1989); *In re Application of Senate Impeachment Trial Committee (Nixon)*, Misc. No. 89-175 (D.D.C. Aug. 15, 1989).

witness (Exhibit D), on July 22, 2010, the Department of Justice waived (Exhibit F) the requirement that ten days have elapsed before the filing of the application for an immunity order.

Accordingly, the Impeachment Trial Committee requests that the Court issue an order immunizing the testimony and other information which Robert Creely may provide at the Committee's proceedings.

Respectfully submitted,



Morgan J. Frankel, Bar #342022
Senate Legal Counsel

Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: July 23, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**FILED**

JUL 27 2010

Clerk, U.S. District & Bankruptcy
Courts for the District of ColumbiaIMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10- ~~444~~

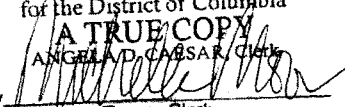
ORDER

Upon consideration of the application by the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 21st day of July, 2010,

ORDERED that ROBERT CREELY may not refuse to testify and provide other information at proceedings before or ancillary to the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED that no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against ROBERT CREELY in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

7/27/10


United States District Judge
U.S. District and Bankruptcy Courts
for the District of ColumbiaA TRUE COPY
ANGELA D. CAESAR, ClerkBy 
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED

AUG 11 2010

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE G. THOMAS PORTEOUS, JR.)

The United States Senate)
Washington, D.C. 20510,)

Applicant.)

Misc. No. 10- 487

APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND
OTHER INFORMATION PROVIDED BY RHONDA DANOS

1. The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. applies to this Court for an order, pursuant to 18 U.S.C. §§ 6002 and 6005, immunizing, from use in prosecutions, testimony and other information provided by one of its potential witnesses, Rhonda Danos, at proceedings of the Impeachment Trial Committee.

2. The presiding officer of the Senate has appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Impeachment Trial Committee to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr. at such times and places as the Committee may determine. A copy of Senate Resolution 458, as agreed to on March 17, 2010, is attached as Exhibit A; a copy of Impeachment Rule XI is attached as Exhibit B.

3. On August 4, 2010, by a vote of eleven of its twelve members, the Impeachment Trial Committee adopted a resolution directing the Senate Legal Counsel to apply for an order immunizing testimony and other information provided by the witness at its proceedings. The Committee's resolution is attached as Exhibit C.

4. It is anticipated that the witness would invoke her constitutional privilege against self-incrimination if subpoenaed to testify.

5. In accordance with 18 U.S.C. § 6005, we notified the Attorney General on August 4, 2010, of the Impeachment Trial Committee's intention to request this order. A copy of the notice to the Attorney General is attached as Exhibit D. A certificate of service of Exhibit D is attached as Exhibit E.

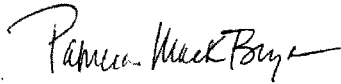
6. By letter dated August 10, 2010, the Department of Justice stated it has no objection to the proposed order to compel the testimony of Rhonda Danos, and that the Attorney General will waive the ten-day notice to which he is entitled under 18 U.S.C. § 6005(b)(3). A copy of the Department of Justice's letter is attached as Exhibit F.

Wherefore, the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., respectfully requests that this Court issue an order immunizing from

use in prosecutions testimony and other information provided by Rhonda Danos at
proceedings of the Committee.

Respectfully submitted,

Morgan J. Frankel, Bar #342022
Senate Legal Counsel



Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435

Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: August 11, 2010

EXHIBIT A

S. Res. 458***In the Senate of the United States,****March 17, 2010.*

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members, including a chairman and vice chairman, respectively, to the Presiding Officer for appointment to the committee.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the

Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6(a). The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

(b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimburs-

+SRES 458 ES

able, basis the services of personnel of any such department or agency.

SEC. 7. The committee appointed pursuant to section one of this resolution shall terminate no later than 60 days after the pronouncement of judgment by the Senate on the articles of impeachment.

SEC. 8. The Secretary shall notify the House of Representatives and counsel for Judge G. Thomas Porteous, Jr. of this resolution.

Attest:

A handwritten signature in black ink, appearing to read "Nancy Dieckman". The signature is fluid and cursive, with the first name "Nancy" written in a larger, more prominent script than the last name "Dieckman".

Secretary.

+SRES 458 ES

EXHIBIT B

RULES OF PROCEDURE AND PRACTICE IN THE SENATE
WHEN SITTING ON IMPEACHMENT TRIALS

* * * * *

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

EXHIBIT C

111th CONGRESS
2nd SESSION

RESOLUTION

of the Senate Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

To immunize from use in prosecution the testimony of,
and other information provided by,
Rhonda Danos

August 4, 2010

MRS. McCASKILL, the Chairman of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., submitted the following resolution to the Committee, which approved it by a vote of 11 of its twelve members on the 4th day of August, 2010.

Whereas, the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. has been appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr.;

Whereas, the Committee may require Rhonda Danos to testify and/or provide other information at proceedings before or ancillary to the Committee;

Whereas, the Committee anticipates that Rhonda Danos may refuse to testify and/or provide other information at proceedings before or ancillary to the Committee on the ground of self-incrimination; and

Whereas, pursuant to 18 U.S.C. §§ 6002 and 6005, a committee of the Senate may seek, by two-thirds vote, a court order immunizing testimony and/or other information provided by a witness at proceedings before or ancillary to a committee from use in prosecutions

other than for perjury, giving a false statement, or otherwise failing to comply with the court order: Now, therefore, be it

Resolved, That the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., pursuant to 2 U.S.C. §§ 288b(d) and 288f, directs the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by Rhonda Danos at proceedings before or ancillary to the Committee.

Attest: A True Copy

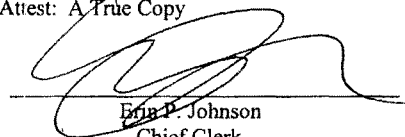
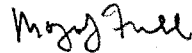

Erin P. Johnson
Chief Clerk
Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

EXHIBIT D

**NOTICE OF INTENTION TO REQUEST
ORDER CONFERRING IMMUNITY**

**TO: The Honorable Eric H. Holder, Jr.
 The Attorney General of the United States
 Washington, D.C. 20530**

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against G. Thomas Porteous, Jr., will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, Rhonda Danos at proceedings of the committee.



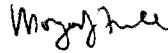
**Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435**

Dated: August 4, 2010

EXHIBIT E

CERTIFICATE OF SERVICE

I certify that on August 4, 2010, in accordance with 18 U.S.C. § 6005(b)(3), notice of the intention of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas, Porteous, Jr. to seek an order conferring immunity upon Rhonda Danos was sent by electronic mail to the Office of Legislative Affairs of the Department of Justice.



Morgan J. Frankel

August 5, 2010

EXHIBIT F



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 10, 2010

Mr. Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510

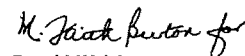
Dear Mr. Frankel:

This responds to your letter, dated August 4, 2010, notifying the Department that, in connection with the impeachment proceedings pending in the United States Senate against Judge G. Thomas Porteous, Jr., the Senate Impeachment Trial Committee, pursuant to Title 18, United States Code, Section 6005, intends to apply for orders from the United States District Court for the District of Columbia granting use immunity to Leonard Levinson, Rhonda Danos, and Bruce Netterville to compel their Senate testimony. You also requested that the Department waive the ten-day notice period provided under that statute.

The Department has no objection to the Committee's application for these orders and further agrees to waive the ten-day statutory notice period under 18 U.S.C. § 6005(b)(3).

We hope this information is helpful. Please do not hesitate to contact us if we may provided additional assistance with this or any other matter.

Sincerely,


Ronald Weich
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10-____

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICATION FOR ORDER IMMUNIZING TESTIMONY
AND OTHER INFORMATION PROVIDED BY RHONDA DANOS

The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., appointed pursuant to Senate Resolution 458 of the 111th Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, is applying to this Court for an order immunizing testimony and other information which may be provided to the Committee by Rhonda Danos. The application is presented pursuant to 18 U.S.C. § 6005, which provides, in relevant part:

§ 6005. Congressional proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee . . . of either House, . . . a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

(1) * * * *

(2) in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

This law provides the mechanism by which a witness before a congressional committee receives "use immunity" for testimony.¹ The immunized witness remains subject to prosecution for the transactions about which he or she testifies if the government sustains the burden of proving at trial that it did not use the immunized testimony or its fruits in the prosecution. See *Kastigar v. United States*, 406 U.S. 441, 459-62 (1972). Because the court's inquiry on an application for an immunity order is narrow and its tests are mechanical, the application may be decided *ex parte* without a hearing.

¹ The witness who is the subject of this application was previously granted use immunity pursuant to this law for her testimony before the House of Representatives Committee on the Judiciary in the impeachment proceedings preceding the House's instigation of impeachment articles against Judge Porteous for trial by the Senate. *In re Application of House Committee on the Judiciary*, Misc. No. 09-424 (RCL) (D.D.C. Aug. 12, 2009). Because that order immunized testimony only at proceedings before the House Judiciary Committee, a separate, companion order is necessary to confer use immunity for testimony at forthcoming proceedings before or ancillary to the Senate Impeachment Trial Committee.

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).²

On July 27, 2010, this Court immunized two other witnesses to testify before the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. *See*, Nos. 1:10-mc-0443-PLF, 1:10-mc-0444-PLF (D.D.C. July 27, 2010).³

Section 6005 sets out the two requirements for an immunity order, both of which have been met here.⁴ First, “in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee.” 18 U.S.C. § 6005(b)(2). The Impeachment Trial Committee’s resolution (Exhibit C to the application) shows that the Committee approved this request for an order by a vote of eleven of its twelve members on August 4, 2010.

Second, the Attorney General has waived the requirement that “ten days or more prior to the day on which the request for such an order was made,” he have received

² The court noted in *Ryan* that “nothing in the statute bars the court . . . from notifying the witness, . . . or hearing any objections,” but “these procedures are not required by the constitution or by the immunity statute.” *Id.* at 540.

³ This Court has also immunized witnesses to testify before Senate Impeachment Trial Committees in connection with prior judicial impeachment trials. *See In re Application of Senate Impeachment Trial Committee (Hastings)*, Misc. No. 89-129 (D.D.C. June 27, 1989); *In re Application of Senate Impeachment Trial Committee (Nixon)*, Misc. No. 89-175 (D.D.C. Aug. 15, 1989).

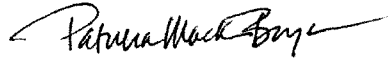
⁴ The Impeachment Trial Committee may apply for this order prior to summoning the witness to testify or provide information at one of its proceedings. *In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano)*, 655 F.2d 1232, 1236-38 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

"notice of an intention to request the order." 18 U.S.C. § 6005(b)(3). It is settled that "the Department [of Justice] may waive the ten-day notice requirement." *Cammisano*, 655 F.2d at 1236. After being informed of the Committee's interest in immunizing this witness (Exhibit D), on August 4, 2010, the Department of Justice waived (Exhibit F) the requirement that ten days have elapsed before the filing of the application for an immunity order.

Accordingly, the Impeachment Trial Committee requests that the Court issue an order immunizing the testimony and other information which Rhonda Danos may provide at the Committee's proceedings.

Respectfully submitted,

Morgan J. Frankel, Bar #342022
Senate Legal Counsel


Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Portcous, Jr.

Dated: August 11, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**FILED**

AUG 11 2010

Clerk, U.S. District & Bankruptcy
Courts for the District of ColumbiaIMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10- 487

ORDER

Upon consideration of the application by the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 11th day of August, 2010,

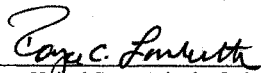
ORDERED that RHONDA DANOS may not refuse to testify and provide other information at proceedings before or ancillary to the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. on the basis of her privilege against self-incrimination, and it is

FURTHER ORDERED that no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against RHONDA DANOS in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

U.S. District and Bankruptcy Courts
for the District of ColumbiaA TRUE COPY
ANGELA D. CAESAR, Clerk

By

Deputy Clerk


United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED

AUG 11 2010

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE G. THOMAS PORTEOUS, JR.)

The United States Senate)
Washington, D.C. 20510,)

Applicant.)

Misc. No. 10- 488

APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND
OTHER INFORMATION PROVIDED BY LEONARD LEVENSON

1. The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. applies to this Court for an order, pursuant to 18 U.S.C. §§ 6002 and 6005, immunizing, from use in prosecutions, testimony and other information provided by one of its potential witnesses, Leonard Levenson, at proceedings of the Impeachment Trial Committee.

2. The presiding officer of the Senate has appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Impeachment Trial Committee to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr. at such times and places as the Committee may determine. A copy of Senate Resolution 458, as

agreed to on March 17, 2010, is attached as Exhibit A; a copy of Impeachment Rule XI is attached as Exhibit B.

3. On August 4, 2010, by a vote of eleven of its twelve members, the Impeachment Trial Committee adopted a resolution directing the Senate Legal Counsel to apply for an order immunizing testimony and other information provided by the witness at its proceedings. The Committee's resolution is attached as Exhibit C.

4. It is anticipated that the witness would invoke his constitutional privilege against self-incrimination if subpoenaed to testify.

5. In accordance with 18 U.S.C. § 6005, we notified the Attorney General on August 4, 2010, of the Impeachment Trial Committee's intention to request this order. A copy of the notice to the Attorney General is attached as Exhibit D. A certificate of service of Exhibit D is attached as Exhibit E.

6. By letter dated August 10, 2010, the Department of Justice stated it has no objection to the proposed order to compel the testimony of Leonard Levenson, and that the Attorney General will waive the ten-day notice to which he is entitled under 18 U.S.C. § 6005(b)(3). A copy of the Department of Justice's letter is attached as Exhibit F.

Wherefore, the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., respectfully requests that this Court issue an order immunizing from

use in prosecutions testimony and other information provided by Leonard Levenson at proceedings of the Committee.

Respectfully submitted,

Morgan J. Frankel, Bar #342022
Senate Legal Counsel



Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: August 11, 2010

EXHIBIT A

S. Res. 458***In the Senate of the United States,****March 17, 2010.*

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members, including a chairman and vice chairman, respectively, to the Presiding Officer for appointment to the committee.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the

Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6(a). The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

(b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimburs-

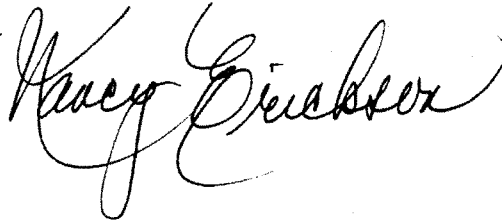
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able, basis the services of personnel of any such department or agency.

SEC. 7. The committee appointed pursuant to section one of this resolution shall terminate no later than 60 days after the pronouncement of judgment by the Senate on the articles of impeachment.

SEC. 8. The Secretary shall notify the House of Representatives and counsel for Judge G. Thomas Porteous, Jr. of this resolution.

Attest:

A handwritten signature in black ink, appearing to read "Nancy Dieckman". The signature is fluid and cursive, with the first name "Nancy" written in a larger, more prominent script than the last name "Dieckman".

Secretary.

+SRES 458 ES

EXHIBIT B

RULES OF PROCEDURE AND PRACTICE IN THE SENATE
WHEN SITTING ON IMPEACHMENT TRIALS

* * * * *

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

EXHIBIT C

111th CONGRESS
2nd SESSION

RESOLUTION

of the Senate Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

To immunize from use in prosecution the testimony of,
and other information provided by,
Leonard Levinson

August 4, 2010

MRS. McCASKILL, the Chairman of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., submitted the following resolution to the Committee, which approved it by a vote of 11 of its twelve members on the 4th day of August, 2010.

Whereas, the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. has been appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr.;

Whereas, the Committee may require Leonard Levinson to testify and/or provide other information at proceedings before or ancillary to the Committee;

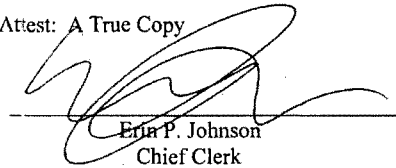
Whereas, the Committee anticipates that Leonard Levinson may refuse to testify and/or provide other information at proceedings before or ancillary to the Committee on the ground of self-incrimination; and

Whereas, pursuant to 18 U.S.C. §§ 6002 and 6005, a committee of the Senate may seek, by two-thirds vote, a court order immunizing testimony and/or other information provided by a witness at proceedings before or ancillary to a committee from use in prosecutions

other than for perjury, giving a false statement, or otherwise failing to comply with the court order: Now, therefore, be it

Resolved, That the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., pursuant to 2 U.S.C. §§ 288b(d) and 288f, directs the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by Leonard Levinson at proceedings before or ancillary to the Committee.

Attest: A True Copy



Erin P. Johnson
Chief Clerk

Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

EXHIBIT D

**NOTICE OF INTENTION TO REQUEST
ORDER CONFERRING IMMUNITY**

**TO: The Honorable Eric H. Holder, Jr.
 The Attorney General of the United States
 Washington, D.C. 20530**

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against G. Thomas Porteous, Jr., will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, Leonard Levenson at proceedings of the committee.



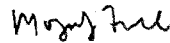
**Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435**

Dated: August 4, 2010

EXHIBIT E

CERTIFICATE OF SERVICE

I certify that on August 4, 2010, in accordance with 18 U.S.C. § 6005(b)(3), notice of the intention of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas, Porteous, Jr. to seek an order conferring immunity upon Leonard Levinson was sent by electronic mail to the Office of Legislative Affairs of the Department of Justice.



Morgan J. Frankel

August 5, 2010

EXHIBIT F



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 10, 2010

Mr. Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Frankel:

This responds to your letter, dated August 4, 2010, notifying the Department that, in connection with the impeachment proceedings pending in the United States Senate against Judge G. Thomas Porteous, Jr., the Senate Impeachment Trial Committee, pursuant to Title 18, United States Code, Section 6005, intends to apply for orders from the United States District Court for the District of Columbia granting use immunity to Leonard Levinson, Rhonda Danos, and Bruce Netterville to compel their Senate testimony. You also requested that the Department waive the ten-day notice period provided under that statute.

The Department has no objection to the Committee's application for these orders and further agrees to waive the ten-day statutory notice period under 18 U.S.C. § 6005(b)(3).

We hope this information is helpful. Please do not hesitate to contact us if we may provided additional assistance with this or any other matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "M. Rick Burton for", written over the printed name of Ronald Weich.

Ronald Weich
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10-____

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICATION FOR ORDER IMMUNIZING TESTIMONY
AND OTHER INFORMATION PROVIDED BY LEONARD LEVENSON

The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., appointed pursuant to Senate Resolution 458 of the 111th Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, is applying to this Court for an order immunizing testimony and other information which may be provided to the Committee by Leonard Levenson. The application is presented pursuant to 18 U.S.C. § 6005, which provides, in relevant part:

§ 6005. Congressional proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee . . . of either House, . . . a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

(1) * * * *

(2) in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

This law provides the mechanism by which a witness before a congressional committee receives "use immunity" for testimony.¹ The immunized witness remains subject to prosecution for the transactions about which he or she testifies if the government sustains the burden of proving at trial that it did not use the immunized testimony or its fruits in the prosecution. *See Kastigar v. United States*, 406 U.S. 441, 459-62 (1972). Because the court's inquiry on an application for an immunity order is narrow and its tests are mechanical, the application may be decided *ex parte* without a hearing.

¹ The witness who is the subject of this application was previously granted use immunity pursuant to this law for his testimony before the House of Representatives Committee on the Judiciary in the impeachment proceedings preceding the House's instigation of impeachment articles against Judge Porteous for trial by the Senate. *In re Application of House Committee on the Judiciary*, Misc. No. 09-424 (RCL) (D.D.C. Aug. 12, 2009). Because that order immunized testimony only at proceedings before the House Judiciary Committee, a separate, companion order is necessary to confer use immunity for testimony at forthcoming proceedings before or ancillary to the Senate Impeachment Trial Committee.

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).²

On July 27, 2010, this Court immunized two other witnesses to testify before the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. *See*, Nos. 1:10-mc-0443-PLF, 1:10-mc-0444-PLF (D.D.C. July 27, 2010).³

Section 6005 sets out the two requirements for an immunity order, both of which have been met here.⁴ First, “in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee.” 18 U.S.C. § 6005(b)(2). The Impeachment Trial Committee’s resolution (Exhibit C to the application) shows that the Committee approved this request for an order by a vote of eleven of its twelve members on August 4, 2010.

Second, the Attorney General has waived the requirement that “ten days or more prior to the day on which the request for such an order was made,” he have received

² The court noted in *Ryan* that “nothing in the statute bars the court . . . from notifying the witness, . . . or hearing any objections,” but “these procedures are not required by the constitution or by the immunity statute.” *Id.* at 540.

³ This Court has also immunized witnesses to testify before Senate Impeachment Trial Committees in connection with prior judicial impeachment trials. *See In re Application of Senate Impeachment Trial Committee (Hastings)*, Misc. No. 89-129 (D.D.C. June 27, 1989); *In re Application of Senate Impeachment Trial Committee (Nixon)*, Misc. No. 89-175 (D.D.C. Aug. 15, 1989).

⁴ The Impeachment Trial Committee may apply for this order prior to summoning the witness to testify or provide information at one of its proceedings. *In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano)*, 655 F.2d 1232, 1236-38 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

"notice of an intention to request the order." 18 U.S.C. § 6005(b)(3). It is settled that "the Department [of Justice] may waive the ten-day notice requirement." *Cammisano*, 655 F.2d at 1236. After being informed of the Committee's interest in immunizing this witness (Exhibit D), on August 4, 2010, the Department of Justice waived (Exhibit F) the requirement that ten days have elapsed before the filing of the application for an immunity order.

Accordingly, the Impeachment Trial Committee requests that the Court issue an order immunizing the testimony and other information which Leonard Levenson may provide at the Committee's proceedings.

Respectfully submitted,

Morgan J. Frankel, Bar #342022
Senate Legal Counsel


Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: August 11, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

AUG 11 2010

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10- 488**ORDER**

Upon consideration of the application by the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 11th day of August, 2010,

ORDERED that LEONARD LEVENSON may not refuse to testify and provide other information at proceedings before or ancillary to the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED that no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against LEONARD LEVENSON in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

U.S. District and Bankruptcy Courts
for the District of Columbia

A TRUE COPY
ANGELA D. CAESAR, Clerk

By

Deputy Clerk

Ray C. Amodeo
United States District Judge

RECEIVED

AUG 11 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAClerk, U.S. District & Bankruptcy
Courts for the District of Columbia

IMPEACHMENT TRIAL COMMITTEE)
ON THE ARTICLES AGAINST)
JUDGE G. THOMAS PORTEOUS, JR.)

The United States Senate)
Washington, D.C. 20510,)

Applicant.)

Misc. No. 10- 489APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND
OTHER INFORMATION PROVIDED BY BRUCE NETTERVILLE

1. The Impeachment Trial Committee on the Articles Against Judge G. Thomas

Porteous, Jr. applies to this Court for an order, pursuant to 18 U.S.C. §§ 6002 and 6005, immunizing, from use in prosecutions, testimony and other information provided by one of its potential witnesses, Bruce Netterville, at proceedings of the Impeachment Trial Committee.

2. The presiding officer of the Senate has appointed, pursuant to Senate Resolution

458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Impeachment Trial Committee to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr. at such times and places as the Committee may determine. A copy of Senate Resolution 458, as

agreed to on March 17, 2010, is attached as Exhibit A; a copy of Impeachment Rule XI is attached as Exhibit B.

3. On August 4, 2010, by a vote of eleven of its twelve members, the Impeachment Trial Committee adopted a resolution directing the Senate Legal Counsel to apply for an order immunizing testimony and other information provided by the witness at its proceedings. The Committee's resolution is attached as Exhibit C.

4. It is anticipated that the witness would invoke his constitutional privilege against self-incrimination if subpoenaed to testify.

5. In accordance with 18 U.S.C. § 6005, we notified the Attorney General on August 4, 2010, of the Impeachment Trial Committee's intention to request this order. A copy of the notice to the Attorney General is attached as Exhibit D. A certificate of service of Exhibit D is attached as Exhibit E.

6. By letter dated August 10, 2010, the Department of Justice stated it has no objection to the proposed order to compel the testimony of Bruce Netterville, and that the Attorney General will waive the ten-day notice to which he is entitled under 18 U.S.C. § 6005(b)(3). A copy of the Department of Justice's letter is attached as Exhibit F.

Wherefore, the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., respectfully requests that this Court issue an order immunizing from

use in prosecutions testimony and other information provided by Bruce Netterville at
proceedings of the Committee.

Respectfully submitted,

Morgan J. Frankel, Bar #342022
Senate Legal Counsel



Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
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Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: August 11, 2010

EXHIBIT A

S. Res. 458***In the Senate of the United States,****March 17, 2010.*

Resolved, That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members, including a chairman and vice chairman, respectively, to the Presiding Officer for appointment to the committee.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

SEC. 4. During proceedings conducted under Rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the

Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6(a). The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

(b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimburs-

+SRES 458 ES

able, basis the services of personnel of any such department or agency.

SEC. 7. The committee appointed pursuant to section one of this resolution shall terminate no later than 60 days after the pronouncement of judgment by the Senate on the articles of impeachment.

SEC. 8. The Secretary shall notify the House of Representatives and counsel for Judge G. Thomas Porteous, Jr. of this resolution.

Attest:

A handwritten signature in black ink, appearing to read "Nancy E. Binkley". The signature is fluid and cursive, with the first name "Nancy" being more prominent.

Secretary.

+SRES 458 ES

EXHIBIT B

RULES OF PROCEDURE AND PRACTICE IN THE SENATE
WHEN SITTING ON IMPEACHMENT TRIALS

* * * * *

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

EXHIBIT C

111th CONGRESS
2nd SESSION

RESOLUTION

of the Senate Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

To immunize from use in prosecution the testimony of,
and other information provided by,
Bruce Netterville

August 4, 2010

MRS. McCASKILL, the Chairman of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., submitted the following resolution to the Committee, which approved it by a vote of 11 of its twelve members on the 4th day of August, 2010.

Whereas, the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. has been appointed, pursuant to Senate Resolution 458, 111th Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive evidence and take testimony on the articles of impeachment against Judge G. Thomas Porteous, Jr.;

Whereas, the Committee may require Bruce Netterville to testify and/or provide other information at proceedings before or ancillary to the Committee;

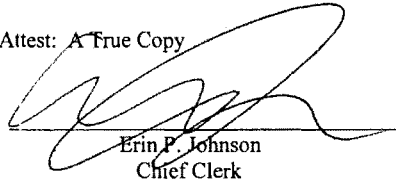
Whereas, the Committee anticipates that Bruce Netterville may refuse to testify and/or provide other information at proceedings before or ancillary to the Committee on the ground of self-incrimination; and

Whereas, pursuant to 18 U.S.C. §§ 6002 and 6005, a committee of the Senate may seek, by two-thirds vote, a court order immunizing testimony and/or other information provided by a witness at proceedings before or ancillary to a committee from use in prosecutions

other than for perjury, giving a false statement, or otherwise failing to comply with the court order: Now, therefore, be it

Resolved, That the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., pursuant to 2 U.S.C. §§ 288b(d) and 288f, directs the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by Bruce Netterville at proceedings before or ancillary to the Committee.

Attest: A True Copy



Erin P. Johnson
Chief Clerk

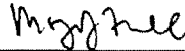
Impeachment Trial Committee on the Articles
Against Judge G. Thomas Porteous, Jr.

EXHIBIT D

**NOTICE OF INTENTION TO REQUEST
ORDER CONFERRING IMMUNITY**

**TO: The Honorable Eric H. Holder, Jr.
 The Attorney General of the United States
 Washington, D.C. 20530**

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against G. Thomas Porteous, Jr., will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, Bruce Netterville at proceedings of the committee.



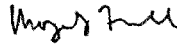
**Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435**

Dated: August 4, 2010

EXHIBIT E

CERTIFICATE OF SERVICE

I certify that on August 4, 2010, in accordance with 18 U.S.C. § 6005(b)(3), notice of the intention of the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas, Porteous, Jr. to seek an order conferring immunity upon Bruce Netterville was sent by electronic mail to the Office of Legislative Affairs of the Department of Justice.



Morgan J. Frankel

August 5, 2010

EXHIBIT F



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 10, 2010

Mr. Morgan J. Frankel
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Frankel:

This responds to your letter, dated August 4, 2010, notifying the Department that, in connection with the impeachment proceedings pending in the United States Senate against Judge G. Thomas Porteous, Jr., the Senate Impeachment Trial Committee, pursuant to Title 18, United States Code, Section 6005, intends to apply for orders from the United States District Court for the District of Columbia granting use immunity to Leonard Levinson, Rhonda Danos, and Bruce Netterville to compel their Senate testimony. You also requested that the Department waive the ten-day notice period provided under that statute.

The Department has no objection to the Committee's application for these orders and further agrees to waive the ten-day statutory notice period under 18 U.S.C. § 6005(b)(3).

We hope this information is helpful. Please do not hesitate to contact us if we may provided additional assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

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)
)
)
) Misc. No. 10-____
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)
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICATION FOR ORDER IMMUNIZING TESTIMONY
AND OTHER INFORMATION PROVIDED BY BRUCE NETTERVILLE

The Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., appointed pursuant to Senate Resolution 458 of the 111th Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, is applying to this Court for an order immunizing testimony and other information which may be provided to the Committee by Bruce Netterville. The application is presented pursuant to 18 U.S.C. § 6005, which provides, in relevant part:

§ 6005. Congressional proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee . . . of either House, . . . a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

(1) * * * *

(2) in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

This law provides the mechanism by which a witness before a congressional committee receives "use immunity" for testimony.¹ The immunized witness remains subject to prosecution for the transactions about which he or she testifies if the government sustains the burden of proving at trial that it did not use the immunized testimony or its fruits in the prosecution. *See Kastigar v. United States*, 406 U.S. 441, 459-62 (1972). Because the court's inquiry on an application for an immunity order is narrow and its tests are mechanical, the application may be decided *ex parte* without a hearing.

¹ The witness who is the subject of this application was previously granted use immunity pursuant to this law for his testimony before the House of Representatives Committee on the Judiciary in the impeachment proceedings preceding the House's instigation of impeachment articles against Judge Porteous for trial by the Senate. *In re Application of House Committee on the Judiciary*, Misc. No. 09-424 (RCL) (D.D.C. Aug. 12, 2009). Because that order immunized testimony only at proceedings before the House Judiciary Committee, a separate, companion order is necessary to confer use immunity for testimony at forthcoming proceedings before or ancillary to the Senate Impeachment Trial Committee.

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).²

On July 27, 2010, this Court immunized two other witnesses to testify before the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. *See*, Nos. 1:10-mc-0443-PLF, 1:10-mc-0444-PLF (D.D.C. July 27, 2010).³

Section 6005 sets out the two requirements for an immunity order, both of which have been met here.⁴ First, “in the case of a proceeding before or ancillary to a committee . . . of either House of Congress . . . the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee.” 18 U.S.C. § 6005(b)(2). The Impeachment Trial Committee’s resolution (Exhibit C to the application) shows that the Committee approved this request for an order by a vote of eleven of its twelve members on August 4, 2010.

Second, the Attorney General has waived the requirement that “ten days or more prior to the day on which the request for such an order was made,” he have received

² The court noted in *Ryan* that “nothing in the statute bars the court . . . from notifying the witness, . . . or hearing any objections,” but “these procedures are not required by the constitution or by the immunity statute.” *Id.* at 540.

³ This Court has also immunized witnesses to testify before Senate Impeachment Trial Committees in connection with prior judicial impeachment trials. *See In re Application of Senate Impeachment Trial Committee (Hastings)*, Misc. No. 89-129 (D.D.C. June 27, 1989); *In re Application of Senate Impeachment Trial Committee (Nixon)*, Misc. No. 89-175 (D.D.C. Aug. 15, 1989).

⁴ The Impeachment Trial Committee may apply for this order prior to summoning the witness to testify or provide information at one of its proceedings. *In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano)*, 655 F.2d 1232, 1236-38 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981).

"notice of an intention to request the order." 18 U.S.C. § 6005(b)(3). It is settled that "the Department [of Justice] may waive the ten-day notice requirement." *Cammisano*, 655 F.2d at 1236. After being informed of the Committee's interest in immunizing this witness (Exhibit D), on August 4, 2010, the Department of Justice waived (Exhibit F) the requirement that ten days have elapsed before the filing of the application for an immunity order.

Accordingly, the Impeachment Trial Committee requests that the Court issue an order immunizing the testimony and other information which Bruce Netterville may provide at the Committee's proceedings.

Respectfully submitted,

Morgan J. Frankel, Bar #342022
Senate Legal Counsel


Patricia Mack Bryan, Bar #335463
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250

Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Impeachment Trial
Committee on the Articles Against
Judge G. Thomas Porteous, Jr.

Dated: August 11, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE G. THOMAS PORTEOUS, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 10- 489

FILED

AUG 11 2010

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

ORDER

Upon consideration of the application by the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 11th day of August, 2010,

ORDERED that BRUCE NETTERVILLE may not refuse to testify and provide other information at proceedings before or ancillary to the Senate Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr. on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED that no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against BRUCE NETTERVILLE in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

U.S. District and Bankruptcy Courts
for the District of Columbia

A TRUE COPY

ANGELA D. CAESAR, Clerk

By

Deputy Clerk

James C. Lander
United States District Judge

THE JUDICIAL COUNCIL
OF THE FIFTH CIRCUIT
FILED

SEP 08 2010

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

Gregory A. Nussel
Secretary to the Council

Before: Edith H. Jones, Chief Judge, U. S. Court of Appeals for the Fifth Circuit; Jerry E. Smith, U. S. Circuit Judge; Carolyn Dineen King, U. S. Circuit Judge; E. Grady Jolly, U. S. Circuit Judge; Jacques L. Wiener, Jr., U. S. Circuit Judge; Fortunato P. Benavides, U. S. Circuit Judge; Edward C. Prado, U. S. Circuit Judge; Jennifer Walker Elrod, U. S. Circuit Judge; Leslie H. Southwick, U. S. Circuit Judge; Catharina Haynes, U. S. Circuit Judge; Eldon E. Fallon, U. S. District Judge; James J. Brady, U. S. District Judge; Dee D. Drell, U. S. District Judge; Neal B. Biggers, Jr., U. S. District Judge; Louis G. Guirola, Jr., U. S. District Judge; Sam R. Cummings, U. S. District Judge; Ricardo H. Hinojosa, U. S. District Judge; David Folsom, U. S. District Judge; Orlando L. Garcia, U. S. District Judge

DOCKET NO. 07-05-351-0085

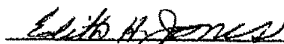
IN RE: Complaint of Judicial Misconduct against United States District Judge G. Thomas Porteous, Jr. under the Judicial Conduct and Disability Act of 1980

ORDER

The Fifth Circuit Judicial Council hereby extends until December 31, 2010 the effect of paragraphs 2, 3 and 4 of its September 10, 2008 Order in this matter.

FOR THE COUNCIL:

Dated: September 8, 2010


Chief Judge

○