116TH CONGRESS
2d Session

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IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP

THE EVIDENTIARY RECORD PURSUANT TO S. RES. 483

VOLUME XI, PART 1

Printed at the direction of Julie E. Adams, Secretary of the Senate, pursuant to S. Res. 483, 116th Congress, 2nd Sess. (2020)

JANUARY 22, 2020.—Ordered to be printed

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IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP

THE EVIDENTIARY RECORD PURSUANT TO H. RES. 798

VOLUME XI, PART 1

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111TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 111–427

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

MARCH 4, 2010.—Referred to the House Calendar and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 1031]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 1031) impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors, having considered the same, reports favorably thereon without amendment and recommends that the resolution be agreed to.

I. THE RESOLUTION

H. RES. 1031

Impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 21, 2010

Mr. Conyers (for himself, Mr. Smith of Texas, Mr. Schiff, Mr. Goodlatte, Ms. Jackson Lee of Texas, Mr. Sensenbrenner, Mr. Delahunt, Mr. Daniel E. Lungren of California, Mr. Cohen, Mr. Forbes, Mr. Johnson of Georgia, Mr. Gohmert, Mr. Pierluisi, and Mr. Gonzalez) submitted the following resolution; which was referred to the Committee on the Judiciary

Resolved, That G. Thomas Porteous, Jr., a judge of the United States District Court for the Eastern District of Louisiana, is im-

89–008

peached 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 1980's 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 1980's 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 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.

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.

II. INTRODUCTION

The House Committee on the Judiciary, in conjunction with its duly authorized "Task Force on Judicial Impeachment," has conducted an investigation into the conduct of United States District Court Judge Gabriel Thomas Porteous, Jr., ("Judge Porteous") and has determined, for the reasons set forth in this Report, that Judge Porteous's impeachment is warranted as a factual matter, fully supported by the Constitution, and is consistent with precedent.

III. JUDGE G. THOMAS PORTEOUS, JR.

Judge Porteous was born December 14, 1946. He grew up in the New Orleans area and attended Louisiana State University both as an undergraduate and for law school. He graduated from law school in 1971.

From 1971 to 1973, Judge Porteous was Special Counsel to the Office of the Louisiana Attorney General. He then served as an Assistant District Attorney from approximately 1973 through 1984. During that time period, Assistant District Attorneys could also hold outside employment. Thus, during some portion of this time, Judge Porteous was a law partner of Jacob Amato, Jr., at the law firm Edwards, Porteous & Amato. Attorney Robert Creely also worked at this firm.

Judge Porteous was elected judge of the 24th Judicial District Court in the State of Louisiana in 1984 and remained in that position until October 1994. In August 1994, Judge Porteous was nominated by President Clinton to be a United States District Court Judge for the Eastern District of Louisiana. His confirmation hearing was held on October 6, 1994. He was confirmed by the Senate on October 7, 1994, received his commission on October 11, 1994, and was sworn in on October 28, 1994.

Judge Porteous was married in 1969 to Carmella Porteous, who passed away on December 22, 2005.

IV. PROCEDURAL BACKGROUND

In or about late 1999, the Department of Justice (occasionally referenced as the "Department" or "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.[1]

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[1] Among the reasons the Department gave in declining prosecution were that some of the conduct at issue was barred by the statue of limitations, and that some of the demonstrably false statements may not have been "material" as a matter of law. 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., May 18, 2007 (hereinafter "DOJ Complaint Letter") at 1 (Ex. 4).

The evidentiary materials have been identified as HP [House Porteous] Exhibit numbers by the Task Force Staff, and the documents are cited as "(Ex. [#])." Certain publicly available documents, such as House and Committee Resolutions, or pleadings in connection with litigation, have also been marked as exhibits for ease of reference. The testimony cited in this Report consists of the following: 1) testimony of witnesses before the House Impeachment Task Force during one of four hearings (either on November 17-18, 2009 (Hearing I), December 8, 2009 (II), December 10, 2009 (III) or December 15, 2009 (IV)), cited as "[Witness] TF Hrg. [I, II, III or

Continued

In a letter dated May 18, 2007, the Department 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 potentially related to his fitness as a judge.[2] The alleged misconduct included soliciting and accepting things of value from litigants, attorneys, and other interested persons (such as the owners of a bail bonds company) with matters before him. The misconduct was alleged to have commenced while Judge Porteous was a State judge serving on the 24th Judicial District Court in Jefferson Parish, Louisiana (from 1984 to 1994), and to have continued while he was a Federal district judge. In addition, the Department also set forth information that Judge Porteous, while a Federal judge, made false statements and engaged in other dishonest conduct in connection with his personal bankruptcy.

Upon receipt of the DOJ Complaint Letter, the Fifth Circuit appointed a Special Investigatory Committee (the "Special Committee") to investigate the Department's allegations. A hearing was held before the Special Committee on October 29 and 30, 2007 (the "Fifth Circuit Hearing"), at which Judge Porteous, representing himself, testified,[3] cross-examined witnesses, and called witnesses on his own behalf.[4] Thereafter, the Special Committee issued a Report to the Judicial Council of the Fifth Circuit, dated November 20, 2007. That Report concluded that Judge Porteous committed misconduct which "might constitute one or more grounds for impeachment."[5]

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."[6] The Fifth Circuit Judicial Council thereafter certified these findings and the supporting records to the Judicial Conference of the United States.[7]

IV] at [page];" 2) testimony of witnesses before the Fifth Circuit Special Investigative Committee Hearing in October 1997, cited as "[Witness] 5th Cir. Hrg. at [page]," or otherwise referencing the speaker if the person quoted is not the sworn witness; 3) testimony of witnesses before the Federal grand jury, cited as "[Witness] GJ at [page];" and 4) deposition testimony taken by Task Force Staff, in the late summer and fall of 2009 and early 2010, cited as "[Witness] Dep. at [ ]." Facts that are undisputed—such as the date Judge Porteous was nominated or confirmed—are not always cited. Several witnesses were interviewed by Task Force Staff but were not deposed. Every effort has been made in this Report to rely on documentary materials or testimony under oath; however, on a few occasions, references are made to Task Force Staff interviews where a deposition was not conducted.

[2] DOJ Complaint Letter (Ex. 4).

[3] An order of immunity had been obtained and provided to Judge Porteous in connection with his testimony before the Fifth Circuit Special Committee.

[4] That hearing did not address Judge Porteous's improper relationships with bail bondsmen, nor did it examine his conduct during the confirmation process to become a Federal judge.

[5] Report by the Special Investigatory Committee to the Judicial Council of the United States Court of Appeals for the Fifth Circuit, In the Matter of Judge G. Thomas Porteous, Jr. United States District Judge, Eastern District of Louisiana, Dkt. No. 07-05-351-0085 (Nov. 20, 2007) (Ex. 5).

[6] Memorandum Order and Certification, In re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr. Under the Judicial Conduct and Disability Act of 1980, Judicial Council of the Fifth Circuit, Dkt. No. 07-05-351-0085 (Dec. 20, 2007) at 4 (Ex. 6(a)). A dissenting opinion authored by Circuit Judge James L. Dennis examined each of Judge Porteous's acts individually and concluded that, under that analysis, the evidence did not demonstrate a possible ground for impeachment and removal. Id. (J. Dennis dissenting) (Ex. 6(b)). Judge Dennis would have recommended suspending and reprimanding Judge Porteous.

[7] Memorandum Order and Certification, In re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr. Under the Judicial Conduct and Disability

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."[8]

On September 10, 2008, the Judicial Council of the Fifth Circuit issued an "Order and Public Reprimand" taking the maximum disciplinary action allowed by law against Judge Porteous, including ordering that no new cases be assigned to him and suspending his authority to employ staff for 2 years or "until Congress takes final action on the impeachment proceedings, whichever occurs earlier."[9]

On September 17, 2008, the House of Representatives of the 110th Congress passed H. 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."[10] On January 6, 2009, Chairman John Conyers, Jr. of the Committee on the Judiciary introduced H. Res. 15, which continued the authority of H. Res. 1448 of the 110th Congress for the 111th Congress.[11] On January 13, 2009, H. Res. 15 passed the full House by voice vote.

V. COMMITTEE AND TASK FORCE ACTIONS

On January 22, 2009, the impeachment inquiry was referred by the Committee on the Judiciary to a Task Force on Judicial Impeachment (the "Task Force"), comprised of 12 Committee Members, to conduct the investigation.[12] On July 29, 2009, the Committee on the Judiciary voted to permit the House General Counsel to seek immunity orders to compel the testimony of 8 witnesses.

A. In General

Task Force Staff reviewed materials provided from the Fifth Circuit (which included DOJ materials that had been provided to the attorneys handling the Special Investigatory inquiry). Task Force Staff also obtained additional documents from DOJ and from other entities, and interviewed over 70 individuals and took over 25 depositions. The evidentiary materials that are pertinent to this Report were made part of the record at the Task Force meeting of January 21, 2010.

Act of 1980, Judicial Council of the Fifth Circuit, Dkt. No. 07-05-351-0085 (Dec. 20, 2007) at 5 (Ex. 6(a)).

[8] Certificate of the Judicial Conference of the United States, to the Speaker, United States House of Representatives [Re: Determination that Consideration of Impeachment of Judge G. Thomas Porteous may be Warranted], June 17, 2008 (Ex. 7). The Certificate was thereafter hand delivered to the Honorable Nancy Pelosi, Speaker of the House, on June 18, 2008.

[9] Order and Public Reprimand, In re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr. Under the Judicial Conduct and Disability Act of 1980, Judicial Council of the Fifth Circuit, Dkt. No. 07-05-351-0085 (Sept. 10, 2008) at 4 (Ex. 8).

[10] H. Res. 1448 (2008).

[11] H. Res. 15 (2009).

[12] See Reestablishment of the Task Force on Judicial Impeachment: Before the H. Comm. on the Judiciary, 111th Con. (2009) (statement of John Conyers, Jr., Chairman, Committee on the Judiciary), http://judiciary.house.gov/hearings/transcripts/transcript090122.pdf at 30-34. The Task Force consisted of Chairman Adam B. Schiff (CA), Ranking Member Bob Goodlatte (VA), Sheila Jackson Lee (TX), Steve Cohen (TN), Henry C. "Hank" Johnson (GA), Pedro Pierluisi (PR), Charles A. Gonzalez (TX), F. James Sensenbrenner (WI), Daniel E. Lungren (CA), J. Randy Forbes (VA), and Louis Gohmert (TX).

B. Litigation by Judge Porteous in Response to the Task Force Inquiry

Judge Porteous has litigated in three different courts in an attempt to preclude, or delay, the Committee from obtaining critically-needed information in this impeachment inquiry.

After review of the DOJ Complaint Letter, and the referral from the U.S. Judicial Conference, the Committee moved to obtain a court order authorizing DOJ to disclose grand jury materials. The Committee originally moved on July 8, 2009 for an order authorizing the disclosure of grand jury materials related to the DOJ investigations of Judge Porteous, Rowan Company, and Diamond Offshore, and a Department of Interior employee, Donald C. Howard.[13]

On July 28, 2009, Judge Porteous filed an opposition to the Committee's Motion.[14] While never challenging the fact that the information sought was relevant and necessary for the impeachment inquiry, the Judge's opposition was based solely on a concern for secrecy of grand jury matters. The court dismissed this objection and issued an order dated August 5, 2009, granting the Committee's Motion.[15] Thereafter, Judge Porteous moved to stay the Order pending his appeal to the U.S. Court of Appeals for the Fifth Circuit;[16] the Committee opposed Judge Porteous's stay motion[17] and the District Court denied the stay as without merit.[18] Judge Porteous took an appeal of the August 5 grand jury disclosure order[19] and also moved in the U.S. Court of Appeals for the Fifth Circuit to stay disclosure pending the duration of the entire ap-

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[13] Memorandum in Support of the U.S. House of Representatives Committee on the Judiciary for an Order Directing the Department of Justice to Disclose Certain Grand Jury Materials, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. July 8, 2009) (Ex. 401). Howard had been prosecuted for not disclosing that he accepted hunting trips from Rowan Companies on his financial disclosure reports, and, in fact, had been on some of the same Rowan hunting trips as Judge Porteous.

After the Committee filed its Motion, Judge Porteous's counsel wrote to the judge assigned to the case and asserted that it would not be proper for any judge currently sitting in the judicial districts comprising the Fifth Circuit to hear and decide the Committee's motion. Letter from Richard W. Westling, Counsel to Judge Porteous, to the Honorable Neal B. Biggers, Jr., Senior United States District Judge (July 13, 2009) (Ex. 400). As a result, the Fifth Circuit designated the Honorable Callie V. S. Granade, the Chief Judge of the Southern District of Alabama, to hear and decide the Committee's motion.

[14] Judge G. Thomas Porteous, Jr.'s Memorandum in Opposition to the Motion of the U.S. House of Representatives, Committee on the Judiciary's Motion for an Order Directing the Department of Justice to Disclose Certain Grand Jury Materials, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. July 28, 2009) (Ex. 402).

[15] Order, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Aug. 5, 2009) (granting motion to disclose grand jury materials) (Ex. 403).

[16] Judge Porteous's Motion for a Stay of the Court's August 5, 2009 Grand Jury Disclosure Order Pending Appeal of the Order to the United States Court of Appeals for the Fifth Circuit, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Aug. 10, 2009) (Ex. 404).

[17] U.S. House Committee on the Judiciary's Opposition to Motion for Stay of the Court's Grand Jury Disclosure Order Pending Appeal, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Aug. 13, 2009) (Ex. 406).

[18] Order, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Aug. 18, 2009) (denying motion to stay disclosure pending appeal) (Ex. 407).

[19] Notice of Appeal of the Court's August 5, 2009 Grand Jury Disclosure Order, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Aug. 10, 2009) (Ex. 405).

peal.[20] The Committee opposed this motion,[21] and the Court of Appeals denied the stay.[22] Throughout these pleadings, Judge Porteous never argued that the grand jury materials sought were not relevant to the Committee's impeachment inquiry.

On September 23, 2009, the Committee moved for summary affirmance of the district court's August 5, 2009 grand jury disclosure order.[23] Judge Porteous opposed this motion[24] and the Committee replied.[25] Judge Porteous moved to disqualify the panel of Fifth Circuit judges that ruled on the motion for a stay pending appeal, to vacate the panel's order denying the stay, and to designate a panel of judges from another Circuit to hear all further proceedings in the appeal.[26] The Committee opposed this motion.[27] On October 26, 2009, Judge Porteous filed the merits brief in his appeal.[28]

On November 12, 2009, the U.S. Court of Appeals for the Fifth Circuit issued an order which granted the Committee's motion for summary affirmance, and denied all of Judge Porteous's motions.[29] The Task Force finally obtained access to the grand jury materials in mid-November 2009.

The Judge's legal maneuverings had delayed access by the staff to important and relevant information for approximately 5 months.

By way of a motion filed October 8, 2009, the Committee sought a second Order authorizing disclosure of grand jury and Title III wiretap materials that related to Judge Porteous. These materials were obtained during the Department's "Wrinkled Robe" investigation into corruption in connection with the relationship of certain bail bondsmen to State judges of the 24th Judicial District Court of Louisiana, where Judge Porteous had presided prior to becoming a Federal judge.[30] Again, Judge Porteous filed an opposition to this

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[20] Appellant's Motion for a Stay of the District Court's Grand Jury Disclosure Order Pending Appeal, In Re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., No. 09-30737 (5th Cir. Aug. 20, 2009) (Ex. 408).

[21] Opposition to Appellant's Motion for Stay, In Re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., No. 09-30737 (5th Cir. Aug. 26, 2009) (Ex. 409).

[22] Order, In Re: Grand Jury Proceedings, No. 09-30737 (5th Cir. Sept. 14, 2009) (denying appellant's motion for a stay pending appeal) (Ex. 410).

[23] Appellee's Motion for Summary Affirmance, In Re: Grand Jury [Proceedings], No. 09-30737 (5th Cir. Sept. 23, 2009) (Ex. 411).

[24] Appellant's Memorandum in Opposition to Appellee's Motion for Summary Affirmance, In Re: Grand Jury Proceedings, No. 09-30737 (5th Cir. Oct. 5, 2009) (Ex. 412).

[25] Reply of U.S. House Judiciary Committee to Appellant's Memorandum in Opposition to Appellee's Motion for Summary Affirmance, In Re: Grand Jury Proceedings, No. 09-30737 (5th Cir. Oct. 9, 2009) (Ex. 413).

[26] Appellant's Motion to Disqualify the Panel of Judges that Ruled on the Motion for a Stay Pending Appeal, to Vacate the Panel's Order Denying a Stay, and to Designate a Panel of Judges From Another Circuit to Hear all Further Proceedings in this Appeal, In Re: Grand Jury Proceedings, No. 09-30737 (5th Cir. Sept. 29, 2009) (Ex. 414).

[27] Opposition of the U.S. House Judiciary Committee to Appellant's Motion to Disqualify the Panel . . . To Vacate the Panel's Order . . . and to Designate a Panel of Judges From Another Circuit to Hear . . . This Appeal, In Re: Grand Jury Proceedings, No. 09-30737 (5th Cir. Oct. 6, 2009) (Ex. 415).

[28] Original Brief on Behalf of Appellant G. Thomas Porteous, Jr., United States District Judge, In Re: Grand Jury Proceedings, No. 09-30737 (5th Cir. Oct. 26, 2009) (Ex. 416).

[29] Order, In Re: Grand Jury Proceedings, No. 09-30737 (5th Cir. Nov. 12, 2009) (granting appellee's motion for summary affirmance and denying appellant's motions to disqualify all Fifth Circuit Court of Appeals Judges from the case, vacate the order denying the motion for staying pending appeal, to designate a panel from another Circuit, and stay pending appeal) (Ex. 417).

[30] U.S. House Judiciary Committee's Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Oct. 8, 2009) (Ex. 418).

motion,[31] and the Committee replied.[32] The Department of Justice filed a memorandum in support of the Committee.[33] On October 23, 2009, the court granted the Committee's motion and authorized disclosure of the grand jury and Title III materials.[34]

Once again, Judge Porteous moved in the district court to stay disclosure.[35] The Committee opposed his stay motion.[36] The district court denied the stay motion as without merit.[37] Judge Porteous did not move to stay disclosure in the Court of Appeals, but he did file and pursue an appeal of the disclosure order. The Committee obtained access to the Wrinkled Robe grand jury and Title III materials in mid-November 2009 pursuant to the district court's disclosure order.

On December 30, 2009, the Committee moved for summary affirmance of Judge Porteous's appeal from the Wrinkled Robe disclosure order.[38] On January 29, 2010, the Fifth Circuit granted the Committee's motion and affirmed the district court's disclosure order.[39]

The district court and the Fifth Circuit granted the Committee's unopposed motions to unseal the litigation[40] so that all of the pleadings would be available to the public.

In addition to the grand jury litigation, on November 12, 2009, a few days prior to the first evidentiary hearing of the Task Force, Judge Porteous filed a lawsuit in the United States District Court for the District of Columbia seeking a permanent injunction preventing the Committee from using or reading his sworn immunized testimony that had been provided to the Committee by the Judicial Conference. On an emergency basis, Judge Porteous sought a temporary restraining order to enjoin three aides to the Impeachment Task Force from using testimony he had provided under a grant of immunity to the Fifth Circuit Special Committee more than 2 years

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[31] Judge G. Thomas Porteous, Jr.'s Memorandum in Opposition to the Motion of the U.S. House of Representatives, Committee on the Judiciary's Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Oct. 16, 2009) (Ex. 419).

[32] Reply of U.S. House Judiciary Committee to Judge G. Thomas Porteous's Opposition to the Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Oct. 23, 2009) (Ex. 420).

[33] Memorandum in Response to U.S. House Judiciary Committee's Motion to Obtain Grand Jury Materials and Specified Court-Ordered Wiretaps, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Oct. 16, 2009) (Ex. 421).

[34] Order, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Oct. 23, 2009) (granting Committee's motion for order authorizing disclosure of grand jury and Title III materials) (Ex. 422).

[35] Judge Porteous's Motion for a Stay of the Court's October 23, 2009 Grand Jury and Specified Wiretaps Disclosure Order Pending Appeal of the Order to the United States Court of Appeals for the Fifth Circuit, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Nov. 4, 2009) (Ex. 423).

[36] Opposition of the Committee on the Judiciary of the U.S. House of Representatives to Judge Porteous's Motion for Stay of the Court's October 23, 2009 Order Pending Appeal, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Nov. 10, 2009) (Ex. 424).

[37] Order, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Nov. 12, 2009) (denying motion for stay pending appeal) (Ex. 425).

[38] Appellee's Motion for Summary Affirmance, In Re: Grand Jury Proceedings, No. 09-31062 (5th Cir. Dec. 30, 2009) (Ex. 426).

[39] Order, In Re: Grand Jury Proceedings, No. 09-31062 (5th Cir. Jan. 29, 2010) (Ex. 436).

[40] Order, In re: Grand Jury Investigation of United States District Judge G. Thomas Porteous, Jr., Misc. No. 09-4346 (E.D. La. Dec. 14, 2009) (granting unopposed motion to unseal) (Ex. 427); Order, In Re: Grand Jury Proceeding, No. 09-30737 (5th Cir. Dec. 30, 2009) (same); Order, In Re; Grand Jury Proceedings, No. 09-31062 (5th Cir. Dec. 30, 2009) (same).

earlier.[41] On an expedited schedule, the Committee moved to dismiss this motion,[42] and Judge Porteous replied.[43] United States District Judge Richard J. Leon of the United States District Court for the District of Columbia denied Judge Porteous's motion for a temporary restraining order after oral argument on November 16, 2009.[44] Per the Court's request, the Committee filed a supplemental memorandum in support of its motion to dismiss.[45] Judge Porteous opposed this motion[46] and the Committee replied.[47]

C. Task Force Hearings

The Task Force held four hearings regarding the conduct of Judge Porteous. On November 17 and 18, 2009, Attorneys Robert Creely, Jacob Amato, and Joseph Mole testified.[48]

On December 8, 2009, Federal Bureau of Investigation Special Agent DeWayne Horner, Attorney Claude Lightfoot, and Chief United States Bankruptcy Judge for the District of Maryland Duncan Keir testified.[49]

On December 10, 2009, Bail Bondsman Louis M. Marcotte, III, and his sister Lori Marcotte testified.[50]

At each of the above hearings, Special Impeachment Counsel Alan I. Baron presented an overview of the evidence that related to the topics of the hearings.

On December 15, 2009, Professors Akhil Reed Amar (Yale Law School), Charles Geyh (Indiana University Maurer School of Law), and Michael Gerhardt (University of North Carolina School of Law) testified.[51]

Judge Porteous's attorney, Richard Westling, Esq., was permitted to give an opening statement at the initial hearing and was offered

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[41] Complaint for Declaratory Judgment and Injunctive Relief, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Nov. 13, 2009) (Ex. 428); Plaintiff G. Thomas Porteous, Jr.'s Motion for a Temporary Restraining Order and Preliminary Injunction, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Nov. 13, 2009) (Ex. 429).

[42] Defendants' Motion to Dismiss, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Nov. 13, 2009) (Ex. 430).

[43] Judge G. Thomas Porteous, Jr.'s Reply Memorandum to Defendants' Opposition to his Motion for a Temporary Restraining Order and a Preliminary Injunction, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Nov. 14, 2009) (Ex. 431).

[44] Bench Order, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Nov. 16, 2009) (denying motion for a temporary restraining order) (PACER Docket Report) (Ex. 432). "PACER" is an acronym for "Public Access to Court Electronic Records." It is an electronic database that allows users to obtain case and docket information from the Federal courts. A document referred to in this Report as a "PACER Docket Report" is a standard computerized printout that sets forth the various events that occur in the course of a given case. In this case, the PACER Docket Report reflects the denial of the Motion for the Temporary Restraining Order on November 16, 2009.

[45] Defendants' Supplemental Memorandum in Support of Motion to Dismiss, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Dec. 18, 2009) (Ex. 433).

[46] Judge G. Thomas Porteous, Jr.'s Memorandum in Opposition to Defendants' Motion to Dismiss, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Jan. 8, 2010) (Ex. 434).

[47] Defendants' Reply Brief in Support of Their Motion to Dismiss, Porteous v. Baron, et al, Case No. 1:09-cv-2131 (D.D.C. Jan. 15, 2010) (Ex. 434). As of the date of the preparation of this Report, the motion to dismiss is under advisement.

[48] See To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part I), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary, House of Representatives, 111th Cong. (Nov. 17-18, 2009).

[49] See To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part II), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary, House of Representatives, 111th Cong. (Dec. 8, 2009).

[50] See To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part III), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary, House of Representatives, 111th Cong. (Dec.10, 2009).

[51] See 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 Committee on the Judiciary, House of Representatives, 111th Cong. (Dec. 15, 2009).

the opportunity to examine the witnesses at each of the four hearings. He did in fact examine witnesses at all the hearings except the December 10, 2009 hearing, where, despite having been offered the opportunity to participate, neither Mr. Westling nor any other attorney representing Judge Porteous was present. Mr. Westling was given the opportunity to identify witnesses whose testimony he sought for the Committee to hear. Mr. Westling did not identify any such individuals. Judge Porteous was also provided the opportunity to testify. He declined to do so.

On January 21, 2010, the Task Force held a meeting to consider proposed articles of impeachment. In connection with that meeting, Task Force exhibits cited in this Report were made part of the record. At that meeting, Task Force Members agreed by an 8-0 vote to recommend four specified Articles of Impeachment to the Full Committee.

On that same day, Chairman Conyers introduced H. Res. 1031, setting forth the four recommended Articles of Impeachment against Judge Porteous.

On January 27, 2010, the Committee on the Judiciary met and unanimously approved by record votes each of the four articles, and, upon doing so, voted unanimously to report H. Res 1031 to the full House.

VI. A BRIEF DISCUSSION OF IMPEACHMENT

A. Pertinent Constitutional Provisions

The following are the pertinent provisions in the United States Constitution that relate to impeachment:

Article I, Section 2, Clause 5:

> The House of Representatives . . . shall have the sole Power of Impeachment.

Article I, Section 3, Clauses 6 and 7:

> 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.
>
> 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.

Article II, Section 2, Clause 1:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article II, Section 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.

In this regard, it has long been recognized that Federal judges are "civil Officers" within the meaning of Article II, Section 4.[52] Finally, as to the life tenure of Federal judges, the Constitution provides:

> Article III, Section 1:
> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . .

B. THE MEANING OF "HIGH CRIMES AND MISDEMEANORS"

The committee report accompanying 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.[53]

In applying these concepts to the conduct of a judge, the Walter 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

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[52] A commentator wrote in 1825:

> All executive and judicial officers, from the president downwards, from the judges of the supreme court to those of the most inferior tribunals, are included in this description.

W. Rawle, A View of the Constitution of the United States of America, Philip H. Nicklin ed. (1829), 213 (The Law Exchange reprint (2003)). Another prominent commentator, Joseph Story, wrote:

> All officers of the United States . . . who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.

2 Joseph Story, Commentaries on the Constitution of the United States § 790 at 258 (1833) (citing Rawle) (quoted in To Consider Possible Impeachment of United States District Judge Samuel B. Kent of the Southern District of Texas: Hearing Before the Task Force on Judicial Impeachment of the H. Comm. on the Judiciary, 111th Cong. Serial No. 111-11 (June 3, 2009) (statement of Prof. Arthur Hellman)).

[53] H.R. Rep. No. 101-36, Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87, 101st Cong., 1st Sess. (1989) [hereinafter "Walter Nixon Impeachment Report"] at 5 (1989).

> 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."[54]

The Walter Nixon Impeachment 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 questions 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.[55]

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."[56] That Report stressed that impeachment is "non-criminal," designed not to impose criminal penalties, but instead simply to remove the offender from office,[57] 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."[58] 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 further clear that impeachment is a remedial provision, not a punitive one.[59]

VII. ARTICLE BY ARTICLE ANALYSIS

A. In General

In connection with the impeachment of Federal Judge George W. English in 1926, the House Committee on the Judiciary noted: "Each case of impeachment must necessarily stand upon its own facts. It can not, therefore, become a precedent or be on all fours with every other case."[60] That observation is particularly true in regard to the case of Judge Porteous, who has committed misconduct in several spheres of activity over many years. As one scholar noted in his testimony before the Task Force, any lack of

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[54] Walter Nixon Impeachment Report at 5 (footnote omitted).

[55] Id. at 12.

[56] H.R. Rep. No. 100-810, Impeachment of Alcee L. Hastings, Report of the Committee on the Judiciary to Accompany H. Res. 499, 100th Cong., 2d Sess. (1988) [hereinafter "Hastings Impeachment Report"], at 6.

[57] Hastings Impeachment Report at 7.

[58] Id. at 7. The last four judicial impeachments—those of Judge Samuel B. Kent (2009), Judge Walter L. Nixon (1989), Judge Alcee Hastings (1988), and Judge Harry Claiborne (1986)—occurred subsequent to Federal criminal proceedings, and the impeachment articles were to a great extent patterned after the Federal criminal charges. However, the principles that underlie the propriety of impeachment do not require that the conduct at issue be criminal in nature, or that there have been a criminal prosecution.

[59] U.S. Const., art. I, § 3, cl. 7.

[60] "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 163 (hereinafter "English Impeachment Report").

factual precedents directly on point "has to do with more the nature of Judge Porteous's misconduct than with anything else. The fact is that we are discovering or finding in this case a pattern of misbehavior that extends over such a long period of time that is virtually unique in the annals of impeachment."[61] Nonetheless, a review of prior judicial impeachments reveals that the four Articles against Judge Porteous are consistent with the Constitution and impeachment precedent.

B. Discussion of the Articles

1. Article I

Article I sets forth Judge Porteous's conduct in the course of presiding over the case Lifemark Hospitals of La., Inc. ["Lifemark"] v. Liljeberg Enterprises, Inc. ["Liljeberg" or "the Liljebergs"],[62] including his failure to recuse himself despite his close personal and financial relationships with attorneys for the Liljebergs (including, in particular, his prior financial relationship with Amato and Amato's partner Creely, while Judge Porteous was a State judge); making false and deceptive statements at the recusal hearing to conceal his relationship and otherwise failing to disclose his prior financial relationship; and continuing to solicit and accept things of value from the attorneys in that case, including cash, while he had the case under advisement.

The conduct alleged in Article I—financial entanglements with persons having business before the court—is well recognized as constituting the "gravest sort" of judicial misconduct.[63] The Committee notes that the conduct involving the solicitation and receipt of things of value violates Federal law as well as several of the Canons of Judicial Ethics that are designed to ensure that parties receive a fair trial by an impartial judge—a judge that is neither soliciting nor accepting things of value from attorneys who are appearing in front of him.[64]

Further, Article I against Judge Porteous alleges misconduct similar to that alleged in articles of impeachment against other judges. For example, in 1912, the House voted articles of impeach-

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[61] Prof. Gerhardt TF Hrg. IV at 25.

[62] Civ. Action No. 93-1794 (E.D. La.). See PACER Docket Report (Ex. 50).

[63] Prof. Geyh TF Hrg. IV at 12 (written statement at 6).

[64] As Professor Geyh testified:

> [J]udge Porteous's misconduct here was of the gravest sort. The current Code of Conduct for United States judges provides that "A judge should comply with the restrictions on acceptance of gifts set forth in the Judicial Conference Gift Regulations. [citation omitted]" The judge who solicits or receives money from a lawyer who has an important case pending before the court, creates the taint of corruption that the Judicial Conference's gift regulations are designed to prevent; it is thus unsurprising that ethics rules universally condemn the practice.

Prof. Geyh TF Hrg. IV at 12 (written statement at 6). The principles of impeachment do not require that the conduct at issue constitute a specific crime or violation of a civil or regulatory rule of law. Nonetheless, the fact that the conduct alleged to warrant impeachment violates widely accepted ethical standards or particular civil or criminal laws is a relevant consideration that informs, and in this case supports, the decision that impeachment and removal is appropriate. In connection with the impeachment of Judge Harry Claiborne, the accompanying Report referenced the Code of Judicial Conduct for United States Judges as "[o]ne guide to what is considered 'good behavior' befitting a member of the judiciary." The Report noted that Canon 1 (providing that judges should "uphold the integrity" of the judiciary) and Canon 2 (providing that judges should "avoid impropriety and the appearance of impropriety") "reinforce the Committee's determination that Judge Claiborne has brought disrepute upon the profession and severely undermined public confidence in the institution." H.R. Rep. No. 99-688, "Impeachment of Judge Harry E. Claiborne, Report of the Committee on the Judiciary to Accompany H. Res. 461," 99th Cong., 2d Sess. 23 (1986) [hereinafter "Claiborne Impeachment Report"].

ment against Circuit Judge Robert W. Archbald alleging numerous incidents of improper financial involvement with attorneys and parties. Articles 1 though 6 against Judge Archbald described complicated financial schemes whereby, while he was a judge of the Commerce Court, Judge Archbald enriched himself through financial dealings with companies and attorneys with cases before the Court. Articles 7 through 9 described complicated relationships through which Judge Archbald obtained money from counsels for parties with cases in front of him when he was a district court judge. Article10 charged that as a district court judge, Judge Archbald received money from an individual who was an officer and director of major railroad corporations "which in the due course of business was liable to be interested in litigation pending in the said court over which [Archbald] presided as a judge." That Article further charged that Judge Archbald's acceptance of the money was thus "improper and had a tendency to and did bring his said office of district judge into disrepute." Article 11 charged that Judge Archbald did "wrongfully accept and receive" money that was "contributed to [him] by various attorneys who were practitioners in the said court presided over by [Judge Archbald]."[65]

Similarly, in 1936, the House voted articles of impeachment against Judge Halsted L. Ritter.[66] In particular, Article I of the Ritter Articles described financial dealings between Judge Ritter and his former law partner, in which Judge Ritter appointed the former law partner as a receiver in a civil case. Thereafter, Judge Ritter approved the payment of a $75,000 receiver fee to the former partner (increasing the amount from $15,000 that had been set by another judge), and then received $4,500 back from the former partner.[67]

Article I against Judge Porteous, in alleging misconduct arising from his undisclosed financial relationships with attorneys with a case in front of him, is consistent with the sorts of charges that have supported Articles of Impeachment against Judges Archbald and Ritter.

Article I also charges that by his conduct, Judge Porteous has harmed the judicial system by bringing it into disrepute. This harm constitutes a discrete injury that justifies impeachment and removal, and numerous of the prior judicial impeachments, including those of Judges Claiborne, Nixon, Ritter, and Archbald, have included Articles that, after reciting the essential facts, have alleged that by virtue of that conduct the judge has brought such disrepute

[65] H. Res. 622, 62d Cong., 2d Sess (1912) (Articles of Impeachment against Judge Robert W. Archbald), 48 Cong Rec. (House) July 8, 1912 (8705-08), reprinted in Impeachment, Selected Materials, House Comm. on the Judiciary, Comm. Print (1973) at 176, 181-82 (Articles 10 and 11) (hereinafter "Archbald Articles"). The Committee Print also contains excerpts from the accompanying Report, Robert W. Archbald, Judge of the United States Commerce Court, H. Rept. No. 946, 62d Cong., 2d sess. (1912), 48 Cong Rec. (House) July 8, 1912 (8697) (hereinafter "Archbald Impeachment Report").

[66] 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) at 188-197 (H. Res 422), 198-202 (H. Res. 471) (hereinafter "Ritter Articles").

[67] Ritter Articles at 188-189. Judge Ritter was acquitted of that Article in the Senate; however, it is not possible to determine the basis for the verdict—whether it was for failure of proof or because of some other reason. In any event, Judge Ritter was convicted of a different Article—Article 7—which re-alleged the $4,500 cash payment from his former partner.

to the Federal courts, and so undermined public confidence in the courts, that the judge should be impeached.[68]

Thus, when Judge Porteous denied a recusal motion and it was later revealed that he had financial entanglements with certain of the attorneys, not only did he harm the party seeking a fair and impartial judge (Lifemark), but he harmed the judicial system as a whole by inviting cynicism as to its fairness and by suggesting to the public at large that, for a litigant to prevail at trial, it may be necessary to pay for meals or trips or to provide other things of value to the presiding judge.[69]

2. Article II

a. Overview

Article II describes Judge Porteous's corrupt relationship with bail bondsman Louis Marcotte and his sister Lori Marcotte, spanning from the late 1980's/ early 1990's through Judge Porteous's tenure as a Federal judge and into approximately 2004. This article alleges what is in substance a bribery scheme, whereby Judge Porteous solicited and accepted things of value from the Marcottes and, in return Judge Porteous took numerous actions to assist the Marcottes, both as a State judge (in setting bonds and taking other judicial acts) and as a Federal judge. This type of conduct is specifically set forth in Article II, Section 4 of the Constitution as a grounds for impeachment—that is "Treason, Bribery, or other high Crimes and Misdemeanors."

b. Pre-Federal Bench Conduct—The Judge Archbald Precedent

Some of the conduct alleged to constitute a basis for impeachment in Article II occurred prior to Judge Porteous taking the Federal bench.[70] Including such conduct as a basis for impeachment is consistent with the impeachment of Judge Archbald and with a common-sense interpretation of the Constitution and Congress's impeachment power.

Judge Archbald was a District Court Judge in the Middle District of Pennsylvania from March 29, 1901 through January 31, 1911, when he was then appointed to the Circuit Court for the Third Circuit. While on the Circuit Court, he also sat on the United States Commerce Court.[71] In 1912—while Judge Archbald was a circuit court judge—the House voted articles of impeachment against him, alleging improper conduct both as a circuit judge sit-

[68] See, e.g., Archbald Article 10 (charging that Judge Archbald's acceptance of money from an officer of a railroad company was "improper and had a tendency to and did bring his said office of district judge into disrepute").

[69] One of the Articles against Judge Harold Louderback accused him of partiality so as "to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and prejudice and favoritism to certain individuals . . . all of which is prejudicial to the dignity of the judiciary." H. Res. 403 (1933), Articles of Impeachment Against Harold Louderback, reprinted in Impeachment, Selected Materials, House Comm. on the Judiciary, Comm. Print (1973) at 185. This same language was used in the articles of impeachment against Judge George W. English, which accused him of conduct so as to "excite fear and distrust and to inspire a widespread belief . . . that causes were not decided in said court according to their merits but were decided with partiality and with prejudice and favoritism to certain individuals. . . ." English Impeachment Report at 163.

[70] Article IV is based exclusively on pre-Federal bench conduct. However, since that issue is arguably implicated in Article II as well, the legal discussion is set forth here.

[71] The United States Commerce Court was in existence from 1910 to 1913. It heard appeals from orders of the Interstate Commerce Commission.

ting on the Commerce Court (Articles 1 through 6) and in his prior position as a district judge (Articles 7 through 12). Article 13 set forth a "catch-all" article encompassing both district court and Circuit Court/Commerce Court conduct. That Article alleged that Archbald "as such United States district judge and judge of the United States Commerce Court," sought loans from persons who had an interest in the matters "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 the said Robert W. Archbald is a Member."[72]

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). In the section of the Report entitled "Impeachment for Offenses Committed in Another Judicial Office," the Report stated:

> 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.[73]

In reaching this conclusion, the Archbald Impeachment Report focused on the similarity of the prior office in which Archbald committed impeachable conduct (district court judge) to the office from which Archbald was holding at the time of his impeachment (circuit court judge). The report further noted that precedents from State courts supported impeachment of a public official for misconduct that occurred in a prior term of office, especially if "the prescribed functions of such offices were of the same general nature and susceptible to the same malversations and abuse."[74]

In 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," the reasoning in Archbald fully supports considering Judge Porteous's State judge conduct as a basis for impeachment. It would simply be "anomalous" if Congress were "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"—in this case, a State judgeship that

[72] Archbald Impeachment Report at 182. Archbald was ultimately convicted in the Senate of 5 of the 13 articles—Articles 1, 3, 4, and 5 involving Commerce Court conduct, and Article 13, a "catch-all" article involving both district court and Commerce Court conduct. VI Cannon's Precedents of the House of Representatives, §512, p. 707.

[73] Archbald Impeachment Report at 175.

[74] Archbald Impeachment Report at 175.

he occupied immediately prior to the Federal judgeship from which impeachment is now sought.[75]

c. Pre-Federal Bench Conduct—Views of Constitutional Scholars

There is broad support among scholars that certain pre-Federal bench conduct—especially of the sort that was committed while Judge Porteous was a State judge—may properly constitute a basis for impeachment. At the Task Force Hearing of December 15, 2009, Professor Michael Gerhardt testified that though Article II of 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,"[76] and certainly does not require that such conduct occur during the tenure of the Federal office from which impeachment is sought. As Professor Gerhardt noted, "[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.[77]

The reason for considering pre-Federal bench conduct in appropriate circumstances is evident from very basic examples. Take the situation where the individual committed a truly heinous crime prior to becoming a Federal judge:

> 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 that 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.[78]

However, the crime or misconduct need not be comparable to homicide to justify impeachment. As another professor testified:

> Let's take bribery. Imagine now a person who bribes his very 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.[79]

Or, as the third expert testified: "[A] quid pro quo arrangement with bail bondsmen . . . is the kind of corruption that fairly may

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[75] Id.

[76] Prof. Gerhardt TF Hrg. IV at 30 (written statement of Prof. Michael J. Gerhardt, University of North Carolina at 4) (emphasis in original).

[77] Id.

[78] Id. This particular example is used to illustrate the principle that pre-Federal bench conduct may justify impeachment; it is not intended to suggest that such conduct must be comparable to homicide. Rather, "[f]rom there you simply have to ask yourself whether the conduct as a State judge is sufficiently egregious to rise to an impeachable standard." Prof. Geyh TF Hrg. IV at 36.

[79] Prof. Amar TF Hrg. IV at 17.

be characterized as a violation of the public trust. Who cares if it occurred before [Judge Porteous took the Federal bench]?"[80]

Thus, consistent with reasons set forth in the Archbald Impeachment Report and those provided by three legal scholars at the Task Force Hearing, there is simply no basis in the Constitution, nor is there a basis in policy, for the House or Senate to adopt a narrow or technical reading of the Constitution so as to divest themselves of the power to consider pre-Federal bench conduct as a grounds for impeachment.

d. Federal Bench Conduct

Even though Judge Porteous's conduct while a Federal judge did not involve taking judicial actions to benefit the Marcottes, the Federal bench conduct constituted a continuation of the same unlawful relationship that was in place when Judge Porteous was a State judge, and consisted of Judge Porteous's efforts to help the Marcottes form relationships with no fewer than four State judicial officers as well as other business executives. By these acts, Judge Porteous assisted the Marcottes—whom he knew to be corrupt—to expand their reach in the 24th Judicial District Court (24th JDC). By attending meals with the Marcottes and other judicial officers, Judge Porteous not only received the benefit of those free meals, but provided the opportunity for the Marcottes to show off their relationship with him and to put their generosity on display by paying for him and the others who were in attendance. Though 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 them, from his personal experience Judge Porteous knew that the Marcottes gave him and others things of value to induce favored treatment and thus had every reason to know that the Marcottes would seek to establish the same relationship with new judges. Thus, Judge Porteous was instrumental in helping the Marcottes form a bond with one State judge, Ronald Bodenheimer, with whom the Marcottes formed a corrupt relationship that continued for several years until he was arrested and convicted.[81] Judge Porteous's vouching for the Marcottes was a critical causal factor in the perpetuation of the corruption in the setting of bail bonds in the 24th JDC even when Judge Porteous was no longer on the State bench.[82]

3. Article III

Article III alleges that Judge Porteous committed numerous acts of misconduct in the course of his personal bankruptcy, including making false material statements under oath and otherwise violating court orders. This Article is analogous to the tax evasion, perjury, and obstruction of justice bases of impeachment set forth in the impeachments of Judge Harry E. Claiborne, Judge Walter Nixon and Judge Samuel B. Kent—each of which involved dishonesty under oath in arguably personal and/or financial matters.

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[80] Prof. Geyh TF Hrg. IV at 36.

[81] Lori Marcotte Dep. at 47 (Ex. 76).

[82] Canon 2B of the Code of Conduct for United States Judges (1999) provides: "A judge should not lend the prestige of the judicial office to advance the private interests of others[.]" Again, it is noteworthy that the sort of conduct that is described in Article II, which the Committee has concluded warrants Judge Porteous's impeachment, also runs afoul of standards of conduct promulgated by the Judicial Conference.

In the case of Judge Harry E. Claiborne, a United States District Judge for the District of Nevada, the House voted four Articles of Impeachment. Articles I and II alleged that Judge Claiborne had filed false income tax returns for calendars years 1979 and 1980 under penalties of perjury. The returns were false because they reported total income in the amount of $80,227.04 and $54,251.00 respectively, when "as he then and there well knew and believed, he received and failed to report substantial income [from legal fees] in addition to that stated on the return." Each Article further alleged that because of such conduct, Judge Claiborne "was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office." [83]

In the impeachment of District Court Judge Walter Nixon, the first two Articles each alleged, in substance, discrete incidents of perjury before the grand jury, namely, that "[i]n the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make material false or misleading statements to the grand jury." Each Article summarized the substance of the alleged perjurious statement. Article I, for example, alleged that "[t]he false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon." Each Article concluded: "Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office." [84]

Finally, the House voted four Articles of Impeachment against Judge Samuel B. Kent. Articles III and IV alleged, in substance, that Judge Kent obstructed justice by making false statements to the Fifth Circuit Special Investigatory Committee (Article III) and to the FBI when it investigated his conduct (Article IV). [85]

Judge Porteous's conduct in his personal bankruptcy invites disrepute upon the judiciary. The need for honesty by the debtor in bankruptcy proceedings is obvious, and dishonesty by a Federal judge as a debtor in bankruptcy has particular ramifications. As Chief Judge Duncan Keir of the United States Bankruptcy Court for the District of Maryland testified:

> [Because the conduct at issue] occurs by a Federal judge, I think it has a potential effect of denigrating, if you will, the integrity of the court. What happens if 6 months later somebody has been found by a bankruptcy court to have violated these oaths and denied a discharge, and they appeal it, and the appeal goes in front of Judge Porteous? What is that argument going to be? You did it? I did it? It is untenable. [86]

Article III against Judge Porteous is consistent with these Articles against Judges Claiborne, Nixon and Kent. As with the Judge

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[83] Claiborne Impeachment Report at 1-2.

[84] Walter Nixon Impeachment Report at 1-3.

[85] H. Res. 430, 111th Cong. (2009) (Articles of Impeachment Against Judge Samuel B. Kent).

[86] Keir TF Hrg. II at 81. Thus, though Judge Porteous's bankrutpcy conduct may have been "personal" in some respects, its consequences directly impact his ability to carry out his judicial responsibilities. Further, Judge Porteous's failure acts in the nature of filing false financial disclosure forms that concealed his liabilities for years, though not charged as part of Article III, constitute part of the evidence that implicates Judge Porteous's fitness to hold judicial office.

Claiborne impeachment, Article III against Judge Porteous charges that he filled out forms related to his own personal financial situation under penalty of perjury, on which he concealed material facts. And, as with the perjury and acts of obstruction alleged in the impeachment Articles against Judge Nixon and Judge Kent, Judge Porteous's dishonest statements on court forms and his violation of a court order occurred in the context of a Federal judicial proceeding and demonstrated a disregard of, and contempt for, the authority of the supervising Federal court.[87]

4. Article IV

Article IV alleges that Judge Porteous committed a fraud on the judicial confirmation process by making material false statements to the FBI and on his Senate Judiciary Committee Questionnaire in response to questions as to whether there was anything in his past that could be used to blackmail or coerce him. Judge Porteous answered "no" to such inquiries, notwithstanding his unlawful financial relationships with certain attorneys (Creely and Amato) and with the Marcottes.

For reasons set forth in the discussion of Article II, it is appropriate to consider pre-Federal bench conduct as a basis to impeach. Even though Judge Porteous did not make the statements in a judicial capacity, and even though this conduct did not carry over into his tenure as a Federal judge, the false statements corrupted the judicial appointment and rendered it illegitimate from its inception. 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.[88]

Professor Gerhardt agreed that "lying to or defrauding the Senate in order to be approved as a Federal judge" is likely to justify impeachment. First of all, that conduct 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."[89] Professor Gerhardt noted, however, that in the case of Judge Porteous, it is not necessary to determine whether the false statements themselves demonstrated his unfitness.

> 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

[87] Professor Gerhardt noted that the violation of the bankruptcy laws "reflects a level of disdain for the law that I think is just simply incompatible with being a Federal judge." Prof. Gerhardt TF Hrg. IV at 36.

[88] Prof. Amar TF Hrg. IV at 18.

[89] Prof. Gerhardt TF Hrg. IV at 24.

> constitutional responsibilities of the President and the Senate.[90]

The questions are sufficiently precise for purposes of concluding that the false answers were knowing and intentional, and warrant impeachment. As Professor 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. . . .
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> * * *
>
> [W]e know what those questions at their core [were] about, and he lied at the core. There is vagueness at the periphery, but this was really central.[91]

VIII. THE FACTS UNDERLYING ARTICLE I—JUDGE PORTEOUS'S RELATIONSHIPS WITH ATTORNEYS ROBERT CREELY, JACOB AMATO, JR., DON GARDNER AND LEONARD LEVENSON, AND HIS HANDLING OF THE *LILJEBERG* CASE

A. Introduction

Judge Porteous, while a State court judge, was particularly close to four attorneys: Jacob Amato, Jr., with whom Judge Porteuos had practiced law; Robert Creely, Amato's partner who also practiced with Judge Porteous; and local attorneys Leonard Levenson and Donald Gardner. These individuals regularly paid for expensive lunches for Judge Porteous, accompanied him on travel, including travel to gambling establishments, hosted him on hunting trips, and otherwise subsidized his lifestyle. Creely and Amato, in particular, provided Judge Porteous substantial cash from "curatorships" assigned to Creely by Judge Porteous.

Judge Porteous's personal and financial relationships with these attorneys, as well as his financial dependence upon them, became particularly significant in connection with his handling of a civil case, *Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc.*,[92] when he was a Federal judge. A few weeks prior to the scheduled November 1996 non-jury trial before Judge Porteous, the defendants (the Liljebergs) brought in Amato and Levenson as trial counsel. In response, the plaintiffs (Lifemark) filed a motion to recuse Judge Porteous, arguing that Amato's and Levenson's late entry in the case and their known close relationships with Judge Porteous supported the conclusion that Amato and Levenson were hired precisely because of those relationships. Counsel for

[90] Prof. Gerhardt TF Hrg. IV at 31.

[91] Prof. Amar TF Hrg. IV at 34-35. Professor Amar further noted that these questions did not constitute some sort of "trap" for the unwary: "All he has to do is say, ['I do not wish to be considered for this position.']" Id. at 42.

[92] Civ. Action No. 93-1794 (E.D. La.). See PACER Docket Report (Ex. 50).

Lifemark, however, was unaware of any prior financial relationship between Judge Porteous and Amato, and unaware that Amato and his partner Creely had provided Judge Porteous thousands of dollars in cash while Judge Porteous was a State judge.

Judge Porteous denied Lifemark's recusal motion in a fashion that concealed his respective relationships with Amato and Levenson. Lifemark then added Gardner to their trial team. Trial was ultimately held in June and July 1997. Subsequent to trial, while the case was pending his decision, and while his financial circumstances were significantly deteriorating, Judge Porteous continued to seek money and accept other things of value from these four attorneys.

Finally, in April 2000, as his financial situation became increasingly dire (and just weeks prior to his consulting with a bankruptcy attorney), Judge Porteous ruled for the Liljebergs. This verdict, if it had stood, would have been worth hundreds of thousands of dollars in legal fees to Amato (and his partner Creely) and Levenson—men who had supported Judge Porteous's life-style for years. Judge Porteous's decision was reversed by the Fifth Circuit Court of Appeals, in a scathing opinion that castigated Judge Porteous's legal reasoning.

B. Relationships with the Attorneys Pre-*Liljeberg*—Meals, Trips, Hunting and Entertainment[93]

Meals and Related Entertainment. Beginning with Judge Porteous's years on the State court bench and continuing through his tenure on the Federal bench, the four attorneys—Creely, Amato, Levenson and Gardner—routinely provided Judge Porteous with meals, trips, and entertainment, as well as covered other expenses.

Amato and Creely took Judge Porteous to lunch frequently. When asked how frequently Judge Porteous paid, Amato testified "[n]ot very often."[94] As Amato noted: "He [Porteous] probably paid for one or two of them."[95] As to the frequency of the lunches: "It would depend upon what his schedule was and my schedule. I would say we probably met two to three times a month over a, you know, a period of time. And depending—you know, some months it might have been more. Some months less. It just depended."[96] Amato identified the restaurants he took Judge Porteous to as including: Red Maple, Beef Connection, Ruth's Chris Steak House, Fitzgerald's, and Smith & Wollensky's.[97] Amato also recalled paying for Porteous's swearing in party as a Federal judge at the "Jefferson Orleans,"[98] at which about 100 to 200 people attended.[99] This would have been in late 1994. This party would have cost several thousand dollars.[100]

[93] There is no attempt here to break out the meals, entertainment, and trips that occurred prior to and subsequent to Judge Porteous's appointment as a Federal judge.
[94] Amato 5th Cir. Hrg. at 254 (Ex. 20).
[95] Amato 5th Cir. Hrg. at 255 (Ex. 20). See also Amato TF Hrg. I at 104 (Judge Porteous paid for lunch for Amato "at least on one occasion").
[96] Amato GJ at 15 (Ex. 18).
[97] Amato 5th Cir. Hrg. at 255 (Ex. 20).
[98] Amato GJ at 38 (Ex. 18).
[99] Amato GJ at 66 (Ex. 18).
[100] Amato GJ at 39 (Ex. 18).

Gardner described purchasing Judge Porteous numerous meals over time—"50, 60 lunches a year when he was a [New Orleans] district court judge."[101] In response to questioning at the Task Force deposition, Gardner agreed that he had paid for "countless, countless, countless more meals" than Judge Porteous had paid for Gardner.[102]

Levenson also testified to treating Judge Porteous to lunches over the years. Levenson testified that, starting while Judge Porteous was a State court judge, these lunches "would average . . . maybe over the course of a year three or four times a month, or more. Some months would be or some weeks would be more. Some would be less."[103] Levenson paid "[m]ost of the time;"[104] Judge Porteous paid "[v]ery rarely."[105] "To say that I could specifically remember him picking up another lunch bill, no. Did he do it? I'm sure he did. Was it rare? Yes."[106] Levenson listed the restaurants they went to as Mandina's, Ruth's Chris Steak House, Smith & Wollensky's, Bon Ton, Red Maple, and the Beef Connection.[107] Judge Porteous at the Fifth Circuit Hearing testified that Levenson took him out to places such as Ruth's Chris Steak House and Smith & Wollensky's.[108]

Former State Judge Ronald Bodenheimer testified that when he was first elected, Judge Porteous gave him pointers on being a judge. Judge Porteous told Bodenheimer that he would "never have to buy lunch again. . . . There will always be somebody to take you to lunch."[109]

These attorneys continued taking Judge Porteous out for lunches after he became a Federal judge, including during the period when they had the *Liljeberg* case pending before him.

Creely took Judge Porteous on several hunting and fishing trips while Judge Porteous was on the State bench. For example, Creely identified a dove hunt in Mexico in September 1990, where he paid for Judge Porteous. Creely also took Judge Porteous on another dove hunting trip to Mexico—probably in September 1993.[110] The

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[101] Gardner GJ at 69 (Ex. 33). See also, Gardner Dep. at 8 (lunch "once a week" when Judge Porteous was a State judge) (Ex. 36).

[102] Gardner Dep. at 37 (Ex. 36).

[103] Levenson GJ at 10 (Ex. 25).

[104] Levenson GJ at 10 (Ex. 25).

[105] Levenson GJ at 11 (Ex. 25).

[106] Levenson GJ at 12 (Ex. 25).

[107] Levenson GJ at 15 (Ex. 25); Levenson Dep. at 28 (Ex. 30). Judge Porteous stipulated to Levenson's and Forstall's grand jury testimony at the Fifth Circuit Hearing. 5th Cir. Hrg. at 341.

[108] Porteous 5th Cir. Hrg. at 128 (Ex. 10). Another attorney, Warren A. Forstall, stated he would take Judge Porteous to lunch at Ruth's Chris Steak House and Smith & Wollensky's, and that he [Forstall] always paid the bill. Forstall GJ at 30 (Ex. 38). The Ruth's Chris Steak House bills, on average, were $100. Id. at 31.

[109] Bodenheimer testified that Judge Porteous told him:

> Congratulations kid, you know. Now, let me tell you, give you some pointers about being a judge. Number one, you'll never be known as Ronnie again. You'll be judge for the rest of your life. Number two, you'll never have to buy lunch again OK. There will always be somebody to take you to lunch. And number three, always wash your rear end so the attorneys have a clean place to kiss.

Bodenheimer GJ at 10 (Ex. 87). See also Bodenheimer Dep. at 12 (Ex. 86).

[110] Creely GJ at 19-20 (Ex. 11). Creely also testified there may have been another trip to Mexico in 1995 (when Judge Porteous was a Federal judge). He said he knows he took Judge Porteous twice, and maybe a third time. Id at. 20-21. Creely also traveled to Las Vegas with Judge Porteous a few times when Judge Porteous was a State judge. Creely recalled going to Las Vegas with Judge Porteous as part of a fund-raiser to retire campaign debt of a local candidate in September 1990 , Creely GJ at 29-31 (Ex. 11) and in January 1991 on a Jefferson

Continued

cost of these trips paid for by Creely would have been approximately $1,500 per person plus air fare.[111] Creely also took Judge Porteous fishing on a houseboat Creely leased at Delacroix Island on more than 20 occasions—each time hosting Judge Porteous.[112]

Levenson went on trips to Las Vegas with Judge Porteous, as part of a group, on more than one occasion when Judge Porteous was a State judge. Levenson also recalled going on "one . . . maybe two" trips to Las Vegas. One of the trips was to the Riviera Hotel where Levenson shared a room with Judge Porteous. Attorney Warren Forstall also went on that trip and roomed with State Judge George Giacobbe. Although Levenson did not have a specific recollection of what he may have paid for Judge Porteous, he answered affirmatively that he "could state with confidence . . . that [he] paid for some aspects of drinks or meals or other entertainment . . . for which Judge Porteous would have been a beneficiary."[113]

Gardner also recalled going to Las Vegas with Judge Porteous on several Jefferson Bar Association "Continuing Legal Education" trips, which he thought occurred in the 1970's.[114]

C. Cash from Creely and Amato (Pre-*Liljeberg*)

Amato and Creely formed a law partnership in about 1975 that lasted until 2005. It was a true partnership—all the income and expenses were shared, they held joint accounts, they held themselves out as partners, and took equal draws.[115]

While he was on the State bench, Judge Porteous requested cash from Creely on several occasions. Creely provided cash to Judge Porteous in response to those requests. As Creely testified:

> Q. [C]an you just describe a typical instance that would characterize how this request would be made and the sorts of dollar amounts which were encompassed by these requests?
>
> A. In reference to the dollar amounts, it would be hard for me to say. He would ask me for money when we were together socially or fishing or one of those things. He would ask for money.
>
> Q. Did he give you reasons?
>
> A. Yes. He would have—it would be a number of reasons, just a number of reasons, like needing to pay tuition, needing to meet his obligations, financial obligations.[116]

Bar "Continuing Legal Education" trip. Creely GJ at 32 (Ex. 11). Caesars Palace records reflect that Creely gambled at that casino in January 1991.

[111] Creely GJ at 19-20. Creely also testified there may have been another trip to Mexico in 1995 when Judge Porteous was a Federal judge. He testified he knows he took Judge Porteous twice, and maybe a third time. Id. at 20-21.

[112] Creely GJ at 24-25 (Ex. 11).

[113] Levenson Dep. at 18-19 (Ex. 30).

[114] Gardner GJ at 23 (Ex. 33).

[115] Creely Dep. at 3 (Ex. 16).

[116] Creely Dep. at 6 (Ex. 16). Before the Grand jury, Creely testified: "Every time he came to us it was a car note he couldn't pay. His house was being foreclosed upon. He couldn't pay his kids' tuition." Creely GJ at 61 (Ex. 11). At the Fifth Circuit hearing, Creely stated that Judge Porteous requested the money "for various personal issues." . . . "[I]t would be things like tuition, different things that he needed in his—in his personal life." Creely 5th Cir. Hrg. at 199 (Ex. 12).

The amounts were as much as $500 to $1,000 and Creely never perceived these payments to be loans.[117] Creely explained that he and his partner, Amato, would take draws from the firm account in the form of checks payable to the two men, would cash the checks, and would give Judge Porteous the cash. When asked to describe the mechanics of how he would get the money to give to Judge Porteous, Creely testified:

> [I] think sometimes I had to go cash a check, take a draw, yes. Yes, sir. I did not always have money to hand him. I would have to get—I'd have to say, you know—"You know, his tuition's due. He can't pay his tuition, Jake [Amato]." And he'd say, "all right," you know. "How much money does he need?" And I would say five hundred or a thousand dollars, whatever. I'm just—and I wanna try to be fair to him, OK, to whatever number. And then we'd go get a check cashed and give him the money.[118]

Even though the requests were made to Creely, and the actual provision of money to Judge Porteous came from Creely, the payments to Judge Porteous were split 50-50 between Creely and Amato.[119]

Amato testified consistently as to Judge Porteous's reasons for needing money (as reported to Amato by Creely), the frequency of the requests, the procedures for getting the money to Judge Porteous, and the fact that the payments were split between Amato and Creely. Amato testified that "Bob [Creely] would come in and say, you know, 'Porteous is looking for money.'" After the request was made: "We both took draws to do it. We would split it. . . ." Amato characterized the reasons Judge Porteous gave as follows: "[H]e couldn't pay the tuition for his children. He was gonna lose his house. They were gonna take his car. His daughter was a maid in the Washington Ball and he needed money. Those are the kind of stories that I would get through Bob Creely that Porteous needed money. . . . [H]e [Judge Porteous] was always poor mouthing, you know, he was always busted. He always—you know, it was always a catastrophe. It was always something that, you know—that, you know, hard to ask a—it's hard to turn down a friend, you know."[120]

D. The Curatorship Kickback Scheme with Creely and Amato

1. Creely's and Amato's Testimony

Creely ultimately balked at providing monies to Judge Porteous. Creely testified: "I told him, quite frankly, I thought it was an imposition on our friendship for him to continue to ask me for money."[121] As Creely stated in his Task Force deposition: "I got

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[117] Creely Dep. at 7 (Ex. 16).

[118] Creely GJ at 50 (Ex. 11). See also Creely TF Hrg. I at 20 (Judge Porteous would ask for money for "tuition" and "living expenses").

[119] Creely Dep. at 8 (Ex. 16).

[120] Amato GJ at 25-28 (Ex. 18). See also Amato GJ at 61 (Ex. 18) (to obtain money Amato and Creely would each take a draw).

[121] Creely TF Hrg. I at 21.

tired of the requests for every request he made. I was tired of it."[122]

As a result of Creely's discontent, and in order to generate cash that Creely and Amato could then use to provide Judge Porteous money as he requested, Judge Porteous began increasingly to assign Creely "curatorships."[123] Judge Porteous took this initiative at a time when Creely was resisting giving him more money. Creely described how this scheme began as follows:

> [T]his borrowing turned into this, as you said, burden, and that's a good word 'cause I, you know, can use many words for it. But he—there was a time I said, you know, "I just can't keep doing this man, I can't keep supporting your family." . . .
>
> And so I told him I had to stop. I gotta stop doing this. All right . . . But he started sending curatorships over to my office. . . . And he would send like two or three at a time. . . .
>
> And he then started calling and saying, "Look. I've been sending you curators, you know. Can you give me the money for the curators?" I said, "Man." So I talked to my law partner. I said, "Jake, you know, man what do we do?" He says, "Well, just go ahead and give it to him." We decided to give him the money. We would deduct the expenses. We would pay income taxes on it. . . .
>
> But the practice became that he—and it got to the point that he would call my secretary and say, "Dianne, how may curators do I have over there?" And then she'd come in and it was like a—it was a bad deal. I mean, it's a bad feeling. OK. And she would say, she'd say, "Hey, you got four or five curators" and say, "He's calling wanting the money on [sic]." And I said, "Well, just go get two draws, one for Jake, one for me" and then I would give him the money. Either me or Jake would give him the money.[124]

Creely would receive a fee of approximately $200 for a curatorship, which went into the law firm accounts. Creely did not want these curatorships,[125] even though they involved minimal work.[126] Rather, Creely viewed these curatorships as "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."[127]

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[122] Creely Dep. at 7 (Ex. 16). Creely testified consistently before the Fifth Circuit: "[I] told him that I—we could not continue giving him money, I couldn't continue giving him money." Creely 5th Cir. Hrg. at 204 (Ex. 12).

[123] Creely described the duties of a curator as follows: "[W]hat you do is, you represent an absentee that they can't find. So when somebody would get their house foreclosed on and they would leave and they couldn't find them to serve them with the foreclosure proceedings the court would appoint a lawyer. And I would be the curator in the Porteous instances, in which case then I would have to—the bank would give me the last known address—write a letter, registered letter. Then I'd have to run an ad in the newspaper. And then I'd have to get a certified copy. . . . But a curator is to represent a person that they can't find." Creely GJ at 101-02 (Ex. 11).

[124] Creely GJ at 51-54 (Ex. 11).

[125] At the Task Force Hearing, when asked if he wanted Judge Porteous to assign him curatorships, Creely answered, "No, I did not," and testified they were not important to his business. Creely TF Hrg. I at 21-22.

[126] All the work, consisting primarily of placing notices in the newspapers and preparing routine notices to be filed with the court, was done by Creely's secretary.

[127] Creely 5th Cir. Hrg. at 209-10 (Ex.12).

This was not a dollar-for-dollar arrangement. At the Fifth Circuit Hearing, Creely testified that Judge Porteous received more than 50% of the curatorship fees. Creely also confirmed that the payments of the curatorship fees to Judge Porteous were at Judge Porteous's request.[128] Notwithstanding the mechanics of the scheme, Creely resisted characterizing it as a "kickback" scheme because Creely did not believe he was getting anything out of the arrangement:

> It had nothing to do with, "Look, why don't you give me these and I'll give you that back," or "Do something for me and—you know, and I'll give you this back." It was just—it just occurred that he—you know, he got the curator money.[129]

In the Task Force Hearing, Creely similarly resisted the use of the term "kickback" to describe the relationship, describing the fact that he had received the curatorships from Judge Porteous as a "justification to help him out so that I didn't have to go and spend my own money on him."[130] Nonetheless, Creely understood that Judge Porteous linked his assignment of curatorships to Creely's giving cash back to Judge Porteous.[131]

> Q. [Mr. Johnson] The curatorship process, you say that you would not—there was no agreement before this scheme started, but didn't it become apparent to you during the course of the curatorship scheme that this was a way of you being able to pay Judge Porteous?
>
> A. It evolved into that, yes. He began to rely upon the curators, began to call for them, and we rationalized he is asking for money, giving him the money. And it wasn't all of the money, but, yes, it—that is what it sounds like.[132]

Creely's partner, Amato, confirmed the essentials of this arrangement. Amato testified that "Mr. Creely came to me 1 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."[133] In response to questioning by Task Force Chairman Schiff, Amato testified:

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[128] Creely 5th Cir. Hrg. at 208-09 (Ex. 12).

[129] Creely 5th Cir. Hrg. at 209-10 (Ex.12). The term "kickback" is occasionally used in this Report notwithstanding Creely's resistence to it, and notwithstanding the evidence that suggests that he and Amato were not thrilled about this financial relationship, about engaging in these acts to give Judge Porteous money at Judge Porteous's instigation.

[130] Creely TF Hrg. I at 23.

[131] From Creely TF Hrg. I at 23:

> Q. [S]o he was taking official acts [assigning curatorships] to enrich himself, correct?
>
> A. [Creely] I can't speak for him, but that was my understanding.

[132] Creely TF Hrg. I at 38.

[133] Amato TF Hrg. I at 100. He also testified before the Task Force: "[J]udge Porteous sent curator cases to Bob Creely and at some point asked that he be—receive some of that money." Id. Amato has been consistent throughout his various appearances. Before the grand jury, Amato testified that Judge Porteous "would send curatorships to Bob Creely and then he would ask Bob to, you know, 'I need some money for one of these catastrophes. And, you know, I've sent you 10 or 15 or 20' or however many 'curatorships so, you know, send me a check or' not 'Send me a check.' But you know, 'I need some money.'" Amato GJ at 61 (Ex. 18). At the Fifth Circuit Hearing, he testified: "At some point in time when Judge Porteous was on the State

Continued

Q. [Mr. Schiff] [W]as there ever any doubt in your mind that what he [Judge Porteous] was asking for during the period he was sending you curatorships was part of the money he was sending you for the curatorships?

A. No, no doubt.[134]

Amato knew that giving money to Judge Porteous was wrong.[135] When asked whether he felt he had a choice as to giving Judge Porteous money, he replied: "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."[136]

2. *Judge Porteous's Statements About His Financial Relationship with Amato and Creely at the Fifth Circuit Hearing*

In his testimony at the Fifth Circuit Hearing, Judge Porteous confirmed the essential aspects of his receiving cash from Amato and Creely at the Fifth Circuit Hearing. He admitted that: 1) he received cash from Creely and Amato; 2) at some time, Creely expressed his displeasure with giving him cash; and 3) thereafter his receipts of cash were linked to his assigning Creely curatorships. At that Hearing, he testified:

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.[137]

Judge Porteous also admitted that these transactions "occasionally" followed his assignment of curatorships to Creely, though he claimed he did not know if the amounts paid back to him "matched each time" the curatorship fees.[138]

Furthermore, Judge Porteous confirmed that he started assigning Creely the curatorships after Creely expressed resistance to giving Judge Porteous money:

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.[139]

Judge Porteous implied in his cross-examination of Creely and Amato at the Fifth Circuit Hearing that he gave Creely and Amato the curatorships so they would have funds to pay an individual

bench, Bob Creely started getting a number of curator cases. And after a period of time that that went on, Bob came to me and said that, 'The judge is—Judge Porteous wants some of the curator fees. What should we do?' . . . Well, I told him I didn't like the idea but I guess it's something we had to do." Amato 5th Cir. Hrg. at 238 (Ex. 20).

[134] Amato TF Hrg. I at 107.

[135] Amato TF Hrg. I at 111.

[136] Amato TF Hrg. I at 101.

[137] Porteous 5th Cir. Hrg. at 119 (Ex. 10).

[138] Porteous 5th Cir. Hrg. at 130-33 (Ex. 10).

[139] Porteous 5th Cir. Hrg. at 134 (Ex. 10).

they had hired at Judge Porteous's request. Amato denied this to be the case and Creely did not recall it.[140]

3. Judge Porteous's Knowledge of Amato's Financial Participation

Even though Judge Porteous's requests for and receipts of cash went through Creely, the evidence establishes that Judge Porteous knew that the monies coming back to him were from Amato as well. Judge Porteous was close to Amato, had practiced with him, and the Amato-Creely partnership was well-known. When asked at the Task Force Hearing if Judge Porteous would have known the money was coming from Amato as well as Creely, Amato responded: "Of course. 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."[141]

Further, Judge Porteous, in questioning Amato at the Fifth Circuit Hearing, evidenced his understanding that the money provided to Judge Porteous came from Amato in addition to Creely:

> Q. [J]ust so I'm clear, this money that was given to me, was it done because I'm a judge, to influence me, or just because we're friends?
>
> A. Tom, it's because we were friends and we've been friends for 35 years. And it breaks my heart to be here.[142]

4. Frequency and Amounts of Cash from Amato and Creely

Throughout the various proceedings—the DOJ investigation, the Fifth Circuit Hearing, and the Task Force Inquiry—efforts have been made to quantify the amounts of cash given to Judge Porteous by Creely and Amato. Creely's and Amato's estimates have varied.

a. Grand Jury Testimony

In his March 2006 questioning before the grand jury, Creely estimated that the total amount given to Porteous could have been more or less than $10,000.

> Q. And how much cash we're talking about?
>
> A. [I] don't know how much it is. I mean, it could be $10,000. It could be less than that.[143]

---

[140] Creely 5th Cir. Hrg. at 232-33 (Ex. 12); Amato 5th Cir. Hrg. at 260-62 (Ex. 20). In any event, this would not provide any legitimate basis for curatorship fees to have been given back to Judge Porteous.

[141] Amato TF Hrg. I at 100. Amato elaborated in his deposition: "[W]e had a professional law corporation, Amato and Creely, PLC. We filed tax returns. We had office signs. We had cards, checks. We owned the office building together. . . ." "[W]e had a pension profit sharing plan. . . ." He went on to testify:

> Q. Now, in the course of those encounters from your vantage point, would Judge Porteous have known that you and Bob were true, full-blown partners?
>
> A. I don't, I don't know anything else we could have done to indicate otherwise.
>
> * * *
>
> Q. And following up, therefore, on the previous set of questions, is there any question in your mind that Judge Porteous would have known that the money that was coming back from Mr. Creely for those curatorships was an equal part money coming from you?
>
> A. I would, I would think so. I mean, I, I don't know what was in his mind, but I would think he would imagine that, you know.

Amato Dep. at 5-7 (Ex. 24).

[142] Amato 5th Cir. Hrg. at 258-59 (Ex. 20).

[143] Creely GJ at 44 (Ex. 11).

In his May 2006 questioning before the grand jury, Amato testified that the amount was greater than $10,000 and less than $50,000, agreeing that it was "probably" over $10,000, but "I don't think it ever approached anywhere near [$50,000].[144]

b. Fifth Circuit Hearing

In October 2007, before the Fifth Circuit, Creely was asked how much he and Amato gave to Judge Porteous. He responded: "I would say approximately $10,000 thereabout. Maybe more than that but at least 10,000."[145]

In response to questioning by Judge Benavides, Amato testified consistently with his grand jury testimony as to the frequency and total amount of the cash requests—this time agreeing that it could be from $10,000 to $20,000:

> A. It has just—it's been so long ago and so much water under the bridge since then, I can't tell you specifically how many draws we took, how much money we gave, and when did we give it to him.
>
> Q. All we need is an amount.
>
> A. It was never an amount that was astonishing. It was always a couple thousand dollars.
>
> Q. A couple thousand dollars sometimes every 6 months and sometimes every three or 4 weeks?
>
> A. Yeah, but, I mean, it wasn't a constant thing. It wasn't, you know, "Look, I expect a check every Thursday" or Friday for 2 weeks or anything like that, no.
>
> * * *
>
> Q. All right. But there's no doubt that there had been, you say, not more than $50,000; but would be fair to say ten to twenty thousand dollars in cash?
>
> A. I would say, yes, close to that.[146]

In his testimony before the Fifth Circuit, Judge Porteous admitted receiving cash from Amato and Creely, but would not be pinned down on an amount. He did not deny that the total amount could have been in excess of $10,000. He 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.
>
> * * *
>
> 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.

---

[144] Amato GJ at 36-37 (Ex. 18). Amato testified that he thought all the funds given to Judge Porteous came from the "curatorship" scheme. Amato 5th Cir. Hrg. at 242 (Ex. 20).

[145] Creely 5th Cir. Hrg. at 201 (Ex. 12).

[146] Amato 5th Cir. Hrg. at 242, 247 (Ex. 20).

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.[147]

c. Task Force Inquiry—Creely and Amato Depositions

In Creely's Task Force Deposition, he stated that the amount paid to Judge Porteous by Amato and himself was close to $20,000 (including approximately $2,500 paid in 1999, discussed below). He testified:

Q. What is your best feel for how much that [what you and Amato gave Judge Porteous] would have amounted to?

A. During the twenty year period of time he was on the bench, it would be about $10,000 a piece.

Q. So that would be about $20,000; is that right?

A. Yes.

Q. And this was all cash, correct?

A. Yes.[148]

At his deposition, Amato acknowledged that the amount could have even been greater than $20,000:

Q. Now, referring again to these monies from the curatorships, at some point in prior testimony the amount of $10,000 was used to describe in some sense the amount of monies which had come from you and Creely to Judge Porteous when he was a State judge. If upon the analysis of the curatorship records the amount proves to be greater by some substantial amount, is that a fact that you would take dispute with?

A. No. I don't—I have no idea how much the curators amounted to.

Q. Okay. So if it was over 20,000 or over 30,000 or whatever the dollar amount is, that is not an amount that you would disagree with?

A. Right.[149]

d. Task Force Hearing Testimony

At the Task Force Hearing, Creely, consistent with his deposition testimony, estimated the amount that he and Amato paid to Judge Porteous was approximately $20,000.[150]

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[147] Porteous 5th Cir. Hrg. at 118-19 (Ex. 10).
[148] Creely Dep. at 8-9 (Ex. 16).
[149] Amato Dep. at 7-8 (Ex. 24).
[150] Creely TF Hrg. I at 24.

Amato, like Creely, estimated at the Task Force Hearing that the amount was "over $10,000, but how much over, I don't know."[151] He did not disagree with Creely's estimate that the amount could have been as much as $20,000.[152]

e. Analysis of the Curatorship Records from the 24th Judicial District Court

Subsequent to Creely's deposition but before Amato was deposed, the Task Force obtained from Amato a computer printout of records that were retained in his office's computer system that listed the curatorships assigned to Creely.[153] The printout revealed that Creely had over 350 curatorships assigned to him (from all judges—not just Judge Porteous) in the late 1980's (when the firm's financial records were first computerized) and early 1990's. Of the cases listed in that printout, the Clerk's Office of the 24th Judicial District Court ("24th JDC") located and made certified copies of the curatorship cases that, based on case assignment information, appeared to be the ones that were most likely to have been handled by Judge Porteous. Those records have been provided to the Task Force. The analysis of those records reflects the following:

Total number of curatorships assigned to Creely: 350

Total number of these cases located by the 24th JDC Clerk's Office: 209

Total number of theses cases assigned to Creely by Judge Porteous: 192

The reimbursement amount to Creely would have started at $150 in 1988, increased to $200 sometime in 1988, and stayed at $200 until 1994. The payment to Creely for the 192 curatorships that have been identified is approximately as shown in the following chart:[154]

[151] Amato TF Hrg. I at 101. See also Amato TF Hrg. I at 108 (agreeing that the total amount was "in the neighborhood of 10 [thousand] to 20 thousand [dollars]").

[152] Amato TF Hrg. I at 101.

[153] Ex. 193. These were identified by Amato's long-time accountant Jody Rotolo. See also Rotolo Dep. (Ex. 191). Mr. Amato provided the records to the Task Force without a subpoena.

[154] This chart has been marked as Ex. 190. A similar chart, used at the November 17, 2009 Task Force Hearing, listed 191 curatorship cases. Further review has identified an additional curatorship assigned by Judge Porteous to Creely, and has revealed a few changes in the amounts in some of the years. The curatorships are listed on the Exhibit List as Exhibits 189(1) through 189(227), and includes a few curatorships that were assigned to Creely by other judges.

Table 1. Fees Received by Creely from Curatorships Assigned by Judge Porteous

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	$6,000
1994	20 x $200	$4,000
TOTAL	192	$37,500 - $38,400

Thus, the best evidence to date is that a minimum, Judge Porteous assigned curatorships to Creely resulting in Creely receiving fees amounting to over $37,500 from 1988 through 1994.

E. Cash and Things of Value from Gardner

Donald Gardner was another attorney from whom Judge Porteous asked for money and other things of value, and who also ended up as an attorney in the *Liljeberg* case discussed below. His testimony, including his description of Judge Porteous's behavior, is consistent with (and thus serves to corroborate) the testimony of Creely and Amato.

As to requests for cash, Gardner testified he gave Judge Porteous money on more than one occasion, at least sometimes in connection with Judge Porteous's gambling. Gardner's grand jury testimony does not pin him down on the frequency of these events or the dates they occurred:

> I wouldn't say often, but when I was with Tom [Porteous], he'd come up to me . . . Donnie, you got $200? Can I borrow $200 from you? I'm a little short. I'd give him the $200. Can I borrow $100 from you? You know. And I'd give it to him.[155]

Similarly:

> I think he [Porteous] was always short. I think that's why, you know, he would ask me from time to time for money for stuff, you know, to buy gifts, to do this or whatever.
>
> At the gambling casinos at the CLE [Continuing Legal Education trips], you know, I remember. . . . I gave him a couple hundred dollars. He, you know, Donnie, I'm bust-

[155] Gardner GJ at 31 (Ex. 33).

> ed. You got a couple hundred dollars on you? Like I said, I didn't gamble. I always had money if you don't gamble.[156]

At the Fifth Circuit Hearing, Gardner estimated the amount he gave Judge Porteous to be "[p]robably less than [$]3,000."[157] Gardner agreed with the questioner that his payments to Judge Porteous were "in small amounts, like $300 or a hundred dollars, when he [Judge Porteous] would ask."[158] Gardner specifically recalled an instance when he gave Judge Porteous $200 so that Judge Porteous could buy a Christmas present (drinking glasses) for his wife.[159] In the grand jury, Gardner testified that the total amount was more like $2,000:

> Q. How many times did he ask you for cash in the amount of—in the range of a hundred dollars or in the range of between fifty and a hundred dollars?
>
> * * *
>
> I'm asking in total.
>
> A. In total from the time I've known Tom to present, most of it was before he was a Federal judge. But I would imagine that the total would be close—and I keep going through adding it up in my mind—$2,000, give or take.[160]

Gardner also recalled paying for some home improvements (hanging fans, paying a sheet rock installer), paying to have Judge Porteous's car towed when it broke down, as well as buying Judge Porteous an expensive fountain pen.[161]

As he did with Creely, Judge Porteous assigned Gardner curatorships. Gardner denied that Judge Porteous asked for cash back from these appointments.[162]

Judge Porteous called Gardner as a witness on his behalf at the Fifth Circuit Hearing. In response to questioning from Judge Porteous at that Hearing, Gardner testified as follows:

> When we were practicing lawyers, we were Christmas shopping for the wives; and I believe that you had bought a gift and you were short. And you asked me if I had some money on me. You wanted to buy some glasses—glasses, and I think I gave you some money then.

---

[156] Gardner GJ at 62-63 (Ex. 33). Gardner provided more detail in his deposition testimony, testifying: "[On occasions] when we were at CLE [Continuing Legal Education], he would come up and say, 'Don, you got a hundred dollars?' And sometimes I'd give him a couple 20's. I'd give him—I'd count out five 20's or a hundred dollars. But I have to tell you, there was never any occasions where Tom Porteous ever asked me for any large sums of money or did I give him that. It would just be, 'Hey, I'm short. You've got a few dollars?'" Gardner Dep. at 32 (Ex. 36).

[157] Gardner 5th Cir. Hrg. at 461 (Ex. 32).

[158] Gardner 5th Cir. Hrg. at 467 (Ex. 32).

[159] Gardner GJ at 31-32 (Ex. 33).

[160] Gardner Dep. at 32-33 (Ex. 36).

[161] Gardner GJ at 32-34 (Ex. 33); Gardner 5th Cir. Hrg. at 468 (Ex. 32).

[162] Gardner 5th Cir. Hrg. at 464 (Ex. 32). There might have been as many as one per month on the average. Gardner Dep. at 24-25 (Ex. 36). Gardner testified he received 50 curatorships from Judge Porteous, if not more. This would have meant approximately $10,000 in fees. (The curatorship reimbursement rates at the applicable time period were $150 and $200.) Even if Judge Porteous did not have the same understanding with Gardner as he did with Creely regarding the curatorships, it is significant that Judge Porteous assigned the curatorships to an individual who in turn was spending money on him on a regular basis. It is reasonable to conclude that Judge Porteous knew and intended that by assigning Gardner curatorships, he was generating cash for Gardner that Gardner could, in turn, use for Judge Porteous's benefit.

> At various times, you'd asked me for this or that when we were out either eating or drinking and I'd advance it to you or give it to you. I did so as a friend.[163]

At the Fifth Circuit Hearing, Judge Porteous admitted receiving cash from Gardner prior to his becoming a Federal judge.

> Q. Now, other than Messrs. Amato and Creely, who else had—what other lawyers—lawyer friends of yours have given you money over the years?
>
> A. Given me money?
>
> Q. Money, cash.
>
> A. Gardner may have. Probably did.
>
> * * *
>
> Q. And when is the last time Mr. Gardner gave you money?
>
> A. Before I took the Federal bench, I'm sure.
>
> Q. Okay. And do you recall how much?
>
> A. Absolutely not.[164]

F. Creely's Statements as Part of Judge Porteous's Background Check

In August 1994, Creely was interviewed by the FBI as part of Judge Porteous's background check. The FBI write-up of the interview reports:

> CREELY has never known the candidate to use illegal drugs or to abuse alcohol or prescription drugs. . . . CREELY advised that he knows of no financial problems on the part of the candidate and the candidate appears to live within his economic means.[165]

In his August 28, 2009 Task Force deposition, Creely was questioned about his statements concerning Judge Porteous's drinking habits and financial circumstances. Although Creely stated that Judge Porteous "drank excessively," and that "he did, in my opinion, drink a lot," he also stated that Judge Porteous "was a very intelligent man" and that "[h]is drinking in no way impaired his ability as a judge."[166] In his Task Force Hearing testimony, Creely

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[163] Gardner 5th Cir. Hrg. at 461 (Ex. 32). Judge Porteous asked for and accepted money from Gardner to buy a Christmas present for his wife:

> We [Judge Porteous and Gardner] were shopping one Christmas and he wanted to buy Mel [Judge Porteous's wife Carmella]—we would go out for Christmas and try to find a gift for our wives, and he wanted toasting glasses. He was short and he asked me, he says, "Don, can I borrow $200 for toasting glasses?"
>
> They were in the 160, 180 range. And I had it on me because I had Christmas money and loaned it to him.

Notwithstanding Gardner's use of the word "loan," Judge Porteous never repaid him. Gardner Dep. at 34-35 (Ex. 36).

[164] Porteous 5th Cir. Hrg. at 129 (Ex. 10).

[165] Creely FBI Interview, Aug. 1, 1994, PORT 0477-78 (Ex. 69(b)) (also marked as Creely Dep Ex. 50 (Ex. 250)).

[166] Creely Dep. at 11, 13, 14 (Ex. 16).

acknowledged having seen Judge Porteous in circumstances in which Judge Porteous had obviously abused alcohol.[167]

As to Judge Porteous's financial circumstances, Creely testified both at the Task Force Hearing and during his deposition that his statements to the FBI were not truthful. In his deposition, Creely testified:

> Q. [I]f the FBI's write-up of its interview with you indicated that you, and I'm quoting, "advised that [you] knew of no financial problems on the part of the candidate and the candidate appears to live within his economic means," do you have any reason to doubt that you said that?
>
> A. No sir.
>
> Q. And that wouldn't have been true, would it? That would not have been true, because, in fact, you did know that he had financial problems, correct?
>
> A. Yes.[168]

Creely stated he made those statements because he held Judge Porteous in "very high esteem," had a lot of affection for him, and would not have wanted to do anything to harm his candidacy for the Federal judgeship."[169] Before the Task Force, Creely testified: "I didn't want to do anything to impede his [Judge Porteous's] advancement. He was a friend. He was a very manipulative friend. And I didn't want to—I didn't want to hurt the guy.[170]

G. THE *LILJEBERG* PROCEEDINGS

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"].*[171] This case involved a dispute between a hospital and a pharmacy, and implicated 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 Porteous in January 1996. The matter was particularly contentious, with millions of dollars at stake.

1. September-October 1996—Amato and Levenson Are Hired by the Liljebergs; Lifemark files a Motion to Recuse Judge Porteous

The *Liljeberg* case was set for a non-jury trial before Judge Porteous beginning on November 4, 1996. On September 19, 1996, approximately 6 weeks prior to the scheduled trial date, the Liljebergs filed a motion to enter the appearances of Amato and Levenson as their attorneys.[172] As Amato described it: "I was approached by a lawyer by the name of Ken Fonte who represented the Liljebergs and asked if I would be interested in the case. And I told him 'I'm always interested in litigation and I would take a

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[167] Creely TF Hrg. I at 25.
[168] Creely Dep. at 13 (Ex. 16).
[169] Creely Dep. at 12 (Ex. 16).
[170] Creely TF Hrg. I at 25.
[171] Civ. Action No. 93-1794 (E.D. La.). See PACER Docket Report (Ex. 50).
[172] The Motion by the Liljebergs to enter the appearance of attorneys Amato and Levenson was dated September 16, 1996 (Ex. 51(a)). Judge Porteous granted the motion on September 26, 1996 (Ex. 51(b)).

look at the case.'"[173] According to Amato, the Liljebergs "were looking for people [attorneys] who were, you know, not only competent, but had some rapport with the court."[174] Amato and Levenson were hired on a contingent fee basis, that is, they would not receive anything unless the Liljebergs prevailed.[175] Amato estimated that if the Liljebergs prevailed at trial, his fee would have been between $500,000 and $1,000,000.[176] The motion to enter Amato's appearance clearly identified him with the firm "Amato and Creely."[177] Amato described the case as "exceptionally important" to him.[178]

The decision of the Liljebergs to add Amato and Levenson so close to the trial date aroused the concerns of Lifemark's lawyer, Joseph Mole, who spoke to other attorneys who knew Judge Porteous, Amato and Levenson:

> I learned that—from people who would talk to me . . . —that Mr. Levenson and Mr. Amato were very close to Judge Porteous, that Mr. Amato had been his law partner, as had Mr. Creely—Amato and Creely was the firm—and Mr. Levenson was very close to Judge Porteous and had—I think had been to a fifth circuit conference or two as Judge Porteous's guest, that they frequently socialized in—in the way of lunches, hunting trips, and things like that, and that they—I also knew—well, I formed the opinion that there was—there was a high likelihood that the case—it was a bench trial. There was no jury. So it would be entirely a decision by the judge in a case that had been valued as high as $200 million for my client that the case would be handled in the way by the judge that would be favorable to his friends, and that was of deep concern.[179]

On October 1, 1996, Mole, on behalf of his client Lifemark, filed a motion to recuse Judge Porteous. The motion focused on the appearance of impropriety suggested by the fact that just weeks prior to trial, the Liljebergs retained two lawyers who were close friends with Judge Porteous, neither having particular expertise in complicated business litigation.[180]

Lifemark's recusal motion did not allege an actual conflict of interest or that Amato (or his partner Creely) had given money to Judge Porteous because Lifemark's counsel (Mole) had no idea what, if anything, Amato (or Creely) had ever given to Judge Porteous.[181] If he had known of prior cash dealings between Judge Porteous and Amato, he would have used that fact in his mo-

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[173] Amato GJ at 41 (Ex. 18).

[174] Amato GJ at 42 (Ex. 18).

[175] Amato GJ at 44 (Ex. 18). See also, Motion to Recuse, Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La.) (Oct. 1, 1996) at 3 (stating that Levenson and Amato were to receive a contingent fee) (Ex. 52).

[176] Amato GJ at 50 (Ex. 18). Amato stated he believed that the Liljebergs had a good case. Amato GJ at 54 (Ex. 18).

[177] Ex Parte Motion of Liljeberg Enterprises Inc. To Substitute Counsel, Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La.) (Sept. 16, 1996) (Ex. 51(a)).

[178] Amato TF Hrg. I at 102.

[179] Mole TF Hrg. I at 141. See also Mole 5th Cir. Hrg. at 168 (Ex. 65); Mole GJ at 9-10 (Ex. 64).

[180] Motion to Recuse, Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La.) (Oct. 1, 1996) (Ex. 52).

[181] Mole 5th Cir. Hrg. at 169-70 (Ex. 65).

tion,[182] and he believed that if a prior financial relationship existed recusal would have been mandatory.[183] Further, Mole believed recusal would have been required even if the relationship were between Judge Porteous and Creely, and not Judge Porteous and Amato, because Creely and Amato were partners and it was the firm Amato & Creely that had entered its appearance for Lifemark—not just Amato.[184]

Because he was unaware of a prior financial relationship, as Mole himself described: "[I] danced around that issue [of a financial relationship] pretty carefully because I didn't want to accuse the judge that was going to try my case of doing something of which I had no evidence."[185] Thus, Mole argued "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, 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."[186]

As to the appearance of impropriety, the recusal motion stated:

> Your Honor's relationship with Messrs. Amato and Levenson is well known to the legal community. It needs no elaboration in this memorandum. This would be of no concern were it not for the timing of their addition, and the fact that the [Liljebergs] clearly believe that influence with governmental bodies, including judges, can be bought.
>
> * * *
>
> Under the circumstances, it is respectfully submitted that Your Honor is duty bound to remove any appearance of impropriety. In spite of Your Honor's attempts to be fair, the obviousness of the Liljebergs' intentions, coupled with the timing of the hiring of these lawyers, will always leave questions in the eyes of any objective observer, the "man in the street," who is aware of the Court's relationship with Messrs. Amato and Levenson and the Liljebergs' attitudes toward the political and judicial systems. [citation omitted.] Under such circumstances, Lifemark suggests that Your Honor, the Federal courts, and the litigants in this case (including the Liljebergs) are all best served by Your Honor's recusal.[187]

The Motion went on to argue that the applicable standard for review of Judge Porteous's role was "how things appear to the well informed, thoughtful and objective observer, rather than the hypersensitive, cynical and suspicious person."[188]

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[182] Mole GJ at 14 (Ex. 64). The various investigations have not disclosed that Levenson gave Judge Porteous cash at any time.

[183] Mole TF Hrg. I at 142.

[184] Mole TF Hrg. I at 142.

[185] Mole 5th Cir. Hrg. at 171 (Ex. 65).

[186] Mole TF Hrg. I at 141-42.

[187] [Lifemark's] Motion to Recuse, Lifemark Hospitals of La., Inc. v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La., Oct. 1, 1996) [hereinafter "Motion to Recuse"] at 3, 5-6 (Ex. 52).

[188] Motion to Recuse at 7 (citing United States v. Jordan, 49 F.3d 156, 156 (5th Cir., 1995)) (Ex. 52).

The Liljebergs filed their Opposition dated October 9, 1996, signed by Levenson;[189] Lifemark filed its Reply to the Opposition, dated October 11, 1996;[190] and the Liljebergs filed a Memorandum in Opposition to Lifemark's Reply, dated October 15, 1996, again signed by Levenson.[191] 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:"

> In its original supporting memorandum, Lifemark uses terms such as "close," "extremely close" and "closest" to characterize the relationship between the Court and Messrs. Amato and Levenson. . . . However, such vague superlatives provide absolutely no information upon which an objective, thoughtful and well-informed person could reasonably rely in determining whether grounds exist to question the Court's impartiality.
>
> * * *
>
> Lifemark presents no evidence that a reasonable person would attribute to the mere existence of a friendly relationship a significant likelihood that a judge would violate Federal law and subordinate his oath of office just to help a lawyer earn a fee.[192]

Judge Porteous, of course, knew that his respective relationships with Amato and Creely went well beyond the "mere existence of a friendly relationship."

2. Judge Porteous's Statements at the Recusal Hearing

On October 16, 1996, Judge Porteous held a hearing on the recusal motion. Both Levenson and Amato were present. In that hearing, the following colloquy occurred:

> 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.[193]
>
> * * *
>
> Mr. Mole:

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[189] [The Liljebergs'] Memorandum in Opposition to Lifemark's Motion to Recuse Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La., Oct. 9, 1996) [hereinafter "Memorandum in Opposition"] (Ex. 53).

[190] Lifemark's Reply Memorandum to Liljeberg Enterprises, Inc.'s Opposition to Motion to Recuse, Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La., Oct. 11, 1996) [hereinafter "Lifemark's Reply to the Liljeberg's Opposition"] (Ex. 54).

[191] Memorandum of Liljeberg Enterprises, Inc. and St. Judge Hospital of Kenner La., Inc., in Opposition to Reply Memorandum of Lifemark on Motion to Recuse, Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La., Oct. 15, 1996) (hereinafter "Liljeberg's Opposition to Lifemark's Reply") (Ex. 55).

[192] Liljeberg's Opposition to Lifemark's Reply at 2 (Ex. 55).

[193] Transcript of Proceedings, Plaintiff's Motion to Recuse, Lifemark Hospitals, Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-179-4-T (E.D. La., Oct. 16, 1996) (hereinafter "Recusal Hearing Transcript") at 4 (Ex. 56).

I am happy to tell the Judge what the public perception is of the relationship.

* * *

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.[194]

* * *

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.[195]

* * *

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.[196]

* * *

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

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[194] Recusal Hearing Transcript at 6-7 (Ex. 56).

[195] Recusal Hearing Transcript at 8 (Ex. 56). Judge Porteous spent several transcript pages on the issue of whether the attorneys had given him campaign contributions and challenged Mole on that issue:

> [D]on't misstate, don't come up with a document that clearly shows well in excess of $6700 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.

Recusal Hearing Transcript at 10 (Ex. 56).

[196] Recusal Hearing Transcript at 10-11 (Ex. 56).

> 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."[197]

Judge Porteous denied the recusal motion after the argument in open court on October 16, 1996. The complete written opinion signed the following day states:

> 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.[198]

Lifemark sought a writ of mandamus from the Fifth Circuit. That petition was also denied.[199]

3. Discussion of the Recusal Hearing

The attorneys—Levenson and Amato—made no factual disclosures. Amato, who was present in the courtroom during the recusal hearing, viewed the issue of disclosure and recusal to be Judge Porteous's issue—not Amato's. He thus took his lead as to disclosure from Judge Porteous, and was not going to embarrass the judge by stating that in the past he and his partner had given Judge Porteous tens of thousands of dollars funded by curatorships assigned by Judge Porteous. As Amato testified at his Task Force deposition:

> Q. Okay. Now, in connection with that motion to recuse Judge Porteous, would it be fair to say that you considered it really Judge Porteous'[s] decision as to whether or not he should be recused?

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[197] Recusal Hearing Transcript at 17-19 (Ex. 56).

[198] Judgment [Denying Motion to Recuse], Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La., Oct. 17, 1996) (Ex. 57).

[199] Petition for Writ of Mandamus, Brief of Petitioner [Lifemark], In re: Lifemark Hospitals of Louisiana, Inc., No. 96-31098 (5th Cir., Oct. 24, 1996) (Ex. 58); Order [Denying Petition for Writ of Mandamus], In re: Lifemark Hospitals of Louisiana, Inc., No. 96-31098 (5th Cir., Oct. 28, 1996) (Ex. 59).

A. Oh, absolutely.

Q. And would it be fair to say that you followed his lead in terms of disclosures which could be made or should be made relative to your relationship with Judge Porteous?

A. Yes. That Porteous—that was Porteous'[s] obligation.

* * *

Q. . . . Was the fact that you all had given back to Judge Porteous money from the curators disclosed in the course of the Liljeberg litigation?

A. No, it was not disclosed.

Q. And if that, if that was a fact that could have or should have been disclosed, that was really in your mind something that Judge Porteous would have to do?

A. Yes.[200]

Amato, in the Task Force Hearing, before the Fifth Circuit, and in the grand jury, has acknowledged the materiality of this prior relationship to Judge Porteous's handling of the recusal motion.[201]

With Amato and Levenson remaining silent in the courtroom, the only factual disclosures about the relationships were made by Judge Porteous, and these were limited to the facts 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 was "the only time when they gave me money."

Judge Porteous did not mention that Amato, through his firm Amato & Creely, had given him thousands of dollars in cash, including monies funded through the assignment of curatorships to Creely. And, as discussed, Judge Porteous would have known, and in fact subsequently acknowledged, that the funds paid by Creely under that arrangement came from Amato as well. Judge Porteous did not address Mole's specific statement that he [Mole] had heard Judge Porteous had traveled with the attorneys, and thus, did not disclose, for example, that he had gone to Las Vegas with Levenson (and shared a room with him) and had gone hunting and fishing with Amato and Creely on several occasions. Judge Porteous also failed to disclose that Amato and Creely paid for his party to celebrate his appointment to the Federal bench.[202]

Judge Porteous's statement denying that he had ever been to either one of their houses suggests a relationship that is totally at odds with the truth of their respective associations. He 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. . . ." And, by suggesting merely that he had "dinner with" or "gone along to lunch with" the

[200] Amato Dep. at 8-10 (Ex. 24).

[201] See also Amato TF Hrg. I at 103; Amato 5th Cir. Hrg. at 248 (Ex. 20); Amato GJ at 57 (Ex. 18).

[202] There is also some evidence that Judge Porteous's secretary, Rhonda Danos, had solicited Amato, Creely and Levenson to help pay for his son's expenses when Judge Porteous was a State judge.

two men, with no elaboration, he affirmatively concealed what was really the truth: that Amato and Levenson had paid for hundreds of his lunches and dinners at expensive restaurants for a decade or longer. Judge Porteous affirmatively attempted to divert the hearing from the true issues raised in the recusal motion by spending considerable attention on the issue of whether the attorneys had given him campaign contributions—denying that fact—and criticizing Lifemark's attorney for raising the issue.[203]

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 with the issue having been raised. The most significant instance of this conduct 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.[204]

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.

4. March 1997—Lifemark Hires Gardner

Lifemark, having lost the recusal motion, felt that it was necessary to "level the playing field," and thus hired Don Gardner to be part of its trial team.[205] Lifemark's pleading to the court entering the appearance of Gardner was date-stamped March 11, 1997.[206] As Mole described:

> Q. Why was Gardner then brought in by Lifemark?
>
> A. After we lost the motion to recuse, my client and I discussed that—and my client insisted that we try to find a lawyer who, like Mr. Amato and Mr. Levenson, was a friend with the judge and knew him very well. They were concerned that they would do everything they can to achieve a level playing field. I resisted doing that. I am not happy with the fact that we did it. But my client insisted, and so we did it.[207]

Even Gardner recognized: "[T]hey [Lifemark] wanted to have a friendly face."[208] Lifemark's contract with Gardner provided that Gardner would be paid based on the results of the case, that he would be guaranteed $100,000 simply for entering his appearance, and that he would receive another $100,000 if Judge Porteous withdrew or if the case settled.[209] As Mole bluntly testified at the Fifth Circuit Hearing:

> Q. So is it fair to say this term [the $100,000 guaranteed payment] also shows that the purpose that Don Gard-

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[203] Recusal Hearing Transcript at 8-10 (Ex. 56).
[204] Recusal Hearing Transcript at 18 (Ex. 56).
[205] Mole 5th Cir. Hrg. at 174 (Ex. 65); Mole GJ at 18 (Ex. 64).
[206] Ex Parte Motion of Lifemark to Enroll Additional Counsel of Record (Don Gardner), Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. Action No. 93-1794 (E.D. La., Mar. 11, 1997) (Ex. 60(a)).
[207] Mole TF Hrg. I at 143; Mole 5th Cir. Hrg. at 174-75 (Ex. 65).
[208] Gardner 5th Cir. Hrg. at 462 (Ex. 32).
[209] Mole 5th Cir. Hrg. at 177-80 (Ex. 65); Mole GJ at 21-22 (Ex. 64).

ner came in the litigation was because of his relationship with Judge Porteous?

A. Yeah. Embarrassing but true.[210]

5. June and July 1997—Trial

Judge Porteous conducted a bench trial in the *Liljeberg* case in June and July 1997.[211] Amato handled a substantial portion of the trial for the Liljebergs.[212]

One incident during the trial is noteworthy. Judge Porteous played an active role in examining some of Lifemark's witnesses, and at one point in the proceedings near the end of the day, Lifemark's attorney, Mole, sought permission to ask additional questions of the witness after Judge Porteous's examination. Judge Porteous lost his temper at Mole, and though the descriptions of the event vary, Judge Porteous ended up knocking or throwing some of the evidence binders that were in front of him in the direction of Mole. When the parties returned to court the following trial day, which was after an intervening weekend, Judge Porteous stated for the record his position, and then permitted Mole to ask additional questions.[213]

At the conclusion of the trial in July 1997, Judge Porteous took the case under advisement. He did not issue his opinion until April 26, 2000, nearly 3 years after trial.

H. Judge Porteous's Declining Financial Circumstances—1996 Through 2000

Judge Porteous's financial circumstances in the years preceding his filing for bankruptcy in 2001 are discussed in the next section. However, in order to understand Judge Porteous's behavior in accepting and soliciting things of value from attorneys during the pendency of the *Liljeberg* case (and to appreciate his dependency on attorneys and others to support his lifestyle), it is useful to note the decline of Judge Porteous's financial situation during the period 1996-2000.

At the end of 1996, a few months after the October 1996 recusal hearing, Judge Porteous had credit card debt of approximately $45,000, and a balance in his individual retirement account (IRA) of $59,000. Over the next 4 years, he gradually drew down his IRA account, frequently to pay off his credit cards. By April 2000, he had credit card debt of $153,000, and an IRA balance of $12,000.

By the time he rendered his decision in the *Liljeberg* case in April 2000, Judge Porteous was just weeks away from consulting with a bankruptcy attorney.[214]

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[210] Mole GJ at 28 (Ex. 64).

[211] The Court's "PACER" Docket Report reveals that the trial took place from June 16, 1997 through June 27, 1997, then started again on July 14, 1997 and concluded July 23, 1997. (Ex. 50).

[212] Amato GJ at 48 (Ex.18).

[213] Mole TF Hrg. I at 144; Levenson Dep. at 41-42 (Ex. 30); Transcript(s) of Proceedings (Excerpts), Lifemark Hospitals of La., Inc., v. Liljeberg Enterprises, Inc., Civ. No. 93-CIV-1794 (E.D. La.) (Excerpts of Non-Jury Trial, July 17, 1997 and July 21, 1997) (Ex. 61).

[214] As described in the Bankruptcy Section of this Report, Judge Porteous's debts were largely a result of gambling.

I. Judge Porteous's Relationships with Amato, Levenson, and Gardner While He Had the *Liljeberg* Case under Advisement (July 1997-April 2000)

During the period from July 1997 through the issuance of his verdict for the Liljebergs in April 2000, with millions of dollars for the parties and substantial fees for the attorneys at stake, Judge Porteous continued to seek and accept things of value from Amato, Creely, Levenson and, to a lesser extent, Gardner.

1. Meals

Amato continued to take Judge Porteous to lunches after the *Liljeberg* trial and prior to Porteous's ruling in that case. As Amato testified in his Task Force appearance:

> Q. After the trial, did you continue to take Judge Porteous to lunch on a regular basis?
>
> A. Judge Porteous and I have been eating lunch together for—since we have known each other, yes.
>
> Q. Okay. And some of them . . . involved you eating well at Ruth's Chris Steak House, the Beef Connection, Andrea's, Emeril's, and so forth, correct?
>
> A. Yes, we had a nice—we had a good time.
>
> * * *
>
> Q. So I am talking about roughly summer of 1997 to April 2000, and that is the period that you have just testified that, as part of your whole life, you took him to restaurants that we have just mentioned, correct?
>
> A. Right.[215]

The Department subpoenaed Amato's calendar and corresponding credit card records reflecting meals he bought for Judge Porteous starting in 1999. From 1999 to April 2000 (during which the *Liljeberg* case was pending), the following chart reflects some of the meals attended by Judge Porteous and paid for by Amato.[216]

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[215] Amato TF Hrg. I at 103-04. See also Amato Dep. at 17-18 (Ex. 24) (paying for Judge Porteous's meals at restaurants such as Beef Connection, Ruth's Chris Steak House, and Dickie Brennan's while Liljeberg case was pending).

[216] Exs. 21(b)-(c). By virtue of the limited records, the chart does not include all instances where there is a calendar entry mentioning Judge Porteous but no corresponding credit card charge, and also does not include meals for which there is no entry on Amato's calendar.

Table 2. Selected Meals Provided by Amato to Judge Porteous (1999-2000)

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]
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]

Gardner also testified that he took Judge Porteous to meals while the *Liljeberg* case was pending. Specifically, Gardner testified he took Judge Porteous to the following restaurants when Judge Porteous was a Federal judge: Ruth's Chris Steak House ("more than six [times]."[217]); Mr. B's ("four or five times a year"[218]); Emeril's ("on occasions"[219]); Brennan's/Dickie Brennan's ("I've been to Dickie Brennan's I guess with Tom Porteous three or four times during that period of time"[220]); NOLA's ("[t]hree or four times"[221]),

[217] Gardner Dep. at 16 (Ex. 36).
[218] Gardner Dep. at 15-16 (Ex. 36).
[219] Gardner Dep. at 16 (Ex. 36).
[220] Gardner Dep. at 16-17 (Ex. 36).
[221] Gardner Dep. at 17 (Ex. 36).

and Metro Bistro ("a little more frequent [than NOLA's]"[222]). For each of these restaurants, there are charges on Gardner's American Express account from approximately 1994 through 2000, including charges during the roughly 3 year period spanning Gardner's appearance as an attorney in the *Liljeberg* case (early 1997) to the issuance of Judge Porteous's decision (April 2000).

Though Gardner could not identify specific meals during this time frame as being ones where he paid for Judge Porteous, the charges on Gardner's American Express card identify the likely meals, and provide a sense of what the meals would have cost. For example, Gardner testified he took Judge Porteous to NOLA's, Dickie Brennan's or Brennan's "three or four times." Charges on Gardner's credit card between 1997 and 1999 (when *Liljeberg* was pending and when Gardner represented Lifemark) at those restaurants were as shown in the following chart:

Table 3. Selected Meals Provided by Gardner to Judge Porteous (1997-1999)

Date	Restaurant	Amount
April 12, 1997	NOLA's	$ 203.01
June 28, 1997	NOLA's	$ 231.10
June 29, 1997	Brennan's	$ 205.20
September 8, 1997	NOLA's	$ 86.27
January 30, 1998	NOLA's	$ 142.10
December 22, 1998	NOLA's	$ 385.76
January 25, 1999	Dickie Brennan's Steakhouse	$ 95.02
February 23, 1999	Dickie Brennan's Steakhouse	$ 143.38
July 1, 1999	Dickie Brennan's Steakhouse	$ 82.60
August 9, 1999	NOLA's	$ 110.53
December 28, 1999	NOLA's	$ 308.42

From August 1994 through February 2000, Gardner had over 30 charges at Ruth's Chris Steak House, 16 charges at Emeril's, over 30 charges at Mr. B's, and 23 at the Metro Bistro—consistent with his testimony as to other places he frequently took Judge Porteous.

2. May 1999—Creely Helps Pay for Bachelor Party Trip to Las Vegas

In connection with his son Timothy's bachelor party, Judge Porteous went on a trip from May 20-23, 1999 (while Liljeberg was pending) with several of his friends, including Creely and Gardner, to Las Vegas, Nevada. Creely paid for Judge Porteous's room and

[222] Gardner Dep. at 17 (Ex. 36).

for a portion of Timothy's bachelor party dinner during that trip.[223]

As to Judge Porteous's room, Caesars Palace records reflect that Judge Porteous's room was charged to Creely's credit card number.[224] Judge Porteous also seemed to recall that Creely paid for his room.[225]

As to the bachelor party meal at a steakhouse, Creely testified:

> [A]nd in these charges [on my credit card], all right, is a meal for the bachelor party meal, OK, that we went out on, and the way all that—$560.48. And the way I recall what happened, there's no way that all these people could eat for $500 at a steak house, drinking and eating. The way I recall, is that there were a number of people that, after the meal and the bill came out, that put up the credit card to pay for the meal. . . . There were a number of credit cards put up to have the tip and the bill divided among everybody.[226]

Creely recalled that Judge Porteous did not share the cost of this meal.[227] Creely's American Express records also revealed a charge of $560.48 at the steakhouse.[228]

Gardner also went to Las Vegas on the bachelor party trip.[229] Gardner denied paying anything for Judge Porteous on that trip.[230]

3. June 1999—Judge Porteous Solicits and Accepts Money from Amato

On June 28, 1999—after his son's wedding and prior to issuing his decision in *Liljeberg*—Judge Porteous solicited money from Amato. This request was made while the two men were on a fishing trip. Amato identified the date of the fishing trip—June 28, 1999—by reference to an entry on his calendar.[231] At the Task Force Hearing, Amato recalled the amount requested by Judge Porteous as being $2,500.[232] Amato described the incident as follows:

> It was a weekday, and a friend of mine has a fairly large boat, and we were going to Caminada Pass, which is the pass at Grand Isle, and at certain times of the year, the fish run between the Gulf of Mexico and the marsh. And the fish just at night, they bubble up. They come to the surface, and it is a free-for-all. 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,

[223] Creely GJ at 39-40 (Ex. 11).
[224] Caesars Palace Record (Ex. 377); Creely American Express Record for May 1999 (Ex. 378).
[225] Porteous 5th Cir. Hrg. at 140 (Ex. 10).
[226] Creely GJ at 40 (Ex. 11).
[227] Creely GJ at 41 (Ex. 11).
[228] Creely American Express Record for May 1999 (Ex. 378).
[229] Porteous 5th Cir. Hrg. at 194 (Ex. 10); Gardner 5th Cir. Hrg. at 465 (Ex. 33).
[230] Gardner 5th Cir. Hrg. at 465-66 (Ex. 32).
[231] Amato Dep. at 11-13 (Ex. 24); Amato Dep. Ex. 83 (Ex. 283).
[232] Amato Dep. at 13 (Ex. 24).

> however you want to call it, something, like $2,500, to pay for part of the wedding or the after-rehearsal party or something?[233]

Notwithstanding Amato's use of the term "lend" in describing Judge Porteous's request of him, Amato was clear: "I didn't believe I was gonna be paid back."[234] Amato testified he gave Judge Porteous cash.[235] Amato described this incident consistently at the Fifth Circuit Hearing,[236] and further testified that he recalled providing the cash to Judge Porteous in a bank envelope.[237]

Creely recalled and corroborated critical aspects of that incident as well. Specifically, Creely was asked whether Judge Porteous requested money when he was a Federal judge:

> [I] know one occasion that I remember. And it was an occasion and it was May 1999. I have it written on my calendar. And it has at the bottom of the page "Fishing Mitch Martin." And Mitch Martin is a friend of ours that had a boat. . . . I didn't go on this trip.
>
> [B]ut after this trip that—this one trip—I do recall my law partner [Amato] went fishing with him—I didn't go on this fishing trip—he [Amato] came back and said, "The judge was crying about not being able to pay for a wedding of some sort for his daughter. I don't know what it was. But I think it had something to do with a wedding or something. And he said, ["]He's crying." And he said, "What do I do[?"] I said, "I don't know what to tell you to do. It ain't even me." And I believe he gave him the money and I gave my law partner back half of the money or—I don't know how that happened. But I do know he asked for that money and it was given to him.[238]

Creely recalled "that I gave my law partner a thousand dollars, which means he gave him [Judge Porteous] $2,000,"[239] and that Judge Porteous's secretary, Rhonda Danos, picked up an envelope with the cash.[240] Creely also testified he told Judge Porteous it was not appropriate for him to be sending his secretary to pick up the money.[241]

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[233] Amato TF Hrg. I at 104-05. See also Amato GJ at 19-20 (Ex. 18) ("The only time Judge Porteous ever asked me for money was when his first son got married. I went fishing, an overnight fishing trip, and him and I were standing on the bow of the boat and he told me that his son's wedding cost more than the bride's family anticipated because he invited too many guests and could I lend him some money.").

[234] Amato GJ at 21 (Ex. 18).

[235] Amato GJ at 20-24 (Ex. 18).

[236] Amato 5th Cir. Hrg. at 240 (Ex. 20).

[237] Amato GJ at 64 (Ex. 18).

[238] Creely GJ at 59-60 (Ex. 11). Notwithstanding minor discrepancies (the fishing trip was June 1999, not May; the wedding was for Judge Porteous's son, not daughter), Creely's testimony was consistent with Amato's.

[239] Creely GJ at 61 (Ex. 11). At the Fifth Circuit Hearing, Creely testified that he recalled the request being a tuition expense, but confirmed that he recalled the amount as $2,000. Creely 5th Cir. Hrg. at 212-14 (Ex. 12).

[240] Creely 5th Cir. Hrg. at 214 (Ex. 12).

[241] Creely 5th Cir. Hrg. at 215 (Ex. 12). Amato was asked whether he recalled an incident where Judge Porteous's secretary picked up the money. He replied "I don't recall that, but I don't say that it didn't happen. You know, it well may have happened." Amato 5th Cir. Hrg. at 241 (Ex. 20).

Danos recalled picking up envelopes of money or having envelopes delivered from Creely and Amato. In response to questions from the attorneys, she identified that as having occurred in the May-June 1999 time frame. Danos 5th Cir. Hrg. at 421-22 (Ex. 43).

Judge Porteous, testifying in the Fifth Circuit hearing, denied recollection of the specific circumstances in which he made a request to Amato, but did not deny that the conversation occurred. He admitted that he actually received money from Amato for the purposes Amato described, and that the money 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 Mr. 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. [242]

* * *

Q. [W]hether or not you recall asking Mr. 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. [243]

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[242] Porteous 5th Cir. Hrg. at 121 (Ex. 10).
[243] Porteous 5th Cir. Hrg. at 136-37 (Ex. 10).

4. Payments for "Externship" for Judge Porteous's Son

At some point in time—and the best evidence suggests that it occurred during the pendency of the *Liljeberg* case—Judge Porteous and his secretary, Rhonda Danos, solicited the four attorneys to contribute to an "externship" for Judge Porteous's son. As Danos testified: "I pretty much knew who to call," identifying Levenson, Creely, and Amato among others.[244] She testified that all the attorneys contributed, and indicated that as a general matter they gave $500.[245]

Amato recalled that "I just remember that some sort of way that . . . Timmy or Tommy needed money to go to Washington, and they were passing the hat."[246] He testified he contributed a few hundred dollars.[247]

Levenson testified that Danos solicited him for funds for Judge Porteous's son: "[I] recall Rhonda [Danos] saying that they were trying to have some friends help him with—I don't know if it was travel expenses or living expenses of something so that he could go to Washington" and that Levenson gave Rhonda "a couple hundred dollars."[248]

Gardner recalled being asked by Judge Porteous himself. He testified: "[T]o the best of my recollection . . . he [Judge Porteous] says that Tommy or one of his sons, and I think it's Tommy, had the opportunity to extern and whatever. It was a golden opportunity, but that there were some expenses resulting as a result of it. And I think at that point in time I may have volunteered to give him $200 to do that. . . . I don't know if I gave it to Tommy or gave it to his secretary or whatever."[249] Gardner placed the externship as occurring sometime in 1998, 1999 or 2000, that is, while the *Liljeberg* case was pending.[250]

5. Five Year Anniversary Party—Fall 1999

Amato and Creely also 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 former clerks and other attorneys were invited.[251] This would have been in late 1999, during the pendency of the *Liljeberg* case.[252] Danos and Judge Porteous's courtroom deputy clerk, Ricky Windhorst, recalled this party as

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[244] Danos Dep. I at 21-22 (Ex. 46). Rhonda Danos was deposed twice, first on Aug. 25, 2009, referenced as "Danos Dep. I (Ex. 46)," and on December 3, 2009, referenced as "Danos Dep. II (Ex. 47)."

[245] Danos Dep. I at 22 (Ex. 46).

[246] Amato Dep at 21-22 (Ex. 24).

[247] Amato TF Hrg. I at 104 ("I recall that . . . one of his children were coming to Washington to extern, I think, for Senator Breaux, and they were looking for contributions to defray the cost.").

[248] Levenson GJ at 64-65, 66 (Ex. 25).

[249] Gardner GJ at 74 (Ex. 33); Gardner 5th Cir. Hrg. at 468 (Ex. 32); Gardner Dep. at 26-27 (Ex. 36).

[250] Gardner 5th Cir. Hrg. at 471 (Ex. 32); Gardner Dep. at 26 (Ex. 33). The dates of the payments, and the son (or sons) for whom the payments were made, is not entirely clear from the record, though Amato, Gardner and Danos all recall these requests being made.

Danos generally recalled there were two externships. She was "pretty sure one of them was when [Judge Porteous] was, was [a] State [judge]. The other may have been when we were in Federal court." Danos Dep. I at 21 (Ex. 46). However, whether these requests and payments were made prior to the Liljeberg proceeding or while the decision was pending (or, as appears likely, whether there were two externships, one in each time-frame), it was never disclosed to Lifemark that Judge Porteous (through Danos) had ever requested, and that Amato and Levenson had paid, monies to help support Judge Porteous's son or sons.

[251] Amato TF Hrg. I at 105.

[252] The date is not noted on Amato's calendar.

well.[253] Amato estimated the amount of the party as approximately $1,500.[254]

6. Continued Association and Travel with Levenson while Liljeberg was Pending

During the 1996-2000 time frame, Judge Porteous maintained a close relationship with Levenson, characterized by the two men traveling together on several occasions. On some of those occasions, Levenson purchased meals and drinks for Judge Porteous.

Meals and Drinks at the Jefferson Bar Association Events in Biloxi, Mississippi. Levenson has stated he paid for meals and drinks for Judge Porteous and others at the annual Jefferson Bar Association events held in April of the various years, though he does not recall specific meals. His credit card records reflect a charge of $197.24 for food at the "Isle of Capri" restaurant in Biloxi on April 15, 1999, and a charge for $405.38 at that same restaurant on April 14, 2000. It is likely he paid for Judge Porteous at one or both of these meals.[255]

Hunting Trips at Attorney Allen Usry's Mississippi Property 1996-1998. From 1996 through 1998, there were one or two hunting trips that included Levenson, Judge Porteous, and other associates of Judge Porteous (including a neighbor and a now-deceased bankruptcy judge). Allen Usry, an attorney who on occasion worked with Levenson, recalled that Levenson and Judge Porteous came to his property to hunt on two occasions during the period after fall of 1996 (that is, after Levenson entered his appearance in the Liljeberg case) through 1998. Usry recalled that "probably both [hunting trips] . . . [b]ut at least one for sure" occurred in this period.[256] Levenson recalled one such trip.[257]

Trip to Washington D.C. for Mardi Gras—February 1999. In 1999, Judge Porteous's daughter was made a "Princess" in connection with an event generally referred to as Mardi Gras in Washington D.C. This event consisted of meals, drinking, and other entertainment. Levenson traveled to Washington D.C. with Judge Porteous for this event. It appears that Judge Porteous paid his own airfare and hotel charges. Levenson stated he would not have paid for meals, because the meals were provided at that event, "[b]ut I'm sure we probably had a round of drinks, several of us at the bar, that I would have paid for."[258]

Trip to Houston for the Fifth Circuit Judicial Conference—April 1999. In April 1999, Levenson went to Houston as Judge Porteous's invitee for the Fifth Circuit Judicial Conference.[259] Levenson paid for meals and drinks for Judge Porteous, including a meal at a res-

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[253] Danos Dep. I at 35-37 (Ex. 46).

[254] Amato Dep. at 14-15 (Ex. 24). In his deposition he estimated $1,500. At the Task Force Hearing Amato estimated $1,700. TF Hrg. I at 119.

[255] Levenson Expense Records (Ex. 26). The "Isle of Capri" was the hotel where the restaurant was located. Levenson has stated that if Judge Porteous was present, it is likely that he (Levenson) would have taken Judge Porteous (among others) to that restaurant, and though he did not have a specific memory of each dinner, he had taken Judge Porteous to dinner at the Isle of Capri restaurant on at least one occasion. Levenson Dep. II at 9 (Ex. 31). Judge Porteous's credit card records reflect that he was in fact in Biloxi, Mississippi, at these Bar events in both 1999 and 2000. Though Judge Porteous's attendance at the 2000 dinner is not certain, that dinner would have been just a few weeks prior to Judge Porteous issuing his opinion in the Liljeberg case.

[256] Usry Dep. at 20 (Ex. 163).

[257] Levenson Dep. at 8-10 (Ex. 30).

[258] Levenson Dep. at 23 (Ex. 30).

[259] Levenson Expense Records (Ex. 26).

taurant called "Americas" (for which there is a charge of $574.71 on his credit card) and other food or drinks at "Delmonico's" restaurant (for which there are charges amounting to over $200 on Levenson's credit card).[260]

Las Vegas—October 1999. In October 1999, Levenson was in Las Vegas at the same time as Judge Porteous. "I don't recall traveling with him. I do remember going to a national bull riding championship with him out there."[261] Levenson recalled paying for a dinner with Judge Porteous, and confirmed that the "Aqua" restaurant charge of $256 reflected in his hotel records corresponds to that meal.[262]

Hunting trip at the Blackhawk Hunting Facility—December 1999. Usry was offended by the behavior of Judge Porteous and his friends during prior hunting trips at his property—stemming from their drinking—and falsely told Judge Porteous he had sold his Mississippi property so he would not have to invite Judge Porteous back. In December 1999, Levenson and Usry planned to go with Judge Porteous and another friend of Usry's to the "Blackhawk" hunting facility in Louisiana. Usry recalled that he was going to pay for his friend and that Levenson would pay for Judge Porteous. Usry's calendar reflected that this trip was planned for December 7-10, 1999.[263]

A few days prior to the trip, Usry's friend had a health emergency that made it impossible for him to go on the trip, so Usry cancelled as well, leaving Levenson and Judge Porteous to go alone.[264] Levenson testified that either he, Usry, or some combination of the two of them ended up paying for Judge Porteous.

> Q. What do you recall about the payment for yourself and Judge Porteous at this lodge?
>
> A. I know I was supposed to make a payment. I don't recall whether or not I made any payment, and I was unable to find any records where I had made any payments, but I was certainly supposed to pay for myself and a portion of some of the other [persons] which would have included Judge Porteous.[265]

Trip to Houston for the Fifth Circuit Judicial Conference—May 2000. In May 2000, less than 2 weeks after the *Liljeberg* case was decided, Levenson went to San Antonio, Texas, to accompany Judge Porteous to the annual Fifth Circuit Judicial Conference.[266] Levenson confirmed he paid for two dinners for Judge Porteous,

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[260] Levenson Dep. II at 11-12 (Ex. 31). Levenson's Hotel Bill reflecting charges at "Delmonico's," and his credit card statement reflecting a dinner at "Americas" are marked as part of Levenson Dep. II Ex. 91 (Ex. 291) (LEV 048, 043).

[261] Levenson Dep. at 19 (Ex. 30). Caesar's Palace records reveal that Judge Porteous was there from October 27-29, 1999. (Ex. 299).

[262] Levenson Dep. II at 11-12 (Ex. 31). Levenson's Hotel Bill reflecting charges totaling more than $300 at "Aqua" is marked as part of Levenson Dep. II Ex. 91 (Ex. 291) (LEV 034).

[263] Usry Dep at 14 (Ex. 163); Usry Dep. Ex. 86 (Ex. 286).

[264] Levenson Dep. at 10-13 (Ex. 30). Levenson confirmed that he went on this trip with Judge Porteous. Efforts have been made to establish whether Levenson paid for Judge Porteous and, if so, what amount. Judge Porteous's records do not reflect that he paid for the Blackhawk trip; but he had only a few months before asked Amato for money, and the evidence demonstrated that he hardly ever paid for his own hunting. The Levenson financial records that were obtained during the Department's investigation do not include his 1999 American Express records. Blackhawk no longer possessed the pertinent 1999 records.

[265] Levenson Dep. II at 5 (Ex. 31).

[266] Levenson Expense Records (Ex. 26). The records were obtained subsequent to Levenson's deposition, and he was not questioned about these charges.

and his credit card reflects charges of $322.16 at the "Little Rhein Steakhouse" (on May 7, 2000), and $201.33 at "L'Etoile" for food (on May 9, 2000).[267]

7. Conversations with Amato while the Liljeberg Case was Pending

Amato testified that Porteous made occasional comments to him acknowledging that he [Judge Porteous] knew that Amato was waiting for the opinion to be issued. Amato interpreted Judge Porteous's comments as being favorable, and testified that he believed that Judge Porteous was going to rule for him.[268]

8. These Items of Value were not Disclosed to Lifemark

Notwithstanding Judge Porteous's statement at the 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, Creely, or Levenson in order to give Mole the opportunity to move to recuse.

Mole testified he was unaware that Judge Porteous requested money from Amato, and that Amato gave him money:

> Q. Were you aware of any cash changing hands in '99 during the pendency of this suit?
>
> A. No. I 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.[269]

Mole similarly denied knowing or being informed "that Mr. Amato and Mr. Levenson took Judge Porteous out to lunch on a number of occasions;" that "Mr. Amato and Mr. Levenson contributed money to Judge Porteous to help pay for some type of intern or externship for one of Judge Porteous's sons;" "that Amato had paid about $1,500 for a party to celebrate Judge Porteous's fifth year on the bench;" and that "with regard to Mr. Levenson, . . . that he had, in fact, traveled to Washington with Judge Porteous at the end of January 1999, that he traveled to Houston with Judge Porteous in April 1999, that he was in Las Vegas with Judge Porteous in October 1999, and that Levenson and Judge Porteous went on hunting trips together, including a hunting trip to a hunting lodge in December 1999." As Mole testified: "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."[270]

At the Fifth Circuit Hearing, Judge Porteous cross-examined Mole to elicit the fact that Gardner went on the Las Vegas bachelor party trip as well.

> Q. Are you aware that, again, while this case was under advisement, that your counsel Mr. Gardner accom-

[267] Levenson Dep. II at 16-17 (Ex. 31). Levenson's credit card statement reflecting these payments are marked as part of Levenson Dep. II Ex. 91, at 16-17 (Ex. 291).
[268] Amato Dep. at 18-20 (Ex. 24).
[269] Mole 5th Cir. Hrg. at 193 (Ex. 65).
[270] Mole TF Hrg. I at 159.

panied me and my family to Las Vegas for a bachelor party?

A. No, I did not know that.

Q. So, he went—if I represent to you that he went, do you find anything wrong with that?

A. You know, I find something wrong with the whole system that allows that to happen, Judge Porteous. So, yeah, I do.

Q. Okay. But if he—should I have recused because I went with Gardner?

A. Well, I'm not the judge here but——

Q. I'll withdraw that question.

A. Yeah, you should. I think you should.[271]

J. APRIL 2000—JUDGE PORTEOUS RULES FOR THE LILJEBERGS; AUGUST 2002—CASE REVERSED BY THE FIFTH CIRCUIT COURT OF APPEALS

On April 26, 2000, Judge Porteous issued a written opinion ruling for Amato's and Levenson's clients, the Liljebergs.

In ruling for the Liljebergs, Judge Porteous concluded that Lifemark—a lender to the Liljebergs—had breached certain duties it purportedly owed to the Liljebergs in connection with a $44 million loan to construct a hospital. Lifemark's loan to the Liljebergs was secured by hospital property owned by the Liljebergs. In 1993, Lifemark had failed to take certain steps to secure its debt—it was required to "reinscribe" its lien in the appropriate land and title records for the lien to remain in effect and had failed to do so. As a result, another entity—Travelers—which had obtained an unrelated $7.8 million judgment against the Liljebergs, was able to file a lien on the property and place itself in the prime position ahead of Lifemark, which had by its inaction lost its security interest. Travelers, now in the prime position, executed its $7.8 million judgment on the property, forcing its sale in 1994. The property was sold for $26 million—approximately $7.8 million of which went to Travelers, and $18 million to Lifemark (now sitting in the second position).

The Liljebergs alleged (and Judge Porteous found) that Lifemark's failure to "reinscribe" its lien breached a duty Lifemark purportedly owed to the Liljebergs, and that because of that breach, Travelers was able to move to the front of the line (ahead of Lifemark) and foreclose on the Liljebergs' property, in this way damaging the Liljebergs. Judge Porteous made this finding despite the fact that Travelers could have executed on the property even in second position behind Lifemark, and even though the Liljebergs could have "reinscribed" the Lifemark lien themselves. In his April 2000 opinion, Judge Porteous ordered that the 1994 judicial sale be

[271] Porteous 5th Cir. Hrg. at 194 (Ex. 10).

"undone."[272] This was extraordinary relief that the Liljebergs had not even requested.[273]

Lifemark appealed Judge Porteous's decision to the Fifth Circuit. In August 2002, the Fifth Circuit Court of Appeals, in striking language, rejected Judge Porteous's conclusions that Lifemark's failure to preserve its own security interests gave the Liljebergs grounds for complaint. The Fifth Circuit characterized various aspects of Judge Porteous's ruling as "inexplicable," "a chimera," "constructed entirely out of whole cloth," "nonsensical," and "absurd":

> The extraordinary duty the district court imposed upon Lifemark, who loaned the money to build the hospital and held the mortgage on it to secure its payment, is inexplicable. Whatever duty Lifemark may have owed as the pledgee of the collateral mortgage note, they do not include a requirement that Lifemark reinscribe the mortgage executed in Lifemark's favor to secure a debt owed by [the Liljebergs][274] to Lifemark, in order that the mortgage may retain priority for Lifemark's benefit as pledgee and mortgagee. As Lifemark aptly points out, ordinarily a debtor such as [the Liljebergs] is happy to have its creditor fail to record its lien. We reject the assertion that Lifemark as the mortgagee here owed a duty to its mortgagor to reinscribe the mortgage, as illustrated in part, indeed, by the very difficulty of describing exactly how not protecting a mortgage[e]'s first position, in and of itself, could possibly harm the mortgagor.
>
> * * *
>
> Nor can this theory explain how it can lie beside the undisputed right of Lifemark Hospitals, Inc. to, "at any time, without notice to anyone, release any part of the Property from the effect of the Mortgage." . . . The grant of a security interest to secure [the Liljebergs'] debt was to protect the lender, Lifemark Hospitals, Inc., not the borrower.
>
> Nor did Lifemark as mortgagee have a duty to protect the hospital owner from other creditors asserting their rights against the hospital, as the district court held Lifemark did. . . . This is a mere chimera, existing no-

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[272] On this point, Gardner testified he and Judge Porteous had the following off the record conversation:

> At the end of that day's testimony when that was resolved, Mr. Levenson and myself went back to talk about the next day, and Judge Porteous commented about the thing. He says, "I'm really having some problems with Lifemark not reinscribing their mortgage and allowing another creditor to jump ahead of that." Because they allowed the foreclosure in effect by not reinscribing their mortgage.
>
> And I said to him, I said, "Judge"—I may have said "big boy" because I was friendly with him, but we were not in court. And I said, "I don't care who you are. No Federal judge"—because I'm very familiar with State law in foreclosures. I did a lot of them at [a prior law firm]. "You cannot overturn a State court foreclosure absent fraud." And those people [the Liljebergs] put no evidence whatsoever on about any fraud, because they [Lifemark] had a right not to reinscribe their mortgage. They were perfectly in their legal rights the way they went about it.

Gardner Dep. at 53-54 (Ex. 36).

[273] Mole TF Hrg. I at 160.

[274] The Liljebergs owned and operated an entity called "St. Jude." Throughout this discussion, for simplicity's sake, "St. Jude" will be replaced by "[the Liljebergs]."

where in Louisiana law. It was apparently constructed out of whole cloth.[275]

Judge Porteous offered a second ground for undoing the judicial sale, namely, that there was a conspiracy by Lifemark to wrest control of the hospital from the Liljebergs. Evidence of the conspiracy included the fact that Lifemark failed to reinscribe its lien and thus permitted Travelers to initiate foreclosure proceedings. This was also rejected by the Fifth Circuit as "border[ing] on the absurd" and "close to being nonsensical":

> [T]he district court's findings of a "conspiracy" to wrest control of the hospital and medical office building from [the Liljebergs] and Liljeberg Enterprises border on the absurd. . . .
>
> The district court's "conspiracy theory" conclusion is based, in part, on the view that Liljeberg Enterprises's or [the Liljebergs'] losses were caused by Lifemark. Specifically, not reinscribing the collateral mortgage and not buying out the Travelers lien and adding the Travelers debt to the debt owed by [the Liljebergs] to Lifemark. . . . The district court and Liljeberg Enterprises offer no statutory or case law support for this proposition, for the simple reason that this is not the law. [footnote omitted]
>
> The theory that Lifemark proximately caused any loss to Liljeberg Enterprises or [the Liljebergs] from the Travelers foreclosure on its judicial mortgage cannot accommodate the undisputed fact that, under Louisiana law, [the Liljebergs] could have reinscribed the collateral mortgage itself. [footnote omitted] . . . That it could have and did not do so is telling. It rends a large hole in the conspiracy claim and leaves [the Liljebergs'] inaction unexplained. . . .
>
> * * *
>
> [T]he idea that Lifemark deliberately subordinated its mortgage interest to Travelers, knowing it would result in a required payment, to wit, approximately $7.8 million, to Travelers at any judicial sale, comes close to being nonsensical.[276]

After the case was reversed by the Fifth Circuit, the parties settled.[277]

IX. THE FACTS UNDERLYING ARTICLE II—JUDGE PORTEOUS'S CORRUPT RELATIONSHIPS WITH BAIL BONDSMAN LOUIS M. MARCOTTE, III, AND LORI MARCOTTE

A. Introduction

In the early 1990's, while a State judge in the 24th Judicial District Court (the "24th JDC") located in Gretna, Louisiana, Judge Porteous formed a relationship with local bail bondsman Louis M.

[275] In the Matter of: Liljeberg Enterprises, Inc., 304 F.3d 410, 428-29 (5th Cir. 2002) (Ex. 63).
[276] Id. at 431-32 (footnote omitted) (Ex. 63).
[277] Mole GJ at 41-42 (Ex. 64).

Marcotte, III, and his sister, Lori Marcotte, who operated a bail bonds company called Bail Bonds Unlimited (BBU). That relationship was characterized by a course of conduct whereby the Marcottes provided numerous things of value to (then) State judge Porteous, and Judge Porteous in turn took numerous steps in his official capacity to assist the Marcottes in their bail bonds business. Judge Porteous was instrumental to the Marcottes in their ability to expand their business in the 24th JDC.

Ultimately, the Marcottes' conduct and their relationship with State judges and other State law enforcement officials came under investigation. In the late 1990's, after Judge Porteous had become a Federal judge, the FBI, working with the United States Attorney's Office for the Eastern District of Louisiana, conducted the "Wrinkled Robe" investigation, targeting public corruption in the setting of bonds in the 24th JDC. This investigation included wiretaps and other covert methods, and resulted in convictions of Louis Marcotte, Lori Marcotte, another BBU employee (Norman Bowley), two State judges (Ronald Bodenheimer and Alan Green) and several other State law enforcement officials.

The role Judge Porteous played in the inception of the corrupt scheme is discussed generally in the FBI's August 2001 affidavit in support of its request to obtain wiretaps. That affidavit described how the Marcottes had provided Judge Porteous (referred to as "JUDGE #2" in the Affidavit) with meals and a trip to Las Vegas and that Judge Porteous had expunged a conviction of a Marcotte employee. The Affidavit cited specific instances where Judge Porteous set bonds at the Marcottes' request in order to benefit the Marcottes financially. The affidavit concluded that the "pattern of illegal activity has been occurring for at least the last 8 years [*i.e.*, from 1993 to 2001] beginning with [Judge Porteous]."[278] However, as DOJ noted in its 2007 Complaint Letter to the Fifth Circuit, the corrupt relationship between Judge Porteous and the Marcottes that occurred while Judge Porteous was a State judge, even if it were clearly of a criminal nature, could not have been the subject of a criminal prosecution as part of Wrinkled Robe, because it was barred by the applicable statute of limitations.[279]

The FBI's perception of Judge Porteous's central role in the corruption in the 24th JDC has been confirmed by the Marcottes in their Task Force Hearing testimony and in their respective depositions. Not only did Judge Porteous set bonds at the Marcottes' request, but because Judge Porteous was an influential judge on the 24th JDC, the Marcottes were able to trade and build on their close relationship with him to form corrupt relationships with other judges. Significantly, though the Marcottes would give things of value to other judges and law enforcement officials who helped them throughout the 1990's and into the 2000's, several of whom were subsequently convicted of Federal corruption offenses, they each perceived Judge Porteous to be the single most significant judge in assisting them in their business.

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[278] Affidavit in Support of Application, In the Matter of the Application of the United States of America for an Order Authorizing the Interception of Wire Communications, Misc. No. 01-2607 (E.D. La., Aug. 27, 2001) (redacted) at 136 (Ex. 69(f)).

[279] The DOJ Complaint Letter stated: "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." DOJ Complaint Letter at 1 (Ex. 4).

Louis Marcotte testified:

Q. Now, of all the judges who have helped you, where would you rank Judge Porteous?

A. Number one.

Q. Okay. You didn't even hesitate in that response, did you?

A. No.

Q. And you're certain of that; is that right?

A. Yes.[280]

Lori Marcotte, Louis's sister, who ran the company with Louis, testified similarly:

Q. Who was the single most important judge [to] the success of your company, in the 24th Judicial District Court?

A. Tom Porteous.

Q. Is there any question in your mind about that?

A. No.[281]

Even as a Federal judge, Judge Porteous took steps to help the Marcottes maintain and expand their business. He lent his status as Federal judge and reputation on their behalf, notwithstanding his knowledge of their corrupt acts. In particular, Judge Porteous vouched for the Marcottes with newly elected State judges and other judicial officers, and helped the Marcottes secure and cement relationships—including a corrupt relationship with one judge in particular, former State Judge Ronald Bodenheimer. Judge Porteous undertook these efforts while accepting numerous expensive meals from the Marcottes.

Two other incidents that reflect actions taken by Louis Marcotte for the benefit of Judge Porteous are noteworthy. First, in 1994, Louis Marcotte was interviewed by the FBI as part of its background check of Judge Porteous in connection with his nomination to be a Federal judge. Louis Marcotte was not candid with the FBI as to his knowledge of Judge Porteous's activities. Second, in 2003, when he was under criminal investigation, Louis Marcotte prepared an affidavit that generally attempted to exculpate Judge Porteous. As discussed below, that affidavit was misleading, if not false.

B. Overview—the Impact of Louisiana State Judges on the Bail Bonds Businesses

In the 24th JDC where Judge Porteous presided as a State judge until October 1994, the practices of the State judges in setting bonds had enormous financial impact on those in the bail bonds business. If the bonds were set too high, persons who were arrested would not be able to afford to pay the premium (typically 10% of

[280] Louis Marcotte Dep. at 24-25 (Ex. 68).
[281] Lori Marcotte Dep. at 66-67 (Ex. 76).

the bond)[282] to the bondsman to have the bond posted. If the bond was set too low—say, personal recognizance—the bondsman would not make any money in the form of premiums. As a general matter, a bondsman wanted bonds to be set at profit-maximizing levels—that is, the highest amount for which the individual who was arrested could afford to pay the premium, but no higher than the person could pay. As Lori Marcotte testified:

> Q. [E]xplain what the consequences are if bond was set too low or if the bond was too high.
>
> A. It depends on how much money the person had to bail out. If they had little money, then having a low bond set would be advantageous to us. If they had plenty money, then a higher bond would be set.
>
> Q. [W]hy isn't it in your best interest for the judge to set a $100,000 bond or $1 million bond? Does that mean you get $100,000 premium?
>
> A. Not if the people don't have the money. No, it doesn't maximize profit to write a bond and not collect all the money.[283]

In the 24th JDC, the practice was that the Marcottes (or their employees or agents) would interview a prisoner upon arrest, find out identifying information, the nature of the crime, and the prisoner's record, locate relatives or persons capable of posting bail, and ultimately determine how much the prisoner could afford to pay in the form of a premium: "We would screen the family or the defendant to find out how much money they had. At some point, we would run credit reports to see if they had available credit on their credit cards."[284] The Marcottes would use that information in making a recommendation to one of the judges in the courthouse as to the amount of bond that the judge should set.

The procedures in the courthouse during the relevant time period called for bond to be set by a sitting magistrate assigned to that duty. However, any judge in the courthouse could set bond, so if the bondsman thought that the magistrate who would hear the case would set the bond too high or too low, the bondsman would seek out a favored judge to set the bond at the bondsman's recommended, profit-maximizing level. As Louis Marcotte explained: "[I]f the 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."[285]

It is against this background and set of financial incentives that Louis Marcotte and Lori Marcotte formed a relationship with Judge Porteous.[286]

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[282] The actual amount was 12.5%. Of that amount, 10% went to the bondsman, and 2.5% went to the court. The 10% amount will be used for this discussion.

[283] Lori Marcotte Dep. at 8 (Ex. 76).

[284] Louis Marcotte TF Hrg. III at 42.

[285] Louis Marcotte TF Hrg. III at 43.

[286] Though financial records of Judge Porteous in the 1990-1994 time-period have not been obtained, the testimony of those who knew him—including Creely, for example—make it clear that Judge Porteous had financial difficulties meeting family obligations.

C. The Relationship Between the Marcottes and Judge Porteous Through the Summer of 1994

The relationship between Judge Porteous and the Marcottes involved a course of conduct, consisting of Judge Porteous soliciting and accepting a steady stream of things of value from the Marcottes, while, at the same time, Judge Porteous took a series of official actions for their financial benefit. These actions on both sides grew more extensive, and more intertwined, from the inception of their relationship in or about 1990 and 1991 to the time that Judge Porteous took the Federal bench in late October 1994.

1. Judge Porteous's Solicitation and Acceptance of Things of Value from the Marcottes

Meals. The Marcottes frequently took Judge Porteous to lunch, along with his secretary Ms. Danos, as well as other courthouse personnel or staff. The meals were expensive and involved significant consumption of alcohol. Louis Marcotte estimated they occurred "around once a week and sometimes twice a week" and identified the restaurants as "the Beef Connection, Ruth's Chris [Steak House], a place named Romairs, you know, restaurants near the courthouse."[287] Lori Marcotte similarly described the frequency of the lunches as "[a] few times a month. Sometimes once or twice a week and then sometimes once a month. So overall, I don't know, twice a month in the whole history, but sometimes more."[288] On occasion the lunches would go on for hours, to the point that Lori Marcotte left her credit card number with the restaurant—essentially providing Judge Porteous and others access to an open bar and unlimited food.

Several witnesses corroborated the Marcottes. When asked which restaurants the Marcottes took her and Judge Porteous to, Danos responded: "Red Maple, Beef Connection, Emeril's. I'm sure there's others. . . ."[289] Attorney Bruce Netterville was friends with Louis Marcotte,[290] and was also an occasional guest of the Marcottes when they were taking Judge Porteous to lunch. Netterville identified "Ruth's Chris Steakhouse on Broad Street and the Red Maple which is on Lafayette and, I think 10th, but Lafayette Street in Gretna" as among the restaurants they went to, but had no doubt there were others as well.[291] Bodenheimer (who would subsequently be elected judge) testified that when he was a prosecutor: "I was assigned to [Judge Porteous's] court. And when we broke for lunch, he would—Louis and his, one or sometimes both of his sisters, would be there to take him [Judge Porteous] to lunch."[292]

Sometimes Louis would call Judge Porteous, sometimes Judge Porteous would call Louis: "It started out with me calling him for lunch. And then, as we got closer and developed a relationship, he

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[287] Louis Marcotte TF Hrg. III at 44. The various restaurants were described as "pretty close to the same cost" as Ruth's Chris Steak House. Id.
[288] Lori Marcotte Dep. at 18 (Ex. 76).
[289] Danos Dep. I at 25-26 (Ex. 46).
[290] Louis Marcotte was best man at Netterville's 1994 wedding.
[291] Netterville Dep. at 8 (Ex. 92(a)).
[292] Bodenheimer Dep. at 8 (Ex. 86).

would call and then I would call."[293] According to Louis, Judge Porteous never paid for a meal.[294]

Corporate credit card records of Louis Marcotte and Lori Marcotte were obtained going back as far as January 1994, as well as Lori Marcotte's personal credit card going back to March 1993. These records are consistent with the recollections of the Marcottes and other witnesses concerning lunches at the Beef Connection, Red Maple, Emerils, and Romairs, and reveal charges at those restaurants on the days shown in the following chart:[295]

Table 4. Selected Meals Provided by the Marcottes to Judge Porteous (1994)

Date	Credit Card	Restaurant	Amount
1/10/94	Lori Amex (C)	Romair's	$ 77.14
1/21/94	Lori Amex (C)	Beef Connection	$ 256.56
2/28/94	Lori Amex (P)	Emeril's	$ 91.31
3/25/94	Lori Amex (C)	Beef Connection	$ 181.06
4/15/94	Lori Amex (P)	Beef Connection	$ 213.89
4/28/94	Lori Amex (C)	Beef Connection	$ 200.00
5/27/94	Lori Amex (P)	Emeril's	$ 69.33
7/xx/94	Lori Amex (C)	Red Maple	$ 51.98
7/xx/94	Lori Amex (C)	Red Maple	$ 96.64
7/27/94	Lori Amex (P)	Mike's on the Avenue	$ 121.37
8/xx/94	Louis Amex	Red Maple	$ 87.11
8/xx/94	Louis Amex	Red Maple	$ 107.90
8/xx/94	Lori Amex (C)	Red Maple	$ 100.05
8/24/94	Lori Amex (P)	Romair's	$ 74.95
9/29/94	Louis Amex	Beef Connection	$ 139.46
9/xx/94	Lori Amex (C)	Red Maple	$ 77.63
9/12/94	Lori Amex (C)	Beef Connection	$ 113.25
10/8/94	Lori Amex (P)	Romair's	$ 105.96
10/xx/94	Lori Amex (C)	Red Maple	$ 190.42
10/xx/94	Lori Amex (C)	Red Maple	$ 72.75
10/28/94	Lori Amex (P)	Mike's on the Avenue	$ 122.65

Bodenheimer testified that Louis's and Lori's other sister, Lisa Marcotte, was occasionally in attendance at these lunches, and there are charges on Lisa Marcotte's American Express account for

[293] Louis Marcotte TF Hrg. III at 44.

[294] From Louis Marcotte TF Hrg. III at 45:

> Q. [L]et's just say [you took him to lunch] three times a month for 3 years, so 100 lunches. Of the 100 lunches that you went to with Judge Porteous at the restaurants and at the rates that you described, how many of those did Judge Porteous pay for?
>
> A. He didn't pay for any.

[295] Designations in Table 4 reflect that Lori Marcotte used both a personal (P) and corporate (C) American Express account. Records for the Red Maple charges do not indicate the date of the month on which the charges were incurred.

meals at the Red Maple and Beef Connection, consistent with the amounts set forth above, in this same time period. Lori Marcotte and Lisa Marcotte confirmed that on occasion Lisa was in attendance at lunches with Judge Porteous and paid for the meals.

Automobile repairs and maintenance—early 1990's. The Marcottes, through their employees Jeffery Duhon and Aubrey Wallace, began to take care of Judge Porteous's various automobiles (including those of his family).[296] This service included picking up Judge Porteous's car to have it washed, detailed, and filled up with gas, as well as more significant repairs. As Louis Marcotte described: "[F]irst, I started washing it. And then, you know, after I would wash it, I would add a little gas to it. And then it escalated from there, you know. Then the mechanical work started, the tires, the radios in the cars, and then his son's cars, and transmissions and stuff like that."[297] Danos recalled an incident where she went to pick up Judge Porteous's car from the repair shop, and the proprietor told her that the Marcottes were paying for the repairs.[298]

Duhon testified that he "took care of three of [Judge Porteous's] cars. I had his, his son's, and his wife['s]." As to what he meant by "took care of them," Duhon explained: "Anything. Mostly keeping them maintained, maintenance up on them, transmission, brakes, tune-ups, air condition[ing], anything that was wrong with his automobiles, his three automobiles." Duhon specifically recalled: "I had a transmission rebuilt in a Cougar, brake job. I used to tune them up, get them tuned up a lot."[299]

Aubrey Wallace, another Marcotte employee, similarly testified that "I was assigned on some occasions, several occasions to do detail of the car, just basic maintenance. If it needed some maintenance work, I would bring it to the proper place that it needed to go." By "detailing" Wallace meant: "Generally, just cleaning the car inside and out, gassing it up. If there were any additional work that I needed to do, it would be specified to me what I needed to do."[300]

As with the meals, sometimes Louis offered and sometimes Judge Porteous solicited car service. As Louis described: "Well, sometimes we would be at lunch and he would say, 'Well, you know, my car is not running well,' and I would say, 'Okay, Judge, I will take care of that.' And there was also requests from him, you know, asking me to do it. So it worked both ways."[301]

Trip to Las Vegas with Judge Giacobbe and Attorney Bruce Netterville. In or about 1992, the Marcottes invited Judge Porteous

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[296] Louis Marcotte TF Hrg. III at 45-46.

[297] Louis Marcotte TF Hrg. III at 45. See also, Louis Marcotte FBI Interview, 4/29/04, at 3-4 (Ex. 72(d)). In his FBI interviews, Louis specifically recalled Judge Porteous requesting that Marcotte replace four tires on the car, and in a follow-up phone call to the FBI, Louis Marcotte reported that a car stereo for Judge Porteous's car was purchased at "Delta Electronics" and that tires were purchased at "Uniroyal." The tire business's name had changed and was called "Premier Tire" at the time of the interview. Louis Marcotte FBI Interview, Apr. 22, 2004, at 1 (Ex. 72(b)); Louis Marcotte FBI Interview, Apr. 26, 2004 (Ex. 72(c)).

[298] Danos testified she knew that the Marcottes paid for the repairs "Because I, I remember Gus [the mechanic] saying it was taken care of or whoever was working there at the time." Danos Dep. I at 55-56 (Ex. 46).

[299] Duhon Dep. at 10, 12 (Ex. 78).

[300] Wallace Dep. at 6-7 (Ex. 83).

[301] Louis Marcotte TF Hrg. III at 46.

and Danos,[302] among others (including attorneys who helped the Marcottes in their business), on a trip to Las Vegas with them. Judge Porteous did not attend this trip, though Danos did. The trip included attending a "Siegfried and Roy" show, as well as a flight over the Grand Canyon. One of the dinner bills paid for by Lori Marcotte was particularly expensive—"the largest bill we had ever paid for dinner."[303] Photographs have been obtained of guests sitting around the table, and of Lori Marcotte holding the bill.[304]

Thereafter, from approximately 1992 through 1994, the Marcottes paid for at least one, and maybe two, trips for Judge Porteous to Las Vegas.

One of the Las Vegas trips included another State judge—Judge George Giacobbe—as well as Netterville, one of the criminal attorneys with whom the Marcottes had dealings in a professional capacity. That trip to Las Vegas is confirmed by Netterville and Lori Marcotte and was also mentioned in the Wiretap Affidavit.[305] Louis Marcotte testified he wanted attorneys to be on the trip with him and Judge Porteous because "it just doesn't look good with a bail bondsman hanging out with judges. So what I did is I brought some attorneys in to make it look good."[306]

Both Louis Marcotte and Lori Marcotte claimed they split the costs of the trip with the attorneys and did so by paying cash to Judge Porteous's secretary Danos. Louis Marcotte testified:

> Q. Okay. Now, do you recall how Judge Porteous'[s] travel was arranged for and/or paid for?
>
> A. Yes. My sister brought cash money to Rhonda, and Rhonda had wrote the check to pay everything, and we reimbursed her. And we got money from the lawyers for half of it.
>
> Q. And how is it that you happen to remember that?
>
> A. Because that's just one thing that you'd remember.
>
> Q. Okay. And was there, was there conscious thought about paying Rhonda so the money wouldn't come—look like it's coming right from you to Judge Porteous?
>
> A. Right.[307]

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[302] The Marcottes had similar incentives to pay for Danos as they did for Judge Porteous—she was a gatekeeper to Judge Porteous and would help the Marcottes have access to him, and dealt with the jail on bond matters on behalf of Judge Porteous. See e.g., Danos Dep. I at 6 (Ex. 46). In fact, one measure of the importance of Judge Porteous to the Marcottes is the fact that they gave things to his secretary as well to ensure access to him.

[303] Lori Marcotte Dep. at 29-30 (Ex. 76);

[304] Lori Marcotte Dep. Ex. 2 (Ex. 202); Lori Marcotte Dep. Ex. 6 (Ex. 206).

[305] Affidavit in Support of Application, In the Matter of the Application of the United States of America for an Order Authorizing the Interception of Wire Communications, Misc. No. 01-2607 (E.D. La., Aug. 27, 2001) (redacted) at 47 (PORT 793)) (Ex. 69(f)). Judge Porteous also admitted going on this trip in a November 1994 interview with the New Orleans Metropolitan Crime Commission—a respected private citizens watchdog agency—though he denied that the Marcottes paid for him. Interview of United States District Court Judge G. Thomas Porteous by Anthony Radosti and Rafael C. Goyaneche, III, Metropolitan Crime Commission, Nov. 9, 1994 (part of Ex. 85).

[306] Louis Marcotte TF Hrg. III at 46.

[307] Louis Marcotte Dep. at 14-15 (Ex. 68). As written up by the FBI, Louis Marcotte stated in an April 2004 interview:

> On this [Las Vegas] trip the lawyers and LOUIS split the cost of Judge PORTEOUS' expenses and gave the money to DANOS to put it through her checkbook in order to hide the payments. DANOS then wrote a check to pay for the expenses so there was no direct link between LOUIS, JUDGE PORTEOUS and [others].

Lori Marcotte likewise recalled "standing in [Danos's] office, with another attorney, handing her the money."[308] According to Lori Marcotte, this trip to Las Vegas, paid for by the Marcottes, was initiated at Judge Porteous's request.[309]

Attorney Netterville testified that he did not recall how much he actually paid for the trip but acknowledged that if he had been asked to pay for more than his individual personal share (i.e., if he had been asked to chip in for the judges) he would have done so. Netterville testified:

> Q. But you don't doubt that if Louis said your share of this trip is "X" dollars that that's something you would have paid?
>
> A. Yes, I would have.[310]

Possible second trip to Las Vegas. Louis Marcotte and Lori Marcotte both testified they believed there was a second trip where they took Judge Porteous to Las Vegas, a fact that appears supported by Danos as well. Louis recalled a second trip because he "remember[ed] we were standing by a slot machine, and his wife was asking him for some change to put—some dollars to put back in, coins, you know, to put back into the slot machine."[311]

Lori Marcotte also testified there may have been a second trip to Las Vegas paid for by the Marcottes, possibly in connection with Judge Porteous speaking at a Professional Bail Agents of the United States (PBUS) Convention.[312]

Danos did not recall Judge Porteous taking the previously described trip with Judge Giacobbe and the attorneys (a trip that she did not attend).[313] However, she, like Lori Marcotte, recalled what appeared to be a different Marcotte-Judge Porteous trip to Las Vegas in connection with one of the PBUS conventions that Danos herself attended:

> Q. [D]id the Marcottes ever take Judge Porteous to Las Vegas, either with you on any trip that you were in attendance on or on a trip that you know they took him on even if you were not in attendance on?
>
> A. One Las Vegas trip.
>
> Q. Okay. And what do you recall about that trip?
>
> A. Not very much. It was their convention. And I think they would have liked for him to have spoken, but they already had speakers lined up.
>
> Q. Okay. And you were in attendance on that trip?

Louis Marcotte FBI Interview, 4/30/04 at 5 (Ex. 72(a)). See also, Louis Marcotte FBI Interview, Apr. 22, 2004 at 3 (Ex. 72(b)). Lori Marcotte told the FBI that Louis paid for Judge Porteous's airfare, hotel, food and expenses at a club. Lori Marcotte FBI Interview, Mar. 30, 2004 at 2 (Ex. 74(b)).

[308] Lori Marcotte TF Hrg. III at 56.

[309] "LORI remembered DANOS called LOUIS [Marcotte] and told LOUIS that PORTEOUS was ready to go to Las Vegas." Lori Marcotte FBI Interview, Apr. 21, 2004 at 1 (Ex. 74(d)) See also Lori Marcotte FBI Interview, Apr. 2, 2004 at 6 (Ex. 74(c)).

[310] Netterville Dep. at 11-12 (Ex. 92(a)).

[311] Louis Marcotte TF Hrg. III at 47.

[312] Lori Marcotte FBI Interview, Mar. 30, 2004 at 2 (Ex. 74(b)); Lori Marcotte FBI Interview, Apr. 2, 2004 at 8 (mentioning possible trip associated with a bail bonds convention) (Ex. 74(c)).

[313] Danos Dep. I at 15 (Ex. 46).

A. Yes, sir.[314]

* * *

Q. The trip which there was a bail bond convention going on, and I think it's your testimony that to the best of your recollection this was still when he was a State judge, I take it, is it your testimony that that was a trip that was paid for by the Marcottes?

A. I think it was.[315]

Consistent with both Louis's and Lori's testimony, Danos did recall that on one occasion the Marcottes reimbursed her for Judge Porteous's trip to Las Vegas. Danos did not dispute that it was Lori who paid her in cash.[316]

Fence repairs. In or about 1994—while Judge Porteous was still a State judge—Marcotte's employees Duhon and Wallace rebuilt a fence at Judge Porteous's house. They were there more than 1 day and also performed other repairs at the house. They both recalled picking up lumber at Home Depot and described the incident in consistent terms.[317] Louis Marcotte described the incident as follows: "[W]e were at lunch and he mentioned, 'Well, look, my fence blew over in the storm.' And I said, 'Well, you know, I got two guys that will take care of it for you. No problem.'"[318] Lori Marcotte confirmed they paid for a fence for Judge Porteous.[319]

Favors for Judge Porteous's Son. The Marcottes permitted one of Judge Porteous's sons to use one of their parking spaces near the courthouse for his courier business. They also hired his son on occasion.

2. Judge Porteous's Actions on Behalf of the Marcottes

Setting Bonds. When Louis Marcotte first entered the bail bonds business as the owner of Bail Bonds Unlimited (BBU), he did not have connections with judges or other law enforcement personnel in the 24th JDC where he did the bulk of his work. Louis and Lori came to know Judge Porteous through another bondsman—Adam Barnett (who in turn knew Judge Porteous from other connections in the courthouse).[320] On occasion, when Louis Marcotte needed a "difficult" bond to be set, Barnett would go to Judge Porteous to have him set the bond. Barnett was not an employee of Marcotte's, but Louis Marcotte would provide Barnett some portion of the premium that was paid by the individual for whom bond was posted.

Louis Marcotte gradually excluded Barnett as the middleman and he and Lori began to deal with Judge Porteous directly. As Louis and Lori began to do things for Judge Porteous—described

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[314] Danos Dep. I at 15 (Ex. 46). See also Danos Dep. II at 11 (recalling being on a Marcotte trip to Las Vegas with Judge Porteous) (Ex. 47).

[315] Danos Dep. I at 17 (Ex. 46).

[316] Danos Dep. II at 12 (Ex. 47). See also Danos Dep. I at 18 ("One trip I do recall putting the judge's fare on my card. But I, don't recall if it was Lori or Louis that reimbursed me.") (Ex. 46).

[317] See Duhon Dep. at 13-14 (Ex. 78); Wallace Dep. at 10-11 (Ex. 83). The fence repairs occurred either prior to Wallace's February 1991 incarceration or subsequent to his August 1993 release.

[318] Louis Marcotte TF Hrg. III at 46. See also, Louis Marcotte FBI Interview, Apr. 29, 2004, at 7-8 (Ex. 72(d)).

[319] Lori Marcotte FBI Interview, Mar. 30, 2004, at 2 (Ex. 74(b)).

[320] At some point in 1993, Judge Porteous officiated at Adam Barnett's wedding, which was also attended by Lori Marcotte.

in the previous section—Judge Porteous became the "go-to" judge for the Marcottes. Over the time period roughly between 1990 through 1994, as the Marcottes increasingly gave Judge Porteous things of value, they would increasingly go to Judge Porteous to have him set bonds at amounts they requested, and would seek other favors from him. It started "just a little bit" but, as Lori Marcotte described: "[I]n the end it was a lot. It was an everyday, everyday thing in the courthouse. We'd go to the courthouse to see him in his office, call him on his cell phone, call him at home, contact him through his secretary. If he wasn't in the office, she would find him for us, get, get him off the bench. When we needed him to set a bond, he was available for us to set a bond, or split a bond too."[321] As to the frequency of their contacts: "A few times a week. And sometimes when we would go to see him, we'd have more than one bond, sometimes ten at a time. We would make a stack of worksheets and bring bonds. So it's not so much how, how many times in a week. It's when we did go, we always had more than one."[322]

Louis Marcotte described the reasons he gave Judge Porteous things of value as follows:

> Q. The real question, Mr. Marcotte, is, why did you do all of these things for Judge Porteous? What value were you getting by virtue of the fact that you were providing him this stream of value?
>
> A. I wanted service, I wanted access, and I wanted to make money.[323]

The Marcottes' access to Judge Porteous is corroborated by numerous witnesses who saw the Marcottes around his courtroom or in his chambers.[324] For example, Marcotte employee Duhon testified that Louis Marcotte would go to Judge Porteous more than to any other judge in the courthouse to get bonds set. He further described Louis's access to Judge Porteous as follows:

> Q. [W]ould you describe what it would be like to have Judge Porteous go in and set bond at the request of Louis?
>
> A. Yes. He'd get to his chambers at 9:00 in the morning, and they might have 10 or 12 lawyers waiting there. Me and Louis would just walk right by both of them, all of them and walk into his office and have a seat carrying sheets of paper which is like bond form we bring to them, and he let them see them.[325]

Splitting bonds. One way in particular that Judge Porteous helped the Marcottes was through a practice referred to as "splitting" a bond. If a bond for a serious crime would otherwise naturally be set at an amount that would be too high for an accused to pay the required premium, a judge could "split" the bond into

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[321] Lori Marcotte Dep. at 13-14 (Ex. 76).
[322] Lori Marcotte Dep. at 14 (Ex. 76).
[323] Louis Marcotte TF Hrg. III at 47.
[324] Other witnesses describe the Marcottes' frequent access to Judge Porteous. These witnesses include Lori Marcotte, Danos, Netterville (a criminal defense attorney who associated with the Marcottes), Aubrey Wallace (Marcotte employee), and Bodenheimer (a prosecutor at the time, and eventually a State judge).
[325] Duhon Dep. at 7-9 (Ex. 78).

two pieces—one portion was a standard commercial bond, the other was a property bond or other personal promise not backed up by a bondsman. As an example, a $100,000 bond could be "split" into a regular $50,000 commercial bond and a $50,000 component that was secured by property or by the promise of a third party (the accused's mother, for example) to pay $50,000 if the accused did not appear as required.[326] By splitting the bond, the accused needed only to come up with the premium for the $50,000 piece, that is, $5,000. A judge's action in splitting a high bond would mean that the Marcottes would receive some premium rather than no premium.

A "split bond" had political value for the elected State judges who "liked setting high bonds, because if it came out in the newspaper that, you know, something happened and the guy [who was let out on a split bond] did something wrong, then it would look like he got out on a high bond."[327] A judge who "split" a bond could claim that he did not actually reduce the bond (even though in substance this was the effect). Certain individuals in the law enforcement community opposed this practice, and there were some judges who would not "split" bonds.[328]

Judge Porteous became associated with this practice of "splitting bonds" and bragged about having invented it (even though it may have been done by other judges in the past). Former State Judge Bodenheimer testified it was his understanding that Judge Porteous "was the one who somehow came up with this idea of doing these bond splittings" and that Louis Marcotte "told me that Porteous was, was the one who came up with the idea about splitting bonds in the first place."[329] Lori Marcotte stated that "because Judge Porteous was respected in the courthouse by other judges, his peers, the District Attorney's office, Judge Porteous—by Judge Porteous splitting and setting bonds for us was making it like the norm, creating the practice of splitting bonds. He actually originated this practice of splitting bonds."[330]

Setting aside convictions. Judge Porteous took other significant official actions as favors to the Marcottes. In 1993 at Louis Marcotte's request, he set aside the burglary conviction of Jeffery Duhon. Duhon was not only an employee of the Marcottes but was

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[326] Louis Marcotte noted that, frequently, the bail component that was not backed by a surety bond may have had no real value. Louis Marcotte TF Hrg. III at 48 ("[M]ost of the time the personal surety wasn't worth anything, and the only portion of the bond that was worth something was the commercial part of the bond that was executed by the bail agent and backed by the insurance company.").

[327] Louis Marcotte TF Hrg. III at 47.

[328] See Lori Marcotte Dep. at 15 (Ex. 76). As described by the FBI in its wiretap affidavit:

> [I]t is common practice for bondsmen to attempt to get a bond reduced in order to make a bond more affordable; however, there is a built-in reluctance to grant such requests, especially in cases where serious crimes are involved. This reluctance is based primarily on the fact that a Judge, who depends on the public vote to keep his/her job, fears potential serious criticism from the public in general and from the media in particular if a defendant commits another serious crime while out on bond. Splits are a much more attractive means of making bonds "affordable" because a Judge can always argue he/she did not "reduce a bond."

Affidavit in Support of Application at 20-21, In the Matter of the Application of the United States of America for an Order Authorizing the Interception of Wire Communications, Misc. No. 01-2607 (E.D. La., Aug. 27, 2001) (redacted) at 20-21 (Ex. 69(f)).

[329] Bodenheimer Dep. at 6-7 (Ex. 86).

[330] Lori Marcotte Dep. at 17 (Ex. 76). The act of setting a bond is entrusted to a Judge's discretion, so it cannot be argued that the actions of Judge Porteous in splitting or reducing in bond in any particular cases was "right" or "wrong," or that splitting bonds in general was either appropriate or inappropriate across the board.

also married to Lisa Marcotte (Louis's other sister).[331] Louis Marcotte testified he "approached Porteous to see if he would expunge Jeff Duhon's record" and that Judge Porteous did so.[332] Judge Porteous's action in setting aside Duhon's conviction was particularly unusual 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."[333] Louis Marcotte elaborated that in his experience, it was unusual for a judge in one division to expunge a conviction in a criminal case assigned to a judge in a different division.[334]

Additionally, as discussed below, on the eve of his ascension to the Federal bench in October 1994, Judge Porteous set aside the conviction of Aubrey Wallace, another Marcotte employee.

Helping the Marcottes with Judge Alan Green and other Judges. As noted, Judge Porteous was a former prosecutor, had a good relationship with the District Attorney, and was perceived by many in the courthouse to be influential on the bench.[335] By forming a public relationship with Judge Porteous, the Marcottes gained credibility with other State judges on the 24th JDC. Thus, the Marcottes sought to have other State judges included in their lunches with Judge Porteous. Louis Marcotte told the FBI he "wanted to target judges who were not doing bonds and asked RHONDA DANOS [Judge Porteous's secretary] to invite them to lunch with Judge PORTEOUS."[336] An FBI write-up of another Louis Marcotte interview recounts: "MARCOTTE frequently called on PORTEOUS to help bring in other judges MARCOTTE could use to split bonds, reduce bonds and give MARCOTTE good service."[337]

As one example, Judge Porteous helped connect the Marcottes with Judge Alan Green (who was ultimately convicted of a corruption offense arising from his relationship with the Marcottes). Lori Marcotte described this in her Task Force Hearing testimony as follows:

> 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

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[331] In 2003, after Louis Marcotte was publicly identified as the subject of a criminal investigation, Judge Porteous's expungement of Duhon's record was reported in the local newspapers:

> Duhon said it was Porteous who gave him his break in 1992, when the judge expunged his felony record as a favor to Marcotte, allowing him to apply for a bail bonds license. Duhon had been arrested for burglary when he was 17, a charge for which he served 93 days in jail for probation violation, he said.

M. Carr and M. Torres, "Judges Were Given Gifts; Marcotte's Ex-workers Tell of Shrimp, Fence," New Orleans Times-Picayune, Feb. 8, 2003 (part of the Metropolitan Crime Commission Documents, at MCC 0199-200 (Ex. 85), and separately marked as Ex. 119(e)).

[332] Marcotte Dep. at 6-8 (Ex. 68). Exhibit 77(a) is the Motion for Expungement. That Motion is undated, however, it was assigned to "Division B"—Judge E.V. Richards—of the 24th Judicial District Court. Judge Richards set a hearing on that Motion for July 15, 1993. It is not known if that hearing took place. Ex. 77(b) is the Judgment of Expungement dated July 29, 1993, signed by Judge Porteous.

[333] Louis Marcotte TF Hrg. III at 48.

[334] Marcotte Dep. at 6-8 (Ex. 68).

[335] Bodenheimer testified: "Out of all the judges there—Porteous came from the District Attorney's Office—and he was probably the most influential judge with the District Attorney's office, in my opinion.' Bodenheimer Dep. at 5 (Ex. 86). Netterville similarly testified that Judge Porteous was perceived to be an influential Judge on the 24th JDC. Netterville Dep. at 9 (Ex. 92).

[336] Louis Marcotte FBI Interview, May 17, 2004 at 2 (Ex. 72(e)).

[337] Louis Marcotte FBI Interview, Apr. 22, 2004 at 3 (Ex. 72(b)).

> 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.[338]

This practice of having Judge Porteous vouch for the Marcottes with the State judges in the 24th JDC continued after Judge Porteous became a Federal judge.

Helping in civil "non-compete" litigation. The Marcottes also requested that Judge Porteous help lobby other judges on their behalf in connection with "non-compete" litigation initiated by the Marcottes against a former employee. As written up by the FBI, Lori Marcotte described the request for assistance in a BBU civil case against a former employee, Bobby Gene Hollingsworth, as follows:

> BBU [Bail Bonds Unlimited] sued BOBBY HOLLINGSWORTH over a non-compete clause in his contract. LOUIS MARCOTTE went to JUDGE PORTEOUS and wanted JUDGE PORTEOUS to call JUDGE CLARENCE McMANNUS and tell him how to rule. JUDGE PORTEOUS said he would contact JUDGE McMANNUS and called him while LOUIS MARCOTTE was in JUDGE PORTEOUS' chambers. McMANNUS ruled in favor of BBU.[339]

The official court case jacket is consistent with this recollection, and reveals that the Marcottes (Bail Bonds Unlimited) filed the case against Hollingsworth in August 1994, shortly prior to Judge Porteous taking the Federal bench. The Marcottes initially obtained a Temporary Restraining Order restraining Hollingsworth from competing against them, then obtained a permanent injunction which was to be in effect until September 1995.[340]

C. The July-August 1994 Background Check of Judge Porteous

The bulk of the background investigation of Judge Porteous in connection with his nomination to the Federal bench occurred in July and early August 1994. On August 1, 1994, Louis Marcotte was interviewed as part of that standard background check. It is not known how the FBI got Louis Marcotte's name as a person to interview; however, Marcotte testified that Judge Porteous told him "that the FBI is going to be coming to interview you."[341] Louis Marcotte told the FBI as follows:

> MARCOTTE said the candidate [Porteous] 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

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[338] Lori Marcotte TF Hrg. III at 57. See also Lori Marcotte FBI Interview, Apr. 2, 2004 at 1 (Ex. 74(c)) ("After Green won the election, Lori and Louis discussed initiating a relationship with Green via Judge Porteous. Porteous got Green to come to lunch with Porteous and the Marcottes which was set up by Danos [Porteous's secretary]. They had lunch at Romer's (ph) [should be 'Romair's'].'). Danos also identified Judge Green as one of the judges who accompanied them with Judge Porteous on lunches when he was a State judge. Danos Dep. I at 27 (Ex. 46).

[339] Lori Marcotte FBI Interview, Nov. 5, 2004 at 2 (Ex. 74(e)).

[340] Bail Bonds Unlimited v. Bobby Gene Hollingsworth, No. 467-905, Div. E (J. McManus) (24th Jud. Dist. Ct., Jeff. Par., La.) (Ex. 91(b)).

[341] Louis Marcotte TF Hrg. III at 51.

> candidate to associate with anyone of questionable character.[342]

As to Judge Porteous's drinking and financial situation, the write-up 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.[343]

Louis Marcotte acknowledged that these statements about Judge Porteous's financial situation and drinking habits were false. As to Judge Porteous's financial condition, Marcotte has since testified that he knew at the time that Judge Porteous was "struggling": "[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."[344] He further described Judge Porteous's cars as being in "deplorable condition."[345]

As to Judge Porteous's drinking, Louis Marcotte bluntly described his statement to the FBI that Judge Porteous would have a "beer or two" at lunch in the following terms: "That's a false statement."[346] Marcotte testified that he was familiar with Judge Porteous's drinking, and "knew that he [Judge Porteous] was an alcoholic. He drank a lot. . . . He would drink four or five glasses of Absolut for lunch."[347]

Finally, the FBI interview quoted Louis Marcotte as stating 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 would impact negatively on the candidate's [Judge Porteous's] character, reputation, judgement or discretion." Louis Marcotte acknowledged that he "was lying again," 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.[348]

After the initial portion of the background check had been completed, FBI Headquarters directed that further investigation be conducted as a result of some derogatory information that was uncovered (including allegations as to Judge Porteous's drinking and that he was living above his means).[349]

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[342] Porteous Background Check Documents, at PORT 503-04 (Ex. 69(b)).

[343] Porteous Background Check Documents, at PORT 503-04 (Ex. 69(b)).

[344] Louis Marcotte TF Hrg. III at 49.

[345] Louis Marcotte TF Hrg. III at 49 ("I knew he was struggling, because his cars were in deplorable condition.").

[346] Louis Marcotte Dep. at 12 (Ex. 68).

[347] Louis Marcotte Dep. at 11 (Ex. 68). In his Task Force Hearing testimony, Louis Marcotte repeated his testimony that Judge Porteous would have numerous vodka drinks at lunch and that he deliberately misled the FBI about his knowledge of Judge Porteous's drinking. Louis Marcotte TF Hrg. III at 49. Thus, Louis Marcotte, like Robert Creely, was not candid with the FBI as to both Judge Porteous's financial circumstances and as to his drinking.

[348] Louis Marcotte TF Hrg. III at 50.

[349] Porteous Background Check Document, at PORT 462-63 (Ex. 69(c)).

On August 17, 1994, Louis Marcotte was briefly reinterviewed,[350] and the background investigation was completed a few days later.[351]

At the Task Force Hearing, Marcotte testified that after the FBI interview (it was not clear which one), he met with Judge Porteous and "told him [Judge Porteous] everything that they asked about"[352] and that he had given Judge Porteous "a clean bill of health."[353]

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.

D. Judge Porteous's Actions to Benefit the Marcottes During His Final Months on the State Bench

1. September-October 1994 Set-Aside of Wallace's Felony Conviction

After he was nominated, and around the time of his Senate confirmation process, Judge Porteous was pressed by Louis Marcotte to set aside the felony burglary conviction of his employee Aubrey Wallace.[354] As described by Louis Marcotte:

> Q. [W]hat was Judge Porteous's response when you made that request of him?
>
> A. He waffled a little bit because he wasn't confirmed at the time, but he told me—I saw him a few times, I pushed him and said, you know, "Judge, you know, I really need to get this done." He said, "After my confirmation, I will do it."
>
> Q. And, in fact, did he do it?
>
> A. Yes, he did.
>
> Q. And, in your mind, do you have an opinion as to why Judge Porteous set aside Wallace's conviction?
>
> A. Because all of the stuff that I have done for him in the past.
>
> 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.[355]

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[350] Louis Marcotte FBI Interview, Aug. 17, 1994, at PORT 513-14 (Ex. 69(b)). The FBI was primarily concerned with certain bonds that Judge Porteous had set at the request of an attorney at a time prior to Marcotte having formed a relationship with Judge Porteous.

[351] Note to DOJ re: Judge Porteous, Aug. 19, 1994, at PORT 530 (Ex. 69(b)).

[352] Louis Marcotte TF Hrg. III at 51.

[353] Louis Marcotte TF Hrg. III at 64.

[354] Wallace had been arrested on burglary charges on May 8, 1989; he pleaded guilty to the felony charge of simple burglary on June 26, 1990 and was sentenced the same day to a suspended sentence of 3 years incarceration and placed on probation for 2 years. State v. Wallace, No. 89-2360 (24th Jud. Dist. Ct., Jeff. Par., La.) (court case file) (Ex. 82). At the time of his May 1989 burglary arrest, Wallace was under indictment for felony drug charges (PCP and cocaine) for an offense alleged to have occurred on December 15, 1988.

While he was on probation for the burglary conviction, Wallace pleaded guilty on February 26, 1991, to the felony drug charges of possession of over 28 grams of cocaine and possession of PCP and was sentenced to 5 years incarceration.

[355] Louis Marcotte TF Hrg. III at 51. Louis Marcotte's Task Force Hearing testimony tracked his statement to the FBI in 2004 in which he stated that Judge Porteous wanted to wait until after his Senate confirmation to set aside Wallace's conviction:

> PORTEOUS waited until the last days of his term as a 24th Judicial District Court Judge to expunge AUBREY WALLACE'S criminal record. PORTEOUS did not want the fact that he expunged WALLACE'S record to be exposed in the media or discovered in

Setting aside Wallace's burglary conviction required Judge Porteous to take two steps: first, the sentence for Wallace's burglary conviction—a sentence which Wallace had completed—had to be amended from one which, as a matter of law, was not eligible to be set aside, to one that could be set aside; second, the sentence, having been so amended, would then need to be set aside.

On September 20, 1994, Robert Rees, an attorney who did occasional criminal work and thus had interactions with the Marcottes, filed a motion on behalf of Wallace to set aside Wallace's conviction. This was a bare-bones motion, reciting only that Wallace had been sentenced in 1990 and now "desires to amend his sentence to give him benefit under Article 893." [356]

On September 21, 1994, Judge Porteous held a hearing in which he took the first step in the set aside process, by amending Wallace's sentence to make it eligible to be set aside. At that hearing, Netterville (an attorney who did business with the Marcottes and who had traveled to Las Vegas with Judge Porteous and Louis Marcotte in or about 1992 or 1993) stood in for Rees. Netterville did not recall this hearing or how he came to stand in for Rees, and he did not consider Wallace a client. His appearance was limited to his saying "Thank you, Judge" and "Thank you." The entire hearing was less than one transcript page, the critical portion consisting of Judge Porteous's conclusion: "Accordingly, the sentence will be amended to include removal of the unsatisfactory removal of probation and the entering of the plea under Code of Criminal Procedure 893. All right. I've signed the order." [357]

On Thursday, September 22, 1994, Judge Porteous signed the written order that was proposed as part of the underlying September 20, 1994 Motion. The Order amended the sentence so that it would represent that the defendant pleaded guilty under a provision of State law (Article 893) which permitted the conviction to be set aside. [358]

Judge Porteous's Senate confirmation hearing occurred 2 weeks later, on Thursday, October 6, 1994. He was confirmed by the Sen-

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his background investigation for his Federal judicial appointment. PORTEOUS told MARCOTTE that he (PORTEOUS) would act on WALLACE'S expungement after he was appointed to the Federal judicial bench. PORTEOUS told MARCOTTE he was not going to risk a lifetime judicial appointment for WALLACE.

Louis Marcotte FBI Interview, Oct. 15, 2004 at 1 (Ex. 72(g)). Lori Marcotte specifically recalled that "we went to Judge Porteous to ask him if he would expunge Aubrey Wallace's criminal record. My brother and myself, we went to Judge Porteous'[s] office." Lori Marcotte Dep. at 25-26 (Ex. 76).

[356] Motion to Amend Sentence, State of Louisiana v. Aubrey N. Wallace, No. 89-2360 (24th Jud. Dist Ct., Jeff. Par., La.), Sept. 20, 1994, (part of Ex. 82). Wallace's first name is spelled "Aubry" in the court records from this case. The correct spelling of his first name is in fact "Aubrey." Accordingly, throughout this Report, his first name will be spelled "Aubrey" regardless of how it may have been spelled in court records.

[357] Transcript of Proceedings, State of Louisiana v. Aubrey Wallace, No. 89-2360 (24th Judicial Dist. Ct., Jeff. Par.), Sept. 21, 1994, at PORT 0620-24 (part of Ex. 69(d)). Probation was initially deemed to have been unsatisfactorily completed because Wallace was incarcerated while on probation.

[358] The Order stated in full:

ORDER

Considering the foregoing, IT IS ORDERED that the sentence on Aubrey WALLACE is hereby amended to include the following wording, "the defendant plead under Article 893."

GRETNA, LOUISIANA this 22 day of September, 1994.

G. Thomas Porteous /s/
JUDGE

Order (amending sentence), Louisiana v. Aubrey N. Wallace, No. 89-2360 (24th Jud. Dist Ct., Jeff. Par., La.), Sep. 22, 1994 (part of Ex. 82).

ate on Friday, October 7, 1994, and received his commission the following Tuesday, October 11, 1994.

On Friday, October 14, 1994, 1 week after being confirmed but prior to being sworn in as a Federal judge (which occurred on October 28, 1994), Judge Porteous held another hearing on the Wallace matter to finish the process, this time with Rees appearing for Wallace. Again, the transcript of the entire hearing takes up but one transcript page, starting as follows:

> Mr. Reese: You Honor, Robert Reese on behalf of——
>
> Judge Porteous: I'm going to grant that. I've already amended the sentence to provide for a 893.
>
> * * *
>
> Under 893 the dismissal will be entered.[359]

Judge Porteous also signed a written order that date to the same effect, thus setting aside Marcotte employee Wallace's 1990 burglary conviction.[360]

November 1994—Judge Porteous's Interview by the Metropolitan Crime Commission. Shortly after setting aside Wallace's conviction, an allegation was made to the New Orleans Metropolitan Crime Commission (MCC)—a citizen's watchdog group—concerning the lawfulness of Judge Porteous's actions in setting aside Wallace's conviction. Judge Porteous was interviewed by MCC representatives on November 8, 1994, 11 days after he became a Federal judge.

In that interview, Judge Porteous denied having "frequent" lunches with the Marcottes, denied that the Marcottes paid his way to Las Vegas, and denied that he amended Wallace's sentence out of friendship or at the request of Louis Marcotte. That interview was written up as follows:

> Upon arrival we advised Judge Porteous that the purpose of our meeting was to question him regarding his amendment of the Aubrey N. Wallace sentence. . . . In particular we advised Judge Porteous that we wanted to ask him about his relationship with Louis Marcotte. . . . The Judge stated "lets not sugar coat anything, in other words you guys think I'm dirty." We replied that we had some questions about his handling of the Aubrey Wallace case and welcomed an explanation of his reasoning in this matter. . . .

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[359] Transcript of Proceedings, State of Louisiana v. Aubrey N. Wallace, No. 89-2360 (24th Jud. Dist. Ct., Jeff. Par., La.), Oct. 14, 1994, at PORT 000625-29 (Ex. 69(d)). The attorney's name was Robert Rees (without the "e"). It is reported in the documents as Robert "Reese," and that spelling is used in the quoted materials. The prosecutor in the courtroom for the two hearings, Assistant District Attorney Michael Reynolds, stated in a Task Force Staff interview on January 5, 2010, that the set-aside didn't "smell right" to him at the time, that it was wrong as a matter of discretion and perhaps illegal, but that because of Judge Porteous's close relationship with the then-District Attorney, there was nothing he could do.

On October 19, 1994, Judge Porteous signed again the same order he had previously signed on September 22, 1994 (the order amending the sentence to permit it to be set aside). It is not known why he signed this second identical order. It was actually signed after Judge Porteous had set aside the conviction.

[360] Order (setting aside arrest and dismissing charges), State of Louisiana v. Aubrey N. Wallace, No. 89-2360 (24th Jud. Dist Ct., Jeff. Par., La.), Oct. 14, 1994 (part of Ex. 82).

> 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 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.
>
> The Judge stated he felt he had done nothing criminal, but stated that the Assistant District Attorney had the authority to appeal his ruling it was improper. The Judge ended the meeting by telling us to "do what you think you have to do." . . .[361]

These events 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.[362]

The Lawfulness of the Set-Aside. The action of Judge Porteous setting aside Wallace's burglary conviction was not appealed by the State and thus not subject to review as to its lawfulness. Nonetheless, the observations of a practicing attorney in this field are noteworthy. Netterville, the attorney who stood in to represent Wallace at the initial set-aside hearing, has handled hundreds of set-aside motions in his career and understands the law and practice involved in the process. Notwithstanding that Netterville actually appeared for Wallace in open court in seeking the set-aside, he testified in a Task Force deposition that he would not have accepted that case from a paying client and viewed the set-aside as legally improper:

> Q. If a client, if a person came to you and said I want to hire you to have my conviction set aside and . . . I wasn't sentenced under Article 893 [which permits set asides] and my probation was unsatisfactorily terminated, what would you tell them?
>
> A. I'd say you can't hire me because it can't be done.

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[361] Interview of United States District Court Judge G. Thomas Porteous by Anthony Radosti and Rafael C. Goyaneche, III, Metropolitan Crime Commission, Nov. 9, 1994 (part of Ex. 85).

[362] J. Darby, Amending Sentence Questioned, Federal Judge Defends Actions, New Orleans Times-Picayune, B-1, Mar. 19,1995 (Ex. 119(a)).

Q. So that's more—I mean, isn't that more than just being irregular to highly irregular.

A. No, it's highly irregular. You can't, you can't do it. If the district attorney had objected and taken a writ, he would have won in my opinion.[363]

Whether or not the set-aside was unlawful, the facts at a minimum demonstrate that on the eve of his taking the Federal bench, Judge Porteous took the "highly irregular" official act of setting aside the felony conviction of one of Marcotte's employees, at the personal request of Marcotte and as a favor to him. The fact that Judge Porteous timed this judicial act to occur after his confirmation is strong evidence that he knew of its impropriety and that he knew that it evidenced his improper relationship with the Marcottes. It is not possible to challenge the "merits" of a decision to set aside a conviction (any more than it is possible to challenge the exercise of discretion in setting a bond), for such an act inherently embodies the judgment of a judge as to whether an individual merits this significant benefit. However, in this instance, the following factors are noteworthy:

- Wallace had two felony convictions in a short period of time (stemming from the 1989 drug charge and the 1990 burglary charge, which occurred while on release from the drug charge). Wallace had been released from prison for about a year on the drug charge, and was still on parole for that offense at the time Judge Porteous set aside Wallace's burglary conviction.
- It is consistent with Judge Porteous's other conduct as a judge that benefitted Louis Marcotte. Indeed, Judge Porteous had previously set aside the conviction for Marcotte's brother-in-law (Duhon).
- There was no compelling justification for Judge Porteous to set aside the conviction in the last days of his tenure on the State bench. The motions and orders were bare-bones, handled by persons close to Louis Marcotte and Judge Porteous. There were no facts adduced at the hearings or in the pleadings in support of the motion, such as a contention of extraordinary rehabilitation.
- Judge Porteous knew that Wallace, like Duhon, had worked on his cars and his house.
- Moreover, even if both the legality and the merits could be argued, at the time he set aside the conviction, Judge Porteous was indebted to Marcotte, who had assisted him by lying on his behalf in the confirmation process. So long as Judge Porteous was a State judge—and particularly when Judge Porteous was seeking to become a Federal judge—Louis Marcotte had leverage over Judge Porteous by virtue of Marcotte's knowledge of their corrupt relationship.

[363] Netterville Dep. at 18-19 (Ex. 92(a)).

2. Judge Porteous's Bond-Setting in His Final Days on the State Bench

Louis Marcotte also recalled that when Judge Porteous was about to leave the State bench, Marcotte used him to "open the floodgates" in terms of setting bonds: "I figured he was on his way out and let's open the floodgates and let me try to make as much money as I can before he left."[364] In response to questioning from Mr. Schiff at the Task Force hearing, Louis Marcotte explained: "Now, prior to that [the last days on the bench], you know, there was a ton of bail applications as well, but my words were 'Well, let's wear him [Judge Porteous] out.'"[365] Marcotte's testimony has been corroborated by a series of bond forms that were obtained from the Sheriff's Office and the 24th JDC reflecting numerous bonds set by Judge Porteous, for prisoners for whom the Marcottes posted bonds, in the last days of his tenure on the State court bench.[366]

E. JUDGE PORTEOUS'S RELATIONSHIP WITH LOUIS MARCOTTE AND LORI MARCOTTE WHILE HE WAS A FEDERAL JUDGE

1. Overview

Judge Porteous and the Marcottes continued to maintain a relationship after he became a Federal judge. Even though Judge Porteous could no longer set bonds for them, the Marcottes continued to take Judge Porteous to expensive lunches, assisted in having him speak at Bail Bond conventions in Biloxi Mississippi (at the Beau Rivage Resort) and in New Orleans at the Royal Sonesta Hotel, and took his secretary Rhonda Danos to Las Vegas at least twice, to maintain access to Judge Porteous. Louis Marcotte explained that because Judge Porteous was a Federal judge, he "brought strength to the table" on any issues for which the Marcottes sought his assistance, particularly maintaining and forging new relationships with other State judicial officers and business executives.

In his Task Force Hearing testimony, Louis Marcotte was blunt about the prestige that Judge Porteous provided by being at the "table" with him:

> A. Because, number one, he was a Federal judge. Right there, that brings strength to the table whenever he sits down with me.
>
> * * *
>
> A. It would make people respect me because, you know, I am sitting with a Federal judge.

[364] Louis Marcotte TF Hrg. III at 51. See also Louis Marcotte Dep. at 24 (Ex. 68). Louis Marcotte's Task Force Hearing testimony was consistent with what he told the FBI in 2004: "After PORTEOUS was appointed to the Federal bench, he expunged WALLACE'S record and did almost every bond MARCOTTE asked." Louis Marcotte FBI Interview, Oct. 15, 2004 at 1 (Ex. 72(g)). From Judge Porteous's perspective, at the time he set aside Wallace's conviction and signed the bonds on the "way out," he knew that Louis Marcotte had been interviewed twice by the FBI, and had the power to derail his nomination, and, further, that this was one of his last opportunities to set bonds for the Marcottes.

[365] Louis Marcotte TF Hrg. III at 58.

[366] See Exs. 350 (a)-350(zz). Louis Marcotte TF Hrg. III at 51.

* * *

Q. So it is good for you to be sitting with a Federal judge if you are meeting with somebody else, right?

A. Yes, sir.[367]

Judge Porteous, while a Federal judge, helped the Marcottes meet at least four judicial officers—newly elected Justices of the Peace Charles Kerner and Kevin Centanni, and newly elected State judges Ronald D. Bodenheimer and Joan Benge. In addition, Judge Porteous also went with the Marcottes to meals that were also attended by Norman Stotts, the executive for the insurance company that underwrote the Marcottes' bonds. In each instance, Louis Marcotte's explanation of how Judge Porteous "brought strength" and helped him with these individuals is corroborated by other witnesses and evidence.

2. Maintaining the Marcotte-Porteous Relationship

Both Louis Marcotte and Lori Marcotte testified that they continued to take Judge Porteous to lunches when he was a Federal judge—typically with others, and frequently with other State judges. Their testimony on this fact is corroborated by records that were obtained, including calendars of Bail Bonds Unlimited (BBU), noting some of the activities of Louis and Lori Marcotte in the 1999-2002 time frame; various credit card records of Louis Marcotte, Lori Marcotte, and other BBU employees; and several meal checks from the Beef Connection going back to August 1997. Thus, as reflected in the following table, several meals can be identified as including Judge Porteous while he was a Federal judge:[368]

[367] Louis Marcotte TF Hrg. III at 52. See also Louis Marcotte Dep. at 16 (Louis Marcotte maintained a relationship with Judge Porteous "[b]ecause whenever I brought Porteous to the table, I brought strength. . . . Because other judges respected him and they listened to him when he talked.") (Ex. 68).

[368] The exhibits supporting the first four dates in the table 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. The meal checks reflect the purchase of "Abs" or "Abso"—short for "Absolut"—Judge Porteous's drink of choice. The respective exhibits are Ex. 372(a) for August 6, 1997; Ex. 372(b) for August 25, 1997; Ex. 372(c) for November 19, 1997; and Ex. 372(d) for 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 Ex. 373(c) (February 1, 2000) and Ex. 373(d) (November 7, 2001).

In addition, there are other calendar entries mentioning potential lunch appointments with Judge Porteous on other dates for which no corresponding or corroborating credit card statements reflecting restaurant charges were located. Nonetheless, the very presence of Judge Porteous's name in the Marcotte calendars starting in 1999 reflects an ongoing relationship during the years while he was on the Federal bench.

Table 5. Selected Meals Provided by the Marcottes to Judge Porteous (1997-2001)

Date	Calendar Entry	Restaurant	Credit Card	Amount
8/6/97	No calendars located	Beef Connection	Lori Marcotte Amex	$287.03
8/25/97	No calendars located	Beef Connection	Lori Marcotte Amex	$352.42
11/19/97	No calendars located	Beef Connection	Lori Marcotte Amex	$395.77
8/5/98	No calendars located	Beef Connection	Lori Marcotte Amex	$268.84
2/1/00	"Lunch w/Portious [sic] @ Beef Connection"	Beef Connection	Lori Marcotte Amex	$328.94
11/7/01	"12:00 - Giacobbe & Porteous Lunch @ Beef Connection"	Beef Connection	Norman Bowley (BBU employee)	$635.85

PBUS Convention at the Beau Rivage—July 1999. In July 1999, the PBUS held its annual convention at the Beau Rivage resort in Biloxi, Mississippi. The Marcottes paid for some of the events and entertainment at that convention. Judge Porteous's room was paid for by PBUS,[369] however Danos's room was paid for by the Marcottes. Photos taken at that convention show Judge Porteous in the company of Louis Marcotte and Marcotte employee Norman Bowley, among others, at the cocktail reception hosted by BBU.[370]

3. Judge Porteous's Assistance to the Marcottes

a. 1997—Helping with Newly Elected Justice of the Peace Charlie Kerner

Charlie Kerner was the Justice of the Peace in Lafitte, a city about 30 minutes outside of New Orleans. Both Louis Marcotte and Lori Marcotte testified that Judge Porteous helped them try to forge a relationship with Justice of the Peace Kerner. Louis Marcotte testified that they had Judge Porteous attend a lunch with Kerner: "We sat down at the Beef Connection. We ate with Kerner. And then we thought we had a good lunch, and, and Kerner had listened to Porteous. And then after we called Kerner, he kind of froze up on us."[371]

Kerner confirmed that on one occasion, when Judge Porteous was a Federal judge, he (Kerner) arranged to have lunch with Judge Porteous and Danos.[372] Kerner sought to have lunch with Judge Porteous to thank him for having sworn him in as Justice of the

[369] Judge Porteous's hotel room of $206.00 was paid by PBUS, and other food and entertainment for Judge Porteous was provided by PBUS and the Marcottes. Judge Porteous did not disclose this reimbursement in his Financial Disclosure Report for calendar year 1999. In contrast, Judge Porteous did disclose the following comparable events for which he was reimbursed: (1) "Jefferson 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)." Judge Porteous's receipt of hotel accommodations at a gambling location from the PBUS arose from his association with the Marcottes, and his failure to report the receipt of this reimbursement is consistent with an attempt to conceal that relationship.

[370] The photographs were identified by Lori Marcotte in her deposition. See Lori Marcotte Dep. Exs. 23 and 24 (Exs. 223 and 214).

[371] Louis Marcotte Dep. at 16-17 (Ex. 68).

[372] This discussion of events is set forth in Justice of the Peace Kerner's deposition.

Peace.[373] Kerner had "a lot of respect" for Judge Porteous and was "honored" that Judge Porteous had sworn him in.[374]

On the day of the lunch, Kerner received a call from Danos stating that Louis Marcotte, whom Kerner had never met, would be joining them and that the Marcottes would pay for lunch. At that lunch, in the presence of Judge Porteous and Danos, Marcotte spread law books and other materials over the lunch table and tried to explain to Kerner the authority that Kerner possessed to set bonds to help Marcotte. As Kerner described it:

> [H]e [Louis Marcotte] produced some law books to me and had a outline of what he felt as a magistrate and saying setting bonds or whatever would be in my jurisdiction to help him to lower the bonds, you know, so they can help people like that. That's the way he presented it to me.
>
> * * *
>
> Well, he wanted me to help him, help them, I guess, if someone say if the bond could be lowered in a margin that would be affordable to them. That's the way I took it.[375]

Kerner testified that when Louis was giving this presentation: "[I] felt a little uncomfortable. I'll say that. I felt a little uncomfortable."[376] The respect Kerner felt towards Judge Porteous and the honor he felt by Judge Porteous's presence affected Kerner's willingness to hear what the Marcottes had to say.[377] After that lunch, Kerner spoke to another Justice of the Peace who knew the Marcottes, and after that conversation he decided he wanted nothing to do with them.[378]

b. 1997—Helping with Newly Elected Justice of the Peace Kevin Centanni

Lori Marcotte, in her FBI interviews in 2004[379] and Task Force interviews, stated that Judge Porteous also arranged for them to meet newly elected Justice of the Peace Kevin Centanni. As with Justice of the Peace Kerner, the Marcottes' efforts to cultivate a relationship with Centanni were not successful.

Centanni, when interviewed by the FBI in 2004, recalled a meal at the Beef Connection with the Marcottes and other judges, at which he "believed" Judge Porteous was in attendance.[380] At that lunch, according to the FBI write-up, Louis Marcotte gave Centanni information on bond setting and bond splitting. "CENTANNI believed MARCOTTE was trying to educate CENTANNI to

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[373] The lunch would have been in 1997, Kerner having been elected in late 1996.

[374] Kerner Dep. at 6 (Ex. 79).

[375] Kerner Dep. at 9 (Ex. 79).

[376] Kerner Dep. at 12 (Ex. 79).

[377] Kerner Dep. at 13-14, 16-17 (Ex. 79).

[378] Kerner Dep. at 10-11 (Ex. 79). Lori Marcotte, in her Task Force testimony described this event in similar terms: "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." Lori Marcotte TF Hrg. III at 56-57.

[379] Lori Marcotte FBI Interview, April 21, 2004 at 5 (Ex. 74(d)). According to the FBI write-up, Lori Marcotte stated: "PORTEOUS talked to KEVIN CENTANNI, a Justice of the Peace in Jefferson Parish, about doing bonds. CENTANNI did a couple of bonds but stopped because he felt uncomfortable doing the bonds."

[380] Centanni FBI Interview, July 6, 2004 at 1 (Ex. 69(h)). When interviewed by Task Force staff on January 6, 2010, Justice of the Peace Centanni stated he did not recall whether Judge Porteous was present.

get CENTANNI to do bonds for MARCOTTE, however, CENTANNI rarely set bonds."[381]

c. 1999—Helping with Newly Elected State Judge Ronald Bodenheimer

In 1999, Judge Porteous took steps to assist the Marcottes in forming a relationship with newly elected State Judge Ronald Bodenheimer. Shortly after Bodenheimer was elected, Louis Marcotte asked Judge Porteous to help the Marcottes form a relationship with Bodenheimer. During his Task Force Hearing testimony, Louis Marcotte was asked to describe what he asked Judge Porteous to do with regard to Bodenheimer. Louis Marcotte described his request to Judge Porteous as follows:

> A. Judge, tell this guy [Bodenheimer] I am a good 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.
>
> Q. Do you know whether or not Judge Porteous spoke to Judge Bodenheimer?
>
> A. Yes, he did.
>
> Q. And after he spoke to Judge Bodenheimer, did your relationship with Judge Bodenheimer change as a result?
>
> A. Yes, it did. Bodenheimer became the Porteous of the 24th District Court.[382]

Bodenheimer confirmed Louis Marcotte's testimony. He testified in the grand jury: "I distanced myself from him [Marcotte]. Porteous knew it."[383] Bodenheimer recalled that Judge Porteous told him that he [Judge Porteous] "knew that I didn't really like Louis Marcotte and that group very much but they were really—they really weren't as bad as people thought they were, that he [Louis Marcotte] was a pretty good guy."[384]

Bodenheimer had appeared as a prosecutor in front of Judge Porteous in State court in the early 1990's and "looked up" to Judge Porteous. Thus, Judge Porteous's comments about the Marcottes were significant to Bodenheimer and affected his willingness to form a relationship with the Marcottes. As Bodenheimer explained:

> Q. So how did the fact that Judge Porteous—how did the fact that you looked up to Judge Porteous influence, in-

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[381] Centanni FBI Interview, July 6, 2004 at 2 (Ex. 69(h)).

[382] Louis Marcotte TF Hrg. at 53. Similarly, when asked what the Marcottes requested of Judge Porteous, Lori Marcotte responded: "The same thing that we—that Judge Porteous did with us with the other judges, to, to introduce us to him, to get close to him, to—he was familiar with bond splitting because he was a D.A., Judge Bodenheimer. But just to establish trust and to help us split bonds, to get us to help us split bonds." Lori Marcotte Dep. at 46 (Ex. 76). She testified that Bodenheimer "took Judge Porteous'[s] place." Id. at 47.

[383] Bodenheimer GJ at 11 (Ex. 89).

[384] Bodenheimer Dep. at 12 (Ex. 86). See also id. at 13 (Judge Porteous told Bodenheimer "regardless of what preconceived notions I might have about them, that [Louis Marcotte] really wasn't a bad guy, that he wouldn't steer me wrong, if he tells me something about a particular defendant and a bond, I can take it to the bank, he won't lie to me.").

fluence you in interpreting the comments that Judge Porteous made in your dealings with the Marcottes?

A. I had a lot of respect for Judge Porteous. I had a lot of respect for him as a person. I had a lot of respect for him and his rulings. I had been with him for a long time, and I knew he was very, very, just in my opinion, was very, very smart. And if he told me something, I wouldn't question it.

Q. So when he vouched for the Marcottes, that was very significant for you in your willingness to form a relationship with the Marcottes?

A. Yes.[385]

Over time, Bodenheimer would attend lunches with Louis Marcotte and Judge Porteous. Louis Marcotte would pay: "[I]t would be the better restaurants, maybe like the Beef Connection. . . . Of course, we did go to Emeril's one time. But mostly it would be something like the Beef Connection or a place called the Red Maple[.]"[386]

Bodenheimer, who ended up "[taking] Judge Porteous'[s] place," ultimately pleaded guilty to Federal corruption charges arising from his relationship with the Marcottes.[387]

d. March 2002—Helping with Newly Elected State Judge Joan Benge

In 2001, Joan Benge was elected to the State bench. Louis Marcotte sought to get to know her and wanted Judge Porteous to be at a March 2002 lunch at "Emeril's" that included himself, Judge Benge and others.[388] As Louis Marcotte testified:

A. Well, Benge was a new judge. And basically what we tried to do was rally a bunch of judges to have lunch with Porteous, and he could tell them how great the bail bond business is and how, how. . . .

* * *

Q. And did you want Judge Porteous to be there because——

A. Yes, I did. Because I wanted to show strength. He's a Federal judge, and when he—if he spoke, then they would listen.[389]

As described by Bodenheimer, Louis Marcotte arranged the lunch and told him that he wanted to have Judge Benge present because "he didn't really know her that well and he wanted to get to meet

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[385] Bodenheimer Dep. 13-15 (Ex. 86). He testified consistently in the Grand jury:

> I distanced myself from [Marcotte]. Porteous knew it. And he [Porteous] says, "I know you got this bad taste in your mouth for him. I know that you've heard these rumors about him and cocaine." He said, "Let me tell you. It's not true. He's a good guy. You can trust him. If you got problems with bonds go see him. He'll never steer you wrong. He'll never get you hurt."

Bodenheimer GJ at 11 (Ex. 89).

[386] Bodenheimer GJ at 20 (Ex. 89). See also Bodenehimer Dep. at 15-17 (Ex. 86).

[387] See, e.g., Superseding Bill of Information for . . . for Conspiracy to Commit Mail Fraud, United States v. Ronald. D. Bodenheimer, Crim. No. 02-291 (E.D. La.), Mar. 31, 2003, at 3 (Ex. 88(d)).

[388] Louis Marcotte TF Hrg. III at 53-54.

[389] Louis Marcotte Dep. at 18-19 (Ex. 68).

her." He also knew that Judge Benge, who had been a prosecutor in the 24th JDC, "respected him [Judge Porteous] as much as I did."[390] As it turned out, Judge Porteous arrived late for the meal, and only had drinks.[391] The Emeril's credit card receipt and meal check for $414 has been obtained. Louis Marcotte paid for this lunch with his American Express card. The FBI surveilled and videotaped this March 2002 lunch, at which Judge Porteous, Louis Marcotte, Bodenheimer and Judge Benge (as well as BBU staff and Judge Benge's secretary) were in attendance.[392]

e. Meals with Insurance Company Representative Norman Stotts

The Marcottes' bonds were underwritten by an insurance company called "Amwest." As Louis Marcotte described, the Marcottes were in essence insurance agents for Amwest and bail bonds were, in essence, insurance policies that would pay the court if a defendant did not show up as required.[393] Amwest would receive from the Marcottes a portion of the premiums. As the Marcottes were, in substance, selling Amwest insurance policies, Amwest had a vital interest in the Marcottes' profitability and business practices and could, for example, limit the dollar amount of bonds they could write.

On a regular basis, Amwest would send a high level company official, Norman Stotts, to meet with the Marcottes. Louis and Lori would take him out to lunch and include Judge Porteous. As Louis described: "It makes me look good with the insurance company. It gives me more writing authority to write big bonds, you know. It just showed strength in my organization by having a Federal judge sitting with me at the table."[394]

In his FBI interview, Stotts confirmed that he went to lunch with Judge Porteous on occasions when Judge Porteous was a Federal judge.[395] Danos also recalled attending a lunch with Stotts.[396]

F. The Wrinkled Robe Investigation and the Prosecution of Louis Marcotte, Lori Marcotte, and Louisiana State Judges

In 1999, the United States Attorney's Office for the Eastern District of Louisiana commenced a broad investigation of Louis Marcotte's corrupt relationship with Louisiana State judges and other State law enforcement officials. The FBI labeled this investigation "Wrinkled Robe." In August 2001, the FBI sought and obtained wiretaps, and in June 2002, the FBI executed a search warrant at the Marcottes' offices.

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[390] Bodenheimer Dep. at 20 (Ex. 86).

[391] Bodenheimer Dep. at 20 (Ex. 86).

[392] Louis Marcotte TF Hrg. III at 53-54. Photographs that span the period from 1993 to 2002 have been obtained that depict Judge Porteous with Wrinkled Robe convicted conspirators Louis Marcotte, Lori Marcotte, Norman Bowley, and Ron Bodenheimer.

[393] "A bail bondsman is no more than a State Farm agent. We are licensed through the Commission of Insurance. We carry a property and casualty license. And the insurance company supplies us with policies that we can post at the jail so we can get defendants out. It is not real money; it is just a policy. If the defendant doesn't show up in court, then the courts cash the policy." Louis Marcotte TF Hrg. III at 42.

[394] Marcotte Dep. at 15-20 (Ex. 68).

[395] Stotts FBI Interview, Dec. 18, 2002, at 22 (Ex. 69(g)). Stotts also confirmed having meals with the Marcottes that included Judge Porteous in an interview with Task Force Staff in late 2009.

[396] Danos Dep. II at 14 (Ex. 47).

The results of the investigation included the convictions of Louis Marcotte and Lori Marcotte for their actions in giving things of value to State judges and other State law enforcement officials (such as jail employees) who helped them in their bail bonds business. Two State judges (Bodenheimer and Green) and other State law enforcement officials were also convicted on Federal corruption charges arising from their relationships with the Marcottes. By any reasonable interpretation of the evidence, Judge Porteous's conduct was indistinguishable (if not more extensive) from the conduct of the other two State judges who were convicted.

1. Bodenheimer's Guilty Plea

Bodenheimer pleaded guilty in March 2003 to conspiracy to commit mail fraud on a "deprivation of honest services" theory. (This was prior to the Marcottes' guilty pleas.) Among the overt acts charged in the Information were that he:

> 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.[397]

The sorts of things Judge Bodenheimer received from the Marcottes were similar to those things that the Marcottes gave to Judge Porteous. Louis Marcotte, according to Bodenheimer, "worked on my house," "took us on fishing trips," and "took us to the Beau Rivage [casino] to a show."[398] 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

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[397] Superseding Bill of Information for . . . Conspiracy to Commit Mail Fraud, United States v. Ronald D. Bodenheimer, Crim. No. 02-219 (E.D. La.), Mar. 31, 2003, at 3 (Ex. 88(d)).

It is of no consequence that the judge—be it Bodenheimer or Judge Porteous—may have taken the same discretionary acts in setting, splitting, or reducing bonds or setting aside convictions even without accepting the financial inducements from the Marcottes to do so. A judge has significant discretion to exercise as he or she deems fit—just not in exchange for things of value. In this regard, the Committee notes by way of reference that the Federal courts have reached the same understanding in interpreting the bribery laws. Public officials accused of taking bribes have occasionally attempted to defend their conduct, or claim a lack of corrupt intent, on the grounds that they would have taken the same act or reached the same decision anyway, or that the official acts alleged to have been committed for things of value were affirmatively "good" for the community.

One Federal circuit court addressed and rejected these arguments as follows: "It is neither material nor a defense to bribery that 'had there been no bribe, the (public official) might, on the available data, lawfully and properly have made the very recommendation that (the briber) wanted him to make.'" United States v. Janotti, 673 F.2d 578, 601 (3d Cir. 1982) (citing United States v. Labovitz, 251 F.2d 393, 394 (3d Cir. 1958)). In Labovitz, the court explained: "It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision." United States v. Labovitz, 251 F.2d at 394.

The standard Federal criminal jury instruction on this topic tracks the above cases, and provides: "It is not a defense to the crime of bribery as charged in Count of the indictment that the [offer] [or] [promise] [demand] [or] [receipt] of anything of value was made [to] [by] the public official to influence an official act which is actually lawful, desirable, or even beneficial to the public." O'Malley, Grenig & Lee, 2 Fed. Jury Prac. & Instr. §27:11 (6th ed.). See also United States v. Dorri, 15 F.3d 888, 890 (9th Cir. 1994) (same).

[398] Bodenheimer GJ at 25-27 (Ex. 89).

bail bonding company in exchange for things of value, including meals, trips to resorts, campaign contributions, home improvements, and other things of value."[399]

On April 28, 2004 , Bodenheimer was sentenced to 46 months incarceration on the corruption count, to run concurrently with other offenses to which he pleaded guilty.[400]

2. Louis Marcotte Affidavit

On April 17, 2003, 2 months after a New Orleans Times-Picayune article publicly linked Judge Porteous to accepting things of value from Louis Marcotte as a State judge,[401] and 1 month after Bodenheimer pleaded guilty, Louis Marcotte signed an affidavit designed to protect Judge Porteous.[402] 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.[403]

Louis Marcotte testified in his deposition that the statement was "not accurate."

> Q. Okay. And would you describe whether or not that statement is accurate or not?
>
> A. It's not accurate.
>
> * * *
>
> A. I gave him meals, trips, car repairs, radios.
>
> Q. And why did you do all that?
>
> A. I wanted him to help me with the bonds.[404]

In his deposition, Louis Marcotte testified he felt uncomfortable signing the affidavit, and "thought my lawyer was protecting Porteous and not me."[405] Nonetheless, just as he did in 1994 in connection with the FBI background check, Louis Marcotte made statements intended and designed to protect Judge Porteous and to insulate him from investigation, scrutiny and the disclosure of the relationship between the two men.[406]

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[399] Factual Basis [in Support of Guilty Plea], United States v. Ronald D. Bodenheimer, Crim. No. 02-219 (E.D. La.), Mar. 31, 2003, at 10 (Ex. 88(f)); Bodenheimer Dep. Ex. 45 (Ex. 245).

[400] Judgment and Probation/Commitment Order, United States v. Ronald D. Bodenheimer, Crim. No. 02-219 (E.D. La.), Apr. 28, 2004 (Ex. 88(h)).

[401] M. Carr and M. Torres, "Judges Were Given Gifts; Marcotte's Ex-workers Tell of Shrimp, Fence," New Orleans Times-Picayune, Feb. 8, 2003 (part of the Metropolitan Crime Commission Documents, MCC 0199-200 (Ex. 85), and separately marked as Ex. 119(e)). Judge Porteous is identified by name in that article which states:

> The former employees claim Marcotte paid for car repairs and built a fence for former 24th Judicial District Judge Thomas Porteous, who now sits on the Federal bench[.]

Id.

[402] Louis Marcotte Dep. Ex. 80 (Ex. 280).

[403] Marcotte Dep. Ex. 80 (Ex. 280).

[404] Louis Marcotte Dep. at 23-24 (Ex. 68).

[405] Louis Marcotte Dep. at 23 (Ex. 68).

[406] Though the statement may be parsed as "literally true" if read as a denial that Judge Porteous and Louis Marcotte had a specific conversation where Louis Marcotte agreed to give a specific thing of value to Judge Porteous in exchange for a specific official act, the sweeping nature of the denial is misleading, if not outright false, in that it conceals the numerous things of value that Louis Marcotte gave Judge Porteous and the numerous official acts of Judge Porteous that benefitted Louis Marcotte in return.

3. Louis Marcotte's and Lori Marcotte's Guilty Pleas

In March 2004, both Louis Marcotte and Lori Marcotte pleaded guilty to an Information charging Federal corruption offenses. Louis Marcotte pleaded guilty to Racketeering Conspiracy. That conspiracy was alleged to have commenced prior to 1991.[407] The temporal scope of the scheme is consistent with the allegations in the FBI wiretap affidavit that generally described the inception of the corrupt relationship between Marcotte and judges in the 24th JDC as beginning with their relationship with Judge Porteous. Similarly, the Information's elaboration of the acts of the judicial conspirators describes the actions of Judge Porteous.[408] 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.[409]

Bodenheimer, who had already pleaded guilty to having a corrupt relationship with the Marcottes, was specifically identified in the Louis Marcotte Information as one of the judges with whom Marcotte had a corrupt relationship. That relationship was described as follows:

> Beginning at a date unknown and continuing until in or about June 2002, LOUIS M. MARCOTTE, III provided Bodenheimer with gifts, meals, and other things of value. In return, Bodenheimer was available to BBU; quickly responded to the requests of BBU; and set, reduced, increased, and split bonds to maximize BBU's profits, minimize BBU's liability, and hinder BBU's competition.[410]

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[407] Bill of Information for Conspiracy to Operate an Enterprise through a Pattern of Racketeering Activity and Conspiracy to Commit Mail Fraud, United States v. Louis M. Marcotte, III, and Lori M. Marcotte, Crim. No. 04-061 (E.D. La.), Mar. 3, 2004, at 4 (Ex. 71(a)).

[408] DOJ policy generally prohibits publicly identifying uncharged conspirators unless they have otherwise been publicly identified. Thus, though Bodenheimer's name could be included in the Marcotte Information as a named conspirator because he had previously pleaded guilty to a corrupt relationship with the Marcottes, the prosecutors would not have identified Judge Porteous in the Marcotte Information as he had not been publicly accused.

[409] Bill of Information for Conspiracy to Operate an Enterprise through a Pattern of Racketeering Activity and Conspiracy to Commit Mail Fraud, United States v. Louis M. Marcotte, III, and Lori M. Marcotte, Crim. No. 04-061 (E.D. La.), Mar. 3, 2004, at 5 (Ex. 71(a)).

[410] Bill of Information for Conspiracy to Operate an Enterprise through a Pattern of Racketeering Activity and Conspiracy to Commit Mail Fraud, United States v. Louis M. Marcotte, III, and Lori M. Marcotte, Crim. No. 04-061 (E.D. La.), Mar. 3, 2004, at 6 (Ex. 71(a)).

The things of value included: Louis Marcotte's hiring Bodenheimer's daughter, paying for meals and paying for hotel rooms. The Louis Marcotte Information further specified that during the course of that corrupt relationship, Bodenheimer set and split hundreds of bonds.[411]

Lori Marcotte pleaded guilty at the same time as Louis Marcotte to conspiracy to commit mail fraud, that is, "to deprive the citizens of the State of Louisiana of the honest and faithful services, performed free from deceit, bias, self-dealing, and concealment, of certain Jefferson Parish Sheriff's Deputies in the performance of their official duties."[412]

Louis Marcotte was sentenced August 28, 2006 to 38 months incarceration, followed by 3 years supervised release.[413]

Lori Marcotte was sentenced August 28, 2006 to 3 years probation, including 6 months of home detention.[414]

4. Judge Alan Green's Conviction

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.[415] The conspiracy to commit mail fraud (honest services fraud) count (Count Two) with which Green was charged described the scheme in terms that again track the Marcottes' relationship with Judge Porteous (as well as Judge Bodenheimer):

> 2. It was part of the scheme and artifice to defraud that the defendant, NORMAN BOWLEY, the defendant, ALAN GREEN, along with Louis Marcotte, Lori Marcotte, and others known and unknown to the Grand Jury, engaged in a scheme to maximize BBU's and the Marcottes' profits from writing bail bonds in Jefferson Parish and elsewhere through the corruption of the defendant, ALAN GREEN.
>
> * * *
>
> 4. It was a further part of the scheme and artifice to defraud that, in 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.
>
> 5. It was a further part of the conspiracy that, to allow BBU to maximize its profits, the defendant, ALAN GREEN, would engage in the practice of "bond splitting." . . . At BBU's request, GREEN would set the

[411] If "Porteous" were to be substituted for "Bodenheimer"—in the above paragraph, the charging language would aptly describe the nature of Louis Marcotte's relationship with Judge Porteous as established by the evidence.

[412] Bill of Information for Conspiracy to Operate an Enterprise through a Pattern of Racketeering Activity and Conspiracy to Commit Mail Fraud, United States v. Louis M. Marcotte, III, and Lori M. Marcotte, Crim. No. 04-061 (E.D. La.), Mar. 3, 2004, at 14-15 (Ex. 71(a)).

[413] Judgment in a Criminal Case, United States v. Louis M. Marcotte, III, Crim. No. 04-061 (E.D. La.), Aug. 28, 2006 (Ex. 71(e)).

[414] Judgment in a Criminal Case, United States v. Lori Marcotte, Crim. No. 04-061 (E.D. La.), Aug. 28, 2006 (Ex. 73(d)).

[415] Indictment, United States v. Alan Green and Norman Bowley, Crim. No. 04-295 (E.D. La.), Sept. 29, 2004 (Ex. 93(a)).

> 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 it profits and minimize its liability.[416]

On June 29, 2005, the jury found Green guilty of Count Three of the Indictment, charging him with a single substantive count of mail fraud. The jury did not reach a verdict on the conspiracy count. However, Count Three incorporated by reference the description of the scheme set forth above.

Judge Green was sentenced on February 9, 2006, to 51 months incarceration, to be followed by 3 years of supervised release.[417]

G. The Marcottes' Relationship with Danos

As alluded to at various points above, the Marcottes maintained a relationship with Judge Porteous's secretary, Rhonda Danos, over the same time period that they maintained a relationship with Judge Porteous. As Lori Marcotte testified:

> She [Danos] could call [Judge Porteous] if he wasn't in the office. She could get him off of the bench. . . . Also she could call the jail, call in the bonds for us and call to get information on the case itself. So when Judge Porteous was off the bench, he could split or set the bond fast.[418]

Thus, the Marcottes included her in the lunches with Judge Porteous, paid for numerous expensive entertainment events, and took her to Las Vegas four or five times, some of which took place after Judge Porteous became a Federal judge.[419] Danos has also testified that "[i]t may have been four [trips to Las Vegas]"[420] and that the Marcottes took her to two "Siegfried and Roy" shows on those trips.[421] Notably, Lori Marcotte testified she did not know Danos well prior to inviting her the first time,[422] and she explicitly

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[416] Id. at 18-19. The charging language in the Green case is similar in essential aspects to a description of the Marcottes' relationship with Judge Porteous.

[417] Judgment in a Criminal Case, United States v. Alan Green, Crim. No. 04-295 (E.D. La.), Feb. 9, 2006 (Ex. 93(b)).

[418] Lori Marcotte Dep. at 28 (Ex. 76).

[419] There is ample corroboration for these trips: (1) Lori Marcotte testified she took Danos to Las Vegas in 1992 and that on that trip they took an airplane trip over the Grand Canyon. Lori Marcotte identified a "certificate" that she was given by the tour company for that Grand Canyon trip dated February 1992. Danos also recalled that trip and the Grand Canyon flight. (2) Louis Marcotte's credit card records reflect that he purchased for Danos a February 1996 flight to Las Vegas, and Golden Nugget Casino hotel records reflect a room for Danos charged to the Marcottes' office address. Danos also recalled a trip paid by the Marcottes at which she stayed at the Golden Nugget. (3) Lori Marcotte's credit card records reflect her purchase for Danos of a February 1998 flight to Las Vegas. On that trip, the Marcottes stayed at the Luxor Hotel, and Danos shared a room with a Marcotte employee. See, e.g., Lori Marcotte Dep. at 28-29 (Ex. 76); Danos Dep. I at 13-14 (identifying various trips to Las Vegas); Lori Marcotte Dep. Ex. 1 (the Grand Canyon flight certificate) (Ex. 201); Ex. 371 (containing, among other records, Louis Marcotte's credit card statement containing charges for air travel purchased for Danos for a trip to Las Vegas in 1996 and the Golden Nugget Casino room statement for Danos for February 1996 (charged to the BBU address)).

[420] Danos Dep. I at 8 (Ex. 46).

[421] Danos Dep. I at 12 (Ex. 46).

[422] When asked how it came about that she took Danos to Las Vegas, Lori Marcotte testified: "Well, we would go to Judge Porteous's office to get bonds set or split, and I started speaking to her at the desk and asked her to come to Las Vegas. We were having a bail bond convention, and we asked her to come along." Lori Marcotte TF Hrg. III at 55-56.

linked providing these trips with the fact that Danos had been so good to them.[423]

To the extent that Judge Porteous would have understood that the Marcottes gave things of value to Danos because of official acts performed (or to be performed) by her, then his tolerance of those activities would have, in substance, been the condoning of a relationship based on the Marcottes' provision and Danos's acceptance of a stream of illegal gratuities.[424]

X. THE FACTS UNDERLYING ARTICLE III—JUDGE PORTEOUS'S FALSE STATEMENTS AND VIOLATION OF THE COURT ORDER IN CONNECTION WITH HIS PERSONAL BANKRUPTCY

A. Overview

Judge Porteous's conduct surrounding his bankruptcy case was characterized by numerous false statements and material omissions on the official forms that he signed under penalty of perjury that were filed with the court. He also violated a court order by incurring gambling debt and other indebtedness. These acts included filing for bankruptcy under a false name (and with a PO Box rather than his actual residence address) to conceal his identity, and failing to disclose an anticipated substantial tax refund. In addition, Judge Porteous made numerous other false or deceptive statements about his income, liabilities, and financial activities in order to conceal his prior and ongoing gambling activity. As a result, his unsecured creditors (predominantly credit card companies) received a fraction of what he owed them, while, at the same time, (1) every casino that had ever extended credit to Judge Porteous was paid in full, and (2) the casinos continued to extend to Judge Porteous lines of credit which he utilized even while in bankruptcy.

The evidence related to Judge Porteous's dealings with Creely, Amato, other attorneys, and the Marcottes demonstrates that Judge Porteous experienced financial difficulties throughout the 1990's. He solicited money from friends; accepted hundreds of meals and payments towards travel and entertainment with no pretense that he would reciprocate; drove vehicles in "deplorable" condition; and depended on others for home and car repairs. Judge Porteous even asked Gardner to give him money on one occasion so he could buy a Christmas present for his wife. Many of these requests and acceptances of meals and money occurred while on gambling trips at locations such as Las Vegas or casinos in Mississippi.

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[423] Lori Marcotte TF Hrg. III at 56.

[424] Although Danos testified she believed the things of value were solely because of a friendship, she would have known that Lori Marcotte brought jail personnel along on at least one Las Vegas trip that Danos attended. Notably, one of the jail employees, Edward Still, pleaded guilty to Conspiracy to Commit Mail Fraud. The Information charged that Still and others, including Louis Marcotte and Lori Marcotte, conspired to defraud the citizens of Louisiana of their right to the honest services of Still (and other Sheriff's Deputies who worked in the jail). See Bill of Information for Conspiracy to Commit Mail Fraud, United States v. Forges et al (including Edward Still], Crim. No. 04-217 (E.D. La., July 21, 2004) (Ex. 95(a)). Among the overt acts in that Information were: "In or about February 1993, Louis Marcotte and Lori Marcotte paid for the defendant, Edward Still, to take an expense-paid trip to Las Vegas, Nevada." Id. at 4. Still admitted this event in the "Factual Basis," filed in court, to support his guilty plea. See Factual Basis at 3, United States v. Still, Crim. No. 04-217 (E.D. La., Sept. 1, 2004) (Ex. 97(b)). Still pleaded guilty September 1, 2004, and received a sentence of probation. See Judgment in a Criminal Case, United States v. Still, Crim. No. 04-217 (E.D. La., Feb. 2, 2005) (Ex. 97(c)).

The extent of Judge Porteous's deteriorating financial condition in the late 1990's is reflected in his financial records. These reveal extensive gambling expenses and credit card debts that increased dramatically in the late 1990's and amounted to approximately $180,000 by the end of 2000.

For years, Judge Porteous concealed the extent of these liabilities. He annually filed false financial disclosure reports with the Judicial Conference that materially understated his credit card liabilities.

Ultimately, on March 28, 2001, Judge Porteous and his wife Carmella filed for relief under Chapter 13 of the Bankruptcy Code.

B. Judge Porteous's Financial Affairs Prior to Filing for Bankruptcy

1. Causes of His Debt

By the time Judge Porteous took the Federal bench in October 1994, he had a history of gambling and was an "established player"[425] at the Grand Casino Gulfport in Gulfport, Mississippi. As an established player, Judge Porteous held a $2,000 line of credit at the Grand Casino Gulfport, which allowed him to take out $2,000 worth of markers at the casino.[426] After becoming a Federal judge, and prior to filing for bankruptcy in March 2001, Judge Porteous became an established player and opened up lines of credit at seven more casinos.[427] His credit limits ranged from $2,000 to $5,000.

An analysis of Judge Porteous's credit card and bank account records, performed by the FBI, revealed that from 1995 through 2000—while he was a Federal judge—over $130,000 in gambling charges appeared on his credit card statements:

1995	$ 9,545.08
1996	$ 22,927.48
1997	$ 32,927.48
1998	$ 16,056.84
1999	$ 40,825.62
2000	$ 8,908.90
Total	$131,191.40[428]

[425] 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. Established 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 and free meals and drinks. As FBI Special Agent Horner explained, there are two reasons why a gambler would want to be rated: "One for tax purposes, for wins and losses, because they have to report their winnings and losings. Number two, a gamer or gambler would want their gaming activity rated—they call it rated play—because the casino will then give the customer food and room specials. They will give them free shows if they play enough. They will even give them free transportation to the casino. There is a term of art that is used, RFB. It is called room, food, beverage. A gambler will try to attain RFB status at the casino where when he walks in—or he or she walks in, you know, everything is paid for, including your room. So that is the main benefit to a gambler." Horner TF Hrg. II at 23.

[426] A marker is a form of credit extended by a casino that enables the customer to borrow money from the casino. See also Horner TF Hrg. II at 13.

[427] Judge Porteous became an established player at the following casinos: (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. See Porteous Central Credit Inc. Gaming Report (Ex. 326).

[428] FBI Credit Card Chart (Ex. 348). At the Fifth Circuit Hearing, FBI Financial Analyst Gerald Fink testified that the gambling charges on Judge Porteous's credit cards were $66,051 in gaming charges. Fink 5th Cir. Hrg. at 345-48 (Ex. 332). These same dollar amounts were pre-

Additionally, between January 1997 and June 2000, Judge Porteous wrote checks or made cash withdrawals from his bank accounts at casinos totaling at least $27,739.[429] Thus, Judge Porteous had incurred at least $150,000 in gambling charges and related gaming withdrawals in the 5 years preceding his bankruptcy filing.

2. Judge Porteous's Financial Condition from 1996 to 2000

From 1996 to 2000, Judge Porteous's financial situation grew increasingly dire, as follows:

Year-end 1996—Credit card debt in excess of $44,826; IRA Balance of $59,000. In December 1996—a date as of which nearly all the known credit card records of Judge Porteous were obtained—Judge Porteous had about $45,000 in outstanding credit card debt and an IRA balance of about $59,000. (He had no stocks or bonds or other significant savings or assets other than modest equity in his house.)

June of 1997—Credit card debt of $69,000; IRA balance of $20,000. During the first 6 months of 1997, Judge Porteous's financial situation deteriorated significantly. During that period, he made three withdrawals from his IRA account amounting to $40,000, resulting in his IRA balance falling to approximately $20,000. His credit card debt increased to $69,000.

June of 1999—Credit card debt of $103,000; IRA balance of $9,500. Judge Porteous took additional withdrawals from his IRA in April 1998 and January 1999. By June 1999 (when Judge Porteous sought money from Amato on the boat),[430] Judge Porteous's credit card debt had increased to approximately $103,000, while his IRA balance had fallen to approximately $9,500.

April 2000—Credit card debt of $153,000; IRA balance of $12,000. In September 1999, Judge Porteous withdrew another $1,600 from his IRA (his balance was as low as $7,700 on September 30, 1999, but the value grew over the next several months as the value of his securities in that account increased), but his credit card debt had increased to more than $150,000.

3. Judge Porteous's False Statements Concealing Liabilities on Financial Disclosure Reports

On an annual basis, starting with calendar year 1994, Judge Porteous was required by law to file Financial Disclosure Reports with the Judicial Conference of the United States.

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"

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sented at the Task Force Hearing. A subsequent review has revealed that the chart of credit card gambling expenses used at the Fifth Circuit and the Task Force Hearing failed to include several of Judge Porteous's credit cards, and that the actual amount of credit card gambling charges is substantially greater. Agent Horner, at the Task Force Hearing, testified that the chart he identified, Exhibit 327, "doesn't include everything. There is probably some additional credit card charges that were not included in this time period, and there may be some additional withdrawals out of his bank account that were not included." Horner TF Hrg. II at 9. An updated chart, Exhibit 348, supplements the chart (Exhibit 327) that was used at the Task Force Hearing.

[429] The June 2000 date was chosen for the purposes of the Fifth Circuit Hearing because that was the first time Judge Porteous met with his bankruptcy attorney, Claude Lightfoot.

[430] See discussion in VIII(1)(3), supra.

for amounts between $15,001 and $50,000. The filer is required to list all liabilities to credit card companies where the balance exceeded $10,000 at the close of the calendar year for which the Report was filed.[431]

Table 6 sets forth the credit card liabilities that Judge Porteous actually disclosed as compared with the credit card debts he actually incurred and failed to disclose on his Financial Disclosure Reports for calendar years 1996 through 2000.[432]

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[431] Under the Ethics in Government Act of 1978, Federal judges are required by law to file annual public reports with the Judicial Conference 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 conflicts of interests from arising," 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." "By having access to financial disclosure statements, an interested citizen can evaluate the official's performance of his duties in light of the official's outside financial interests." See S. Rpt. 95-170, 95th Cong. 1st Sess. 21-22 (1977), Senate Committee on Governmental Affairs, Report to Accompany S. 555, "Public Officials Integrity Act of 1977." (This Act took the name "Ethics in Government Act" in its final form.)

These disclosure requirements were upheld by the United States Court of Appeals for the Fifth Circuit in Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979). In that case, the Fifth Circuit explained:

> While nomination and confirmation procedures no doubt weed out certain persons who should not serve as Federal judges, they do nothing to scrutinize the behavior of judges once confirmed. Congress could legitimately conclude that the statutory controls mandated by the Act would further the interest of judicial integrity.
>
> By alerting litigants and the public of a judge's financial interest, the financial disclosure provisions of the Act can serve as a check on potential judicial abuse.

Id. at 701. Individuals who have made false statements on Financial Disclosure Reports have been subject to prosecution under the Federal criminal laws as a violation of title 18, United States Code, Section 1001 (False and Fraudulent Statements).

[432] Danos testified that Judge Porteous prepared the forms, including specifying the codes to be used, and she simply typed the forms for him using the information he provided. Danos Dep. II at 4-5 (Ex. 47).

> Judge Porteous's Financial Disclosure Reports are marked as exhibits as follows: Ex. 102(a) (Financial Disclosure Report for 1996); Ex. 103(a) (Report for 1997); Ex. 104(a) (Report for 1998); Ex. 105(a) (Report for 1999), and Ex. 106(a) (Report for 2000). The various credit card statements for December of the respective calendar years containing balances that should have been reported are marked as follows: Ex. 167 (statement for Citibank account 0426 (December 12, 1996)); Ex. 168 (statements for MBNA accounts 0877 (December 19, 1997) and 1290 (December 4, 1997), and Travelers account 0642 (December 30, 1997)); Ex. 169 (statements for MBNA accounts 0877 (December 19, 1998) and 1290 (December 4, 1998)); Ex. 170 (statements for Citibank accounts 0426 (December 10, 1999) and 9138 ((December 21, 1999), MBNA accounts 0877 (December 18, 1999) and 1290 (December 4, 1999)); Ex. 171 (statements for MBNA accounts 0877 (December 20, 2000) and 1290 (December 5, 2000), Citibank accounts 0426 (December 12, 2000) and 9138 (December 21, 2000), Travelers Bank account 0642 (December 29, 2000), and Discover account 9489 in the name of Carmella G. Porteous (December 25, 2000)).

Table 6. Judge Porteous's Non-Disclosure of Liabilities on his Financial Disclosure Reports – 1996 through 2000

Year	Disclosed	Not Disclosed (December Balance)
1996	Box Checked: "None (No reportable liabilities)"	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
2000	1) MBNA - J 2) Citibank - J	1) MBNA Mastercard 0877 ($28,347.44) – K 2) MBNA Mastercard 1290 ($29,258.68) – K 3) Citibank 0426 ($24,565.76) – K 4) Citibank 9138 ($21,227.06) – K 5) Travelers 0642 ($17,682.35) – K 6) Discover 9489 ($21,518.14) – K

The 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 WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS [433]

Thus, for several years prior to filing for bankruptcy, Judge Porteous concealed his financial circumstances on documents where he was legally required to disclose them.

[433] Judge Porteous's Financial Disclosure Report (for calendar year 1998), filed May 13, 1999 (Ex. 105(a)). That warning cites 5 U.S.C. App. 4, § 104 which provides, in part, that the Attorney General may bring civil penalty enforcement actions (seeking damages not to exceed $10,000), against persons who knowingly and willfully falsify a financial disclosure report. Even though the report does not cite to the criminal laws, Judge Porteous would have known that a false statement would also violate Title 18, United States Code, Section 1001 (False Statements) which makes it a crime for an individual "in any matter within the jurisdiction of the . . . judicial branch" to make a "materially false, fictitious, or fraudulent statement or representation," or make or use "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry."

C. The Pre-bankruptcy Workout Period—July 2000 Through February 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.[434]

Lightfoot spent "considerable time" with Judge Porteous and his wife in July and August 2000,[435] working to compile documentation on their assets and debts and to develop a workout proposal for the creditors in an effort to avoid a bankruptcy filing.[436] Lightfoot also told Judge Porteous not to incur any new debts and provided Judge Porteous general information describing Chapter 13 bankruptcies.[437]

During the early months of his engagement with Judge Porteous, Lightfoot gave Judge Porteous worksheets to fill out.[438] Lightfoot specifically explained to Judge Porteous that he needed to disclose all of his assets and all of his debts.[439] Lightfoot believed that the worksheets may have been filled out before he met with Judge Porteous on July 20, 2000, and that Judge Porteous personally filled out the worksheets because, for example, only Judge Porteous's Social Security number was initially filled in on the worksheets, and not Mrs. Porteous's.[440]

Judge Porteous also provided Lightfoot with a "big pile of invoices," bills, and credit card statements.[441] Included among these documents was Judge Porteous's pay stub from the period ending May 31, 2000, which showed Judge Porteous's net monthly income to be $7,531.52.[442]

Lightfoot spent considerable time preparing an analysis of Judge Porteous's debts and collecting all relevant documents that creditors would need to review when considering whether the workout proposal was a fair settlement.[443] Finally, on December 21, 2000, Lightfoot sent Judge Porteous a copy of the workout letters that had been sent to all of Judge Porteous's unsecured creditors, "with the exception of [a $5,000 loan from] Regions Bank which we want-

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[434] Lightfoot GJ I at 22 (Ex. 120). Lightfoot testified three times before the grand jury: August 19, 2004 (Lightfoot GJ I), September 9, 2004 (Lightfoot GJ II), and November 4, 2004 (Lightfoot GJ III).

[435] In August 2000, even as Judge Porteous was consulting with Lightfoot for the purpose of attempting a workout of his debts, he requested a credit limit increase at the Treasure Chest Casino from $2,500 to $3,000. See Porteous Central Credit Inc. Gaming Report (Ex. 326). Judge Porteous did not disclose this fact to Lightfoot.

[436] Lightfoot Affidavit in Support of Attorney's Fees at 1, Docket No. 18, In the Matter of Porteous, Case No. 01-12363, (Bankr. E.D. La.) (hereinafter "Lightfoot Affidavit and Invoice") (Ex. 342). During the workout process, Lightfoot analyzed Judge Porteous's assets and debts and came up with a plan to offer at least a partial payment to Judge Porteous's creditors for all of Judge Porteous's credit card debt of which Lightfoot was aware. Lightfoot TF Hrg. II at 87.

[437] Lightfoot Dep. at 14-15 (Ex. 123); Lightfoot TF Hrg. II at 42.

[438] Lightfoot Dep. at 3 (Ex. 123). Lightfoot's worksheets contained "every single question that appears in the petition, the schedules and the statements and the Chapter 13 plan. . . . [I]t contains everything that would ultimately be contained in a bankruptcy filing." Lightfoot TF Hrg. II at 42.

[439] Lightfoot TF Hrg. II at 42.

[440] Lightfoot GJ III at 36-37 (Ex. 122).

[441] Lightfoot GJ I at 39 (Ex. 120).

[442] Judge Porteous never provided Lightfoot with an updated pay stub closer to the date of the bankruptcy filing in March 2001, nor did he provide any other information indicating that his salary increased in 2001. Lightfoot Dep. at 4 (Ex. 123).

[443] Lightfoot GJ I at 54 (Ex. 120).

ed to exclude.[444]" The workout letters listed thirteen debts owed to ten different creditors, totaling $182,330.23.[445]

During the entire period that Lightfoot represented Judge Porteous in connection with his bankruptcy, Judge Porteous never told Lightfoot that he had any gambling debt. Lightfoot has been consistent in his testimony at every forum—the grand jury, the Fifth Circuit, the Task Force Deposition, and the Task Force Hearing—that at all times he was unaware of Judge Porteous's gambling.[446] At the Task Force Hearing, in response to questioning by Mr. Goodlatte, Lightfoot testified: "I didn't know [Judge Porteous] gambled . . . whatsoever."[447] At the Fifth Circuit Hearing, Chief Judge Jones pressed Lightfoot on this point:

> Q. 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. I didn't. I never knew him before, and I—I really didn't know that gambling was an issue with the judge.[448]

D. JUDGE PORTEOUS'S CONDUCT BETWEEN THE END OF THE WORKOUT (FEBRUARY 2001) AND FILING FOR BANKRUPTCY (MARCH 28, 2001)

In about February 2001, Lightfoot concluded that the proposed workout would not succeed, and he turned his attention toward preparing a bankruptcy filing for Judge Porteous. From February 2001 to the filing of the initial bankruptcy petition on March 28, 2001, Judge Porteous committed a series of acts that have particular significance in connection with the bankruptcy forms he subsequently signed under oath. These acts reflect his intent to conceal certain of his debts, particularly his gambling debts, in violation of applicable bankruptcy law requiring the disclosure of such liabilities.

1. Treasure Chest Markers

On March 2, 2001, Judge Porteous's credit limit at the Treasure Chest Casino ("Treasure Chest") was increased from $3,000 to $4,000.[449] Also on that day Judge Porteous gambled at Treasure Chest and took out seven $500 markers. He repaid four markers in chips that same day but left the casino owing $1,500.[450]

On March 27, 2001, the day prior to filing for bankruptcy, Judge Porteous made a cash payment of $1,500 to Treasure Chest, repaying the three markers that had been outstanding since March 2,

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[444] December 21, 2000 Letter from Lightfoot to the Porteouses (Ex. 146).

[445] December 21, 2000 Letter from Lightfoot to the Porteouses (Ex. 146). Five days after Lightfoot sent Judge Porteous the workout letters, Judge Porteous traveled to Caesars Lake Tahoe and took out a $3,000 marker. (Ex. 380). Judge Porteous did not disclose to Lightfoot this gambling trip or the $3,000 extension of credit.

[446] Lightfoot Dep. at 9 (Ex. 123); Lightfoot 5th Cir. Hrg. at 446 (Ex. 124); Lightfoot TF Hrg. II at 43.

[447] Lightfoot TF Hrg. II at 65.

[448] Lightfoot 5th Cir. Hrg. at 453 (Ex. 124).

[449] Treasure Chest Records (Ex. 331).

[450] Treasure Chest Customer Transaction Inquiry (Ex. 302).

2001.[451] Judge Porteous thus made certain that he had no unsecured debts to Treasure Chest as of the date he filed for bankruptcy.

2. The Fleet Credit Card

Carmella Porteous had a Fleet credit card issued in her name. In the few months prior to March 2001, partial payments had been made to keep that account current and in good standing. Thus, the balance on the account's January 17, 2001 closing date was $1,144, on which $315 was paid in February. The February closing balance was over $1,250, on which a $370 payment was made on March 5, 2001.

On March 19, 2001, a Fleet statement was issued showing a new balance of $1,088.41. Payment on the account was due April 15, 2001. Nonetheless, just a few days after the closing date, Judge Porteous directed his secretary Rhonda Danos to pay off this credit card in full. On March 23, 2001, Danos wrote a check drawn on her personal account in the amount of $1,088.41 to Fleet, indicating in the memo line that the payment was for the Carmella Porteous account.[452] The Fleet card was not used to make any charges from March 5, 2001 (three weeks prior to filing for bankruptcy), to April 7, 2001 (about 10 days after the bankruptcy petition was filed).[453]

3. Grand Casino Gulfport Markers

On February 27, 2001, Judge Porteous gambled at the Grand Casino Gulfport ("Gulfport") and took out two $1,000 markers. Had they been outstanding on the date Judge Porteous filed for bankruptcy, the debt to the casino would have had to be disclosed on the schedule of unsecured creditors that would be filed as part of the bankruptcy process. (And, as will be discussed, if Judge Porteous paid the debt within 90 days of filing for bankruptcy, that payment would be required to be disclosed on his Statement of Financial Affairs, one of the official forms that must be filed in a bankruptcy case.)

Gulfport records reflect that the casino attempted to deposit and collect on these markers starting March 16, 2001—which would have been prior to the bankruptcy filing—but the markers were returned as "uncollected."[454] FBI Agent Horner determined that

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[451] Treasure Chest Customer Transaction Inquiry (Ex. 302). Judge Porteous's payment of these markers on March 27, 2001 in order that they would not be included on the bankruptcy schedules also reflect his understanding that markers were a form of unsecured debt.

[452] Fleet statement and Danos check number 1660 in the amount of $1,088.41 (Ex. 329).

[453] Judge Porteous's handling of this payment to Fleet demonstrates his knowledge of the bankruptcy process and his determination that Fleet not be included as an unsecured creditor. First, it was not Judge Porteous's practice to pay off credit cards early and in full. Second, though he did not have funds in his accounts to make the Fleet payment (he had only $559.07 in his main checking account on the date Danos wrote the $1,088.41 check to Fleet), he could have easily waited until April 1, 2001, when he would receive his monthly salary check in excess of $7,500. Instead, he had Danos pay it a few days prior to his filing for bankruptcy. (Also, by having Danos pay the Fleet card, if creditors were subsequently to insist on examining Judge Porteous's accounts in the month prior to bankruptcy, the check to Fleet would not be signed by Judge Porteous, and Judge Porteous's personal involvement in hiding this card from the creditors would not be apparent.) Third, the 5-week gap in any charges on the card was inconsistent with the card's prior usage pattern, but can be explained by Judge Porteous's desire to be certain there was no debt outstanding on the date of the filing for bankruptcy. Finally, the concealed payment on the concealed account occurred 3 days after Judge Porteous obtained a P.O. Box to hide his actual residential address at a time when he was structuring (and concealing) his activities with his bankruptcy filing in mind.

[454] Grand Casino Gulfport Patron Transaction Report (Ex. 301(a)).

there was a problem with Judge Porteous's bank routing number on the markers.

On March 27, 2001—the day prior to filing his initial bankruptcy petition, and the same day he paid off his Treasure Chest markers—Judge Porteous deposited exactly $2,000 into his Bank One account.[455] This amount consisted of $1,960 cash and a check he drew on his Fidelity money market account of $40—thus ensuring that there be a $2,000 in that account.[456] Without this deposit, there would not have been $2,000 to pay the markers. This $2,000 deposit into an account from which Judge Porteous knew a $2,000 debt was to be collected demonstrates Judge Porteous's awareness that the Gulfport markers were outstanding as of March 27.[457]

Gulfport records reflect that the casino ultimately redeposited the markers for collection on March 24, 2001 (a fact, which if known to Judge Porteous, would explain his $2,000 deposit), and the markers cleared Judge Porteous's bank account on April 5 and 6, 2001, a week after he filed for bankruptcy.[458]

Despite Judge Porteous's efforts to have these markers paid off pre-bankruptcy, the markers were in fact pending on March 28, 2001 when he filed.

4. Obtaining a Post Office Box

On March 20, 2001, Judge Porteous opened a Post Office Box for the explicit purpose of using that address, along with a false name in his bankruptcy filing, instead of using his home address.[459]

5. Filing a Tax Return for Calendar Year 2000

On March 23, 2001 (the same date Danos wrote the check to Fleet), the Porteouses signed their income tax return for 2000 and claimed a tax refund in the amount of $4,143.72.[460]

Judge Porteous did not disclose to Lightfoot his activities associated with the Gulfport and Treasure Chest markers, the Fleet payment, or his filing for a tax refund. As described in (E) below, Judge Porteous further failed to disclose these activities when he signed forms and schedules under oath in connection with his bankruptcy.

E. March 28, 2001—Judge Porteous's Initial Bankruptcy Petition Filed under a False Name

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.[461] While the

[455] Porteous Bank One Records (Ex. 144).

[456] Porteous Fidelity Money Market Statement (Ex. 143).

[457] No other debt has been uncovered which would require that there be at least $2,000 in Judge Porteous's bank account for the 3 days prior to his anticipated receipt of his salary deposit.

[458] See Porteous Bankruptcy Schedules (Ex. 127); Grand Casino Gulfport Patron Transaction Report (Ex. 301(a)); Bank One Account Summary (Ex. 301(b)).

[459] Porteous PO Box Application (Ex. 145).

[460] 2000 Porteous Tax Return (Ex. 141).

[461] Porteous Initial Chapter 13 Bankruptcy Petition, Docket No. 1, In the Matter of Porteous, Case No. 01-12363 (Bankr. E.D. La. Mar. 28, 2001) (hereinafter "Initial Petition") (Ex. 125). During his testimony before the Impeachment Task Force, the Honorable Duncan Keir, Chief Judge of the United States Bankruptcy Court for the District of Maryland, described Chapter 13 bankruptcies as wage earners' 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

Continued

Initial Petition contained a list of creditors, it did not contain financial schedules or other detailed financial information. Those documents were subsequently filed on April 9, 2001.

This Initial Petition was filed with the false names "G.T. Ortous" and "C.A. Ortous" as debtors and also listed a newly obtained P.O. Box address instead of Judge Porteous's actual residential address. Judge Porteous personally reviewed the Initial Petition before it was filed,[462] and both he and his wife signed the Initial Petition "under penalty of perjury that the information provided in this petition is true and correct."[463]

Judge Porteous admitted at the Fifth Circuit Hearing that the names used the Initial Petition were false.

> Q. Your name is not Ortous, is it?
>
> A. No, sir.
>
> Q. Your wife's name is not Ortous?
>
> A. No, sir.
>
> Q. So, those statements that were signed—so, this petition that was signed under penalty of perjury had false information, correct?
>
> A. Yes, sir, it appears to.[464]

While Judge Porteous admitted that he filed his initial bankruptcy petition with a false name, Lightfoot has taken responsibility for coming up with that idea.[465] Lightfoot has since characterized the use of false names as a "stupid idea,"[466] and he explained in his Task Force testimony that his goal in filing the Initial Petition with the false names was to avoid embarrassment to Judge Porteous:

> I had hoped that I could avoid him the embarrassment—or have him avoid the embarrassment of a big story in the newspaper. At that time, these filings were listed in the newspaper once a week. And I knew that it would be corrected very quickly before any notice would go out to creditors. And that was a mistake, and it was my suggestion, and I am sorry that I made that suggestion.[467]

Lightfoot acknowledged that Judge Porteous may have said something about not wanting his bankruptcy to be in the paper.[468] While it was Lightfoot's idea to use a false name, Judge Porteous

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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." Keir TF Hrg. II at 68.

[462] Lightfoot TF Hrg. II at 44.

[463] Initial Petition (Ex. 125). Lightfoot had no doubt that the Porteouses understood that they were signing a document containing false information when they signed the Initial Petition. Lightfoot GJ III at 31 (Ex. 122).

[464] Porteous 5th Cir. Hrg. at 55 (Ex. 10). 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 6 years before filing the petition." Fed. R. Br. P. 1005 (2001). Accuracy in the caption of the petition is not merely a matter of form. "It is of substantive importance since it informs the creditor of exactly who the debtor is in order that the creditor may have an opportunity to determine whether it has a claim against the estate." In re Anderson, 159 B.R. 830, 838-39 (Bankr. N.D. Ill. 1993); accord In re Adair, 212 B.R. 171 (Bankr. N.D. Ga. 1997).

[465] Lightfoot 5th Cir. Hrg. at 435 (Ex. 124).

[466] Lightfoot 5th Cir. Hrg. at 435 (Ex. 124).

[467] Lightfoot TF Hrg. II at 44.

[468] Lightfoot GJ III at 23-24, 26 (Ex. 122).

never objected and never refused to file a document under oath representing he was "G.T. Ortous."[469]

F. April 9, 2001—Judge Porteous's Amended Petition, Accompanying Schedules, and Statement of Financial Affairs

1. The Amended Petition

Judge Porteous amended his Initial Petition on April 9, 2001, 2 weeks after it was filed, correcting the false names and listing his actual residential address in Metairie, Louisiana.[470] The Amended Petition did not list Judge Porteous's newly acquired PO Box under either the "street address" field or the "mailing address" field.[471]

2. The Bankruptcy Schedules and Statement of Financial Affairs

Along with the Amended Petition, Judge Porteous filed two other documents. The first consisted of schedules setting forth such items as assets (for example, real and personal property, and property claimed as exempt), debts (secured and unsecured creditors), income, and other miscellaneous financial matters. The second, entitled "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.[472] Though they were filed April 9, 2001, these forms should have described Judge Porteous's financial affairs as they existed on the date of the Initial Petition—the date which determines the bankruptcy "estate."

Prior to filing these documents, Lightfoot provided Judge Porteous with draft copies and specifically reviewed them with Judge Porteous at least twice.[473] The final review took place within 1 week of the Initial Petition's filing.[474] 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.[475]

3. False Representations in the Bankruptcy Schedules

a. The Tax Refund

Category 17 on Schedule B ("Personal Property") of the Bankruptcy Schedules required Judge Porteous to disclose "other liq-

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[469] Lightfoot testified:

> Q. After you made the suggestion to Judge Porteous that he file under a false name in the original petition, did he object to your suggestion?
>
> A. No.
>
> Q. Did he ever say to you, no, I refuse to file a document with a false name?A.No.

Lightfoot TF Hrg. II at 44.

[470] Porteous Amended Chapter 13 Bankruptcy Petition, Docket No. 2, In the Matter of Porteous, Case No. 01-12363 (Bankr. E.D. La. Apr. 9, 2001) (hereinafter "Amended Petition") (Ex. 126).

[471] Judge Porteous identified his Amended Petition during his testimony before the Fifth Circuit Special Committee. Porteous 5th Cir. Hrg. at 56-57 (Ex. 10).

[472] Porteous Chapter 13 Schedules ["Bankruptcy Schedules"] and Statement of Financial Affairs, Docket No. 3, In the Matter of Porteous, Case No. 01-12363 (Bankr. E.D. La. Apr. 9, 2001) (Ex. 127).

[473] Lightfoot TF Hrg. II at 46. As Lightfoot explained in his Task Force testimony: "[I] would sit down, and I believe with his wife at one time as well, and we went through them to see that everything was accurate and there were no changes, just going page by page, pointing out what was there." Id.

[474] Lightfoot Dep. at 5-6 (Ex. 123).

[475] Bankruptcy Schedules at SC00111, SC00116 (Ex. 127).

uidated debts owing debtor including tax refunds."[476] In response to Category 17, the box "none" is checked.[477]

However, on March 23, 2001—5 days before he filed his Initial Petition and seventeen days before he filed his Bankruptcy Schedules—Judge Porteous filed his calendar year 2000 Federal income tax return and requested a $4,143.72 tax refund.[478] And on April 13, 2001—just 4 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.[479]

At the Fifth Circuit Hearing, Judge Porteous was shown the return and identified it as having been filed on March 23, 2001. When confronted with the fact that the Schedule did not disclose the pending refund, Judge Porteous responded: "When that was listed, you're right."[480]

At one point 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:

> Q. What did Mr. Lightfoot tell you?
>
> A. Said, "If the trustee didn't put a lien on it, put it in your account; but they may—they may ask for it back."
>
> Q. But, Judge Porteous, that schedule was signed under penalty of perjury.
>
> A. It was omitted. I don't know how it got omitted. There was no intentional act to try and defraud somebody. It just got omitted. I don't know why.[481]

Lightfoot, however, testified before the Task Force that Judge Porteous never told him about the year 2000 tax refund.[482] In response to Judge Porteous's statement that he talked about the refund with Lightfoot after he received it, Lightfoot testified that he had a conversation with Judge Porteous in relation to Judge Porteous's receipt of a different tax refund in a subsequent year. Lightfoot testified he specifically recalled the issue in that conversation being whether the "special confirmation order we received from the Houston [bankruptcy judge]" required that the refund be disclosed or turned over, and that to answer Judge Porteous's question, it would be necessary to "look at [the] confirmation order" since it was not a typical order issued in New Orleans.[483] The confirmation order in Judge Porteous's case was issued June 28, 2001. As of the date Judge Porteous received the

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[476] The instructions for completing Category 17 on Schedule B state that "Item 17 request [sic] the debtor to list all monies owed to the debtor . . . and specifically, any expected tax refunds." Instructions for Completing Official Form 6, Schedules at 62 (Ex. 345).

[477] Bankruptcy Schedules at SC00096 (Ex. 127). During his Fifth Circuit testimony, Judge Porteous acknowledged that he checked "none" in response to this question. Porteous 5th Cir. Hrg. at 80 (Ex. 10). The decision to check "none" was Judge Porteous's decision—not Lightfoot's. Lightfoot 5th Cir. Hrg. at 451 (Ex. 124).

[478] 2000 Porteous Federal Tax Return (Ex. 141).

[479] Porteous Bank One records (Ex. 144). Bankruptcy Trustee S.J. Beaulieu told the FBI during an interview in 2004 that the Porteouses should have disclosed any tax refund to Beaulieu, and Beaulieu would have then required the Porteouses to turn over the refund so that it could be distributed to the unsecured creditors. Beaulieu FBI Interview, Jan. 22, 2004, at SC00410 (Ex. 334). 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. Porteous 5th Cir. Hrg. at 82-83 (Ex. 10).

[480] Porteous 5th Cir. Hrg. at 81-82 (Ex. 10).

[481] Porteous 5th Cir. Hrg. at 83-84 (Ex. 10).

[482] Lightfoot TF Hrg. II at 46.

[483] Lightfoot Dep. at 19 (Ex. 123).

refund (April 13, 2001) the order had not yet been issued. Therefore, the conversation that Lightfoot had with Judge Porteous about whether the order required disclosure of the refund could not have taken place in reference to the 2000 tax refund.

Further, Lightfoot testified he viewed the existence of the refund as significant and he stated that if he had known about it, he would have disclosed it to the bankruptcy trustee:

> 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.[484]

According to Lightfoot, a tax refund is an asset and "[i]f you have a liquidated refund owing to you at the time you file, it should be listed."[485]

b. Omitted and Undervalued Financial Accounts

The Bankruptcy Schedules were also inaccurate as to two of Judge Porteous's accounts.

Question 2 on Schedule B ("Personal Property") requires the debtor to list, among other things, "checking, savings or other financial accounts." In response, the current market value of Judge Porteous's Bank One Checking Account—into which his monthly salary was deposited—was listed as $100.[486] However, the opening balance in Judge Porteous's Bank One account for the time period of March 23, 2001 to April 23, 2001 was $559.07, and the closing balance for the same time period was $5,493.91. Indeed, the day prior to filing his Initial Petition, Judge Porteous had deposited $2,000 into the account—the amount he owed on the Gulfport markers—so he knew that the account held at least that amount. At no time during that month did Judge Porteous's balance drop to as low as $100.[487]

Judge Porteous also omitted a Fidelity money market account entirely from Category 2 on Schedule B. This account was held in both his and his wife's names, and was an active account of Judge Porteous. Judge Porteous never told Lightfoot about this account, and did not include it on the worksheets that he filled out for Lightfoot in the summer of 2000.[488] As Lightfoot testified: "I asked

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[484] Lightfoot TF Hrg. II at 47. See also Lightfoot Dep. at 18 ("I would have felt the requirement, the obligation on my part to amend the schedules, to list an expected tax refund as the questions read, and I would have informed the trustee at the upcoming meeting of creditors.") (Ex. 123).

[485] Lightfoot 5th Cir. Hrg. at 447 (Ex. 124); see also Lightfoot TF Hrg. II at 46. Chief Judge Keir also explained that "liquidated" in this context means the tax refund is an amount certain—it does not mean that the amount has already been collected. According to Judge Keir, "[a] tax refund that has been determined or at least initially determined by the tax return is a liquidated amount." Keir TF Hrg. II at 70. Judge Keir 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 TF Hrg. at 77.

[486] Bankruptcy Schedules at SC00095 (Ex. 127). During his Fifth Circuit testimony, Judge Porteous acknowledged that he listed his Bank One checking account under Schedule B as having a balance of $100. Porteous 5th Cir. Hrg. at 79-80 (Ex. 10).

[487] Porteous Bank One Records (Ex. 144). Lightfoot testified that he asked Judge Porteous on April 9, 2001 how much money Judge Porteous had in his Bank One account, and Judge Porteous told Lightfoot that he had "about $100." Lightfoot GJ III at 43. (Ex. 122).

[488] Lightfoot 5th Cir. Hrg. at 436, 448 (Ex. 124).

for all bank accounts, and this [the disclosed accounts] is what I got. I was never told there were others."[489] Judge Porteous acknowledged the existence of his Fidelity money market account, and acknowledged that it was omitted from his Schedule B, during his Fifth Circuit testimony.[490]

The Fidelity money market account was an active account used by Judge Porteous for transactions outside his personal checking account. He would deposit into the account withdrawals from his IRA account, travel reimbursements, insurance checks, cash, and other miscellaneous items. He used the funds for a variety of purposes, including the payment of gambling debts. For example, on November 27, 2000, Judge Porteous deposited $2,400 that he withdrew from his IRA into that account, and on November 30, 2000, he wrote a check on that account for $1,600 to the Treasure Chest Casino.[491] On occasion, he would move money from his main checking account (the Bank One account, into which his salary checks were deposited) to the Fidelity money market account and then write checks from the latter account. The checks drawn on this account also included checks to Danos that appeared to constitute Judge Porteous's repayment to her for payments she made on his behalf.

Moreover, Judge Porteous had used the Fidelity money market account in the time frame immediately surrounding his filing for bankruptcy.[492] By omitting the Fidelity money market account, Judge Porteous kept a bank account available for his own use while in bankruptcy that was outside the knowledge of, and thus the potential scrutiny of, creditors.

c. Understated Income

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)." On that schedule, Judge Porteous's monthly gross income was listed as $7,531.52, the amount that was reflected on the pay stub Judge Porteous gave Lightfoot when he first retained him in the summer of 2000.[493] That amount listed was in fact Judge Porteous's net salary for that month (not gross as called for by the Schedule), and the pay stub was attached to the Schedule. In 2001, Judge Porteous's net judicial salary had increased to $7,705.51 per

[489] Lightfoot GJ III at 45 (Ex. 122).

[490] Porteous 5th Cir. Hrg. at 85-87 (Ex. 10).

[491] Judge Porteous deposited each of the following withdrawals from his IRA into his Fidelity money market account: January 22, 1997 ($12,000); April 30, 1997 ($12,000); April 6, 1998 ($7,200); January 19, 1999 ($2,000); September 27, 1999 ($1,600); May 12, 2000 ($2,400); and November 21, 2000 ($2,400) (Ex. 383).

[492] Porteous Fidelity Statement (Ex. 143). The Fidelity statement that was issued to Judge Porteous immediately prior to his filing the original bankruptcy petition was dated March 20, 2001, and showed a balance of over $600. There was some activity on the account, dropping the balance down to $283.42 on March 28, 2001. On April 4, Judge Porteous deposited another $200 into the account. Judge Porteous knew about this money market account, having written five checks on this account between March 22, 2001 and April 12, 2001, including a check in the amount of $40 which he deposited into his Bank One account on March 27, 2001—the day prior to filing for bankruptcy. Moreover, the account was similarly active and used for the same purposes in the summer of 2000, at the time when Judge Porteous should have disclosed it to Lightfoot. Judge Porteous deposited $2,400 into that account on May 12, 2000, leaving and ending balance that month of $2,456.33, and, after some transactions the next month, a balance on June 20, 2000 of $2,055.43.

[493] Bankruptcy Schedules at SC00108-09 (Ex. 127).

month.[494] Judge Porteous's net income, therefore, was understated by $173.99 a month, or $2,087.88 annually, or over $6,000 for the 3 year life of the proposed Plan.[495]

d. Schedule of Unsecured Creditors

Notwithstanding Judge Porteous's pre-bankruptcy efforts to ensure there would be no outstanding casino markers on the date of filing his Initial Petition, Judge Porteous in fact owed $2,000 in outstanding markers to the Grand Casino Gulfport on March 28, 2001. Though he listed numerous creditors on Schedule F, "Creditors Holding Unsecured Nonpriority Claims," this casino debt was not included. Once again, this was a gambling-related matter as to which Lightfoot was unaware. As Lightfoot testified:

> Q. Did Judge Porteous tell you more specifically that on February 27th of 2001 he gambled at the Grand Casino Gulfport, he took out $2,000 in markers and that he left the casino that day still owing $2,000?
>
> A. No. I never knew that he gambled at all or had any gambling debts.
>
> Q. Did he ever tell you that he owed $2,000 to the Grand Casino Gulfport on March 28th, which was the day that he filed the bankruptcy petition?
>
> A. No.
>
> Q. Should Judge Porteous have told you about those sorts of gambling debts?
>
> A. Yes, so I could list them.[496]

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[494] Porteous Bank One Records (Ex. 144). Judge Porteous never disclosed to his bankruptcy attorney that his judicial salary had increased in 2001. Lightfoot TF Hrg. II at 47. Schedule I was improperly filled out because Judge Porteous's gross income, even according to his attached May 31, 2000 pay stub, was $11,775, and his net (not gross) income was $7,531.52. Nonetheless, the form was prepared by Lightfoot and the pay stub was attached.

[495] Moreover, even as a "net" amount, the $7,531 was misleading. Judge Porteous had Social Security taxes withheld from his salary until he reached a statutorily defined annual gross salary—referred to as the Social Security "wage base"—a level he typically reached in July of a calendar year. At that point, he was no longer subject to Social Security tax withholding, and his net monthly salary would increase several hundred dollars. Judge Porteous had experienced this pattern for years. In 1999, when the Social Security wage base was $72,600, Judge Porteous's net monthly salary increased from approximately $7,350 on June 1 to $8,052 by August, where it stayed for the rest of the year. In 2000, when the Social Security wage base was $76,200, Judge Porteous's salary increased from $7,531 on June 1 to $8,253 on August 1, where it likewise remained for the rest of the year.

The same pattern would hold for 2001. As noted, Judge Porteous received $7,705 per month through June 1, 2001 (though he reported only $7,531 to the bankruptcy court). His monthly net salary increased to $7,875 on July 2, 2001, and thereafter increased to a range between $8,555 through $8,592 for the rest of the year—roughly $1,000 per month more than he reported on his Schedule I, or over $5,000 more for that year. See also Horner TF Hrg. II at 26 (testifying that from "August through December [2001], the pay that is deposited in his account every month is about $8,500").

Schedule I specifically contemplated the possibility that a wage-earner in bankruptcy may anticipate a salary increase, and, to ensure that all disposable income is actually paid to creditors, specifically inquires at the bottom of Schedule I: "Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document." In the response for Judge Porteous, the word "NONE" is typed. Judge Porteous's net monthly salary did in fact go up more than 10%. Thus, Judge Porteous in fact enjoyed thousands of dollars a year in undisclosed disposable income that would otherwise have been available to pay his creditors—income that was significantly in excess of the $7,531.52 that was disclosed on Schedule I as his monthly income.

[496] Lightfoot TF Hrg. II at 43. It was clear to Lightfoot that a marker was a form of debt that had to be reported. He explained, "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.

Continued

Gulfport collected on these markers on or about April 5-6, 2001.[497]

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.[498]

4. Statement of Financial Affairs

Judge Porteous's April 9, 2001 Statement of Financial Affairs likewise contained false information by failing to report the Fleet payment and the payment of certain gambling debts within 90 days of his filing the Initial Petition.

a. Payments to Creditors (Fleet and the Casinos) Within 90 Days of Filing for Bankruptcy

Question 3 on the Statement of Financial Affairs 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." The question thereafter provided fields for the debtor to list the name and address of any creditor, the dates of payments, the amount paid, and the amount still owing.[499]

Relying on the information that Judge Porteous had provided, Lightfoot entered the answer: "normal installments."[500] When questioned about what he meant by "normal installments" during his Task Force Hearing testimony, Lightfoot explained: "'[N]ormal installments' was intended to cover the normal installments on his two leased cars and his two home mortgages."[501]

That answer—"normal installments"—was false, in light of Judge Porteous's actions in the weeks immediately preceding filing for bankruptcy.

First, it failed to disclose Judge Porteous's payment to Treasure Chest. 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

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So it has to be listed. I would have listed and do list anybody who has a casino-type debt." Lightfoot TF Hrg. II at 53.

[497] Ex. 144.

[498] Bankruptcy Schedules at SC00111 (Ex. 127).

[499] Statement of Financial Affairs at SC00112 (Ex. 127). 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. As a Federal judge, Judge Porteous would have well understood this purpose. Lightfoot explained:

> But what I'm looking for was there anything unusual, any unusual payments to anybody, anything outside a normal monthly installment, like a normal house note, a normal car payment, a normal payment to the credit card company. In other words, anybody gets paid off, I want to know that. Some relative gets paid back, I want to know that.

Lightfoot GJ III at 70-71 (Ex. 122).

[500] Statement of Financial Affairs at SC00112 (Ex. 127). During his Fifth Circuit testimony, Judge Porteous acknowledged that his response to Question 3 was "normal installments." Porteous 5th Cir. Hrg. at 89 (Ex. 10).

[501] Lightfoot TF Hrg. at 48. See also Lightfoot GJ III at 70-72 (Ex. 122).

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."[502] Lightfoot testified that the repayment of the markers to Treasure Chest should have been reported on the Statement of Financial Affairs, but that, as with all of Judge Porteous's gambling activities, Lightfoot did not include this payment because he did not know about it.[503]

Second, Judge Porteous also failed to disclose that on March 23, 2001, he had his secretary, Danos, pay off his wife's Fleet credit card balance of $1,088.41.[504] Judge Porteous claimed, in his Fifth Circuit testimony, that he had no recollection of asking Danos to pay off his wife's Fleet bill. However, he also testified that Danos had "paid some bills" for him in the past.[505] Danos testified before the Fifth Circuit that she "assume[d]" Judge Porteous asked her to write the check to Fleet and that she didn't talk with Carmella about paying her bills.[506]

As to both these items—the Treasure Chest payment and the Fleet credit card payment—Lightfoot did not include them in response to Question 3 on the Statement of Financial Affairs because Judge Porteous did not disclose them to him.[507]

Finally, on February 26, 2001, Judge Porteous took out $2,000 in markers at the Grand Casino Gulfport. As noted, these 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, that payment should have been disclosed. Again, Lightfoot was unaware of the Gulfport markers.[508]

b. Gambling Losses

Question 8 on the Statement of Financial Affairs required Judge Porteous to "[l]ist all losses from . . . gambling within 1 year immediately preceding the commencement of this case or since the commencement of this case." In response, the box for "none" is checked.[509] However, an analysis of Judge Porteous's gambling ac-

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[502] Treasure Chest Customer Transaction Inquiry (HP Ex. 302). Judge Porteous was able to take out so many markers on March 2, 2001 because his credit limit at Treasure Chest had been increased during the previous summer. See Central Credit, Inc. Gaming Report for Judge Porteous (HP Ex. 326).

[503] Lightfoot TF Hrg. II at 48.

[504] Fleet Statement and Danos Check (Ex. 329); Fleet Statements at SC00590 (Ex. 140). This payment 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 argue that the payment to Fleet was not in fact made within the 90 days preceding his bankruptcy filing (even though it had been mailed within that time), 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 made sure that Fleet was listed on Judge Porteous's Schedule F as an unsecured creditor. In either event, Fleet should have appeared somewhere in Judge Porteous's bankruptcy filing. In fact the transaction does not appear anywhere.

[505] Porteous 5th Cir. Hrg. at 97-98 (Ex. 10).

[506] Danos 5th Cir. Hrg. at 402-03 (Ex. 43).

[507] "In other words, I, I—my questioning revealed that the only payments that they [the Porteouses] said they made were just normal installments on the debts that I knew of." Lightfoot GJ III at 72 (Ex. 122).

[508] In short, Judge Porteous would have known either that the debt was actually pending (in which case it should have been listed on Schedule F as a debt owed to an unsecured creditor) or that it had been paid (in which case it should have been listed on the Statement of Financial Affairs as a payment made in the 90 days preceding the bankruptcy filing). This indebtedness was not listed in either place, because Judge Porteous did not tell Lightfoot about it.

[509] Statement of Financial Affairs at SC00113 (Ex. 127).

tivities in the year preceding his bankruptcy filing revealed that Judge Porteous had accrued $6,233.20 in net gambling losses during that year.[510]

During his Fifth Circuit testimony, Judge Porteous admitted that his response of "none" to that question 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.[511]

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.[512]

E. Judge Porteous's Post-Filing Activities and the Bankruptcy Creditors Meeting

1. Post-Filing Activities

Despite the fact that he had filed for bankruptcy protection and claimed to have over $190,000 in credit card debts,[513] Judge Porteous continued to gamble and to incur thousands of dollars in additional debt immediately following his bankruptcy filing.[514] Judge Porteous's activities between March 28, 2001, when he filed his Initial Petition, and the Creditors Meeting on May 9, 2001 included the following:[515]

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[510] FBI Gaming Losses Chart (Ex. 337). FBI Agent Horner explained this chart both to the Impeachment Task Force and to the Fifth Circuit Special Committee, and he testified that Judge Porteous's losses totaled $12,895.35, but Judge Porteous also had winnings of $5,312.15. Horner TF Hrg. II at 16; Horner 5th Cir. Hrg. at 317-18 (Ex. 338). The analysis of Judge Porteous's gambling activities (including losses) in the year preceding his bankruptcy was based on a review of each casino's records. Casinos keep these records because "first of all, they have to determine wins and losses for tax purposes for these people; and then, second of all, they're basing their comps on these numbers. So . . . they want the numbers to be as accurate as possible." Horner 5th Cir. Hrg. at 322 (Ex. 338).

[511] Porteous 5th Cir. Hrg. at 99 (Ex. 10).

[512] Statement of Financial Affairs at SC00116 (Ex. 127).

[513] Bankruptcy Schedules at SC00092 (Ex. 127).

[514] Judge Porteous never advised Lightfoot that, after filing the amended petition on April 9, 2001, he incurred thousands of dollars in gambling debt at casinos. Lightfoot 5th Cir. Hrg. at 449 (Ex. 124).

[515] While there was no official court order during this time period prohibiting Judge Porteous from incurring new debt, nor had the bankruptcy trustee yet instructed Judge Porteous that he may not incur new debt, Lightfoot had already made it clear to Judge Porteous that he

- April 6, 2001—Judge Porteous requested a one-time credit increase at the Beau Rivage Casino from $2,500 to $4,000.[516]
- *April 7-8, 2001*—Judge Porteous took out $2,000 in markers at the Beau Rivage Casino. He left the casino owing $1,000, which was not paid back until May 4, 2001.[517]
- *April 10, 2001*—Judge Porteous took out $2,000 in markers at Treasure Chest. He paid them all back the same day in chips.[518]
- *April 30, 2001*—Judge Porteous submitted a casino credit application to Harrah's Casino and requested a $4,000 credit limit.[519]
- *April 30, 2001*—Judge Porteous took out $1,000 in markers at Harrah's Casino. These markers were not paid back until May 30, 2001.[520]
- *Approximately April 30-May 1, 2001*—Judge Porteous repaid the Beau Rivage by withdrawing $1,000 from his IRA, which was paid to him in the form of a check dated April 24, 2001. He endorsed the check directly to Danos, and she deposited it into her personal account on May 1, 2001. On April 30, 2001, Danos wrote a check payable to the Beau Rivage in the amount of $1,000, the memo line referencing Judge Porteous. As noted, that payment was credited against Judge Porteous's Beau Rivage account on May 4, 2001.[521]
- *May 7, 2001*—Judge Porteous took out $4,000 in markers at Treasure Chest. He left the casino owing this amount and repaid all $4,000 2 days later in cash.[522]

2. Bankruptcy Creditors Meeting

On May 9, 2001, the Section 341 Creditors Meeting was held in Judge Porteous's bankruptcy case.[523] Bankruptcy trustee S.J.

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should not be incurring any new debt. Lightfoot Dep. at 13-14 (Ex. 123). Moreover, Judge Porteous's return to the same conduct that had caused him to go into bankruptcy in the first place necessarily placed his creditors at risk. Gambling, and seeking credit to do so, in the very days after filing false documents in bankruptcy (that concealed his gambling) bear on the question of his "good faith" in seeking bankruptcy. See testimony of Judge Greendyke, in X(F)(1) and (2), infra. Finally, Judge Porteous's repayment of the Beau Rivage debt by endorsing a check to Danos and having her write a check to the casino, thus bypassing Judge Porteous's account altogether, is evidence of his consciousness of the wrongfulness of taking out and repaying debts to casinos between the time of filing for bankruptcy and the Creditors Meeting.

[516] Beau Rivage Credit History (Ex. 303).

[517] Beau Rivage Balance Activity (Ex. 304). Judge Porteous was able to leave the casino while still owing money because he had an established credit line. FBI Agent Horner testified before the Fifth Circuit Special Committee and explained that a player has "to establish some kind of credit line with the casino before they would let you [leave while still owing money]." Horner 5th Cir. Hrg. at 309-10 (Ex. 338).

[518] Treasure Chest Customer Transaction Inquiry (Ex. 305).

[519] Harrah's Casino Credit Application (Ex. 149). This application lists "$0" for indebtedness, though it is not clear who may have written that figure on the form. See also Central Credit, Inc. Gaming Report for Judge Porteous (Ex. 326).

[520] Harrah's Patron Credit Activity (Ex. 306). Judge Porteous wrote a check to repay these markers on April 30, 2001, but Harrah's held the check for 30 days before depositing it.

[521] Thus, rather than depositing the money into his own account and writing a check on that account, Judge Porteous conducted this transaction in a way that bypassed his accounts altogether and consistent with an intent to conceal his gambling. (Ex. 382).

[522] Treasure Chest Customer Transaction Inquiry (Ex. 307).

[523] Trustee's Memo to Record, Docket No. 7, In the Matter of Porteous, Case No. 01-12363 (Bankr. E.D. La. May 9, 2001) (Ex. 129). A section 341 creditors meeting is a statutorily mandated meeting of creditors and equity security holders that is held by the bankruptcy trustee.

Continued

Beaulieu, Jr. presided over the hearing, which was attended by Judge Porteous and his attorney Lightfoot. At the beginning of the hearing, Judge Porteous was provided with a copy of a pamphlet entitled "Your Rights and Responsibilities in Chapter 13."[524] 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.[525]

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."[526]

The bankruptcy trustee 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."[527] 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 by taking out markers at casinos—one of which he paid back by way of a transaction that bypassed his personal accounts altogether. Nor did he disclose that he had increased a credit line, that he had concealed a credit card in his bankruptcy filing, or that he had outstanding markers at Harrah's Casino on the date of the meeting.

Despite this admonition by the bankruptcy trustee, and despite the clear language in the "Rights and Responsibilities" pamphlet stating that he was not allowed to borrow money, Judge Porteous continued to gamble, to take out casino markers, and to incur new debt after the Creditors Meeting on May 9, 2001. Judge Porteous's activities between May 9, 2001 and June 28, 2001 included the following:

- *May 16, 2001*—Judge Porteous took out a $500 marker at Treasure Chest. He repaid the marker the same day in chips.[528]
- *May 26-27, 2001*—Judge Porteous took out $1,000 in markers at the Grand Casino Gulfport. He paid back $900 on May

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See 11 U.S.C. §341 (2003). Lightfoot explained during his Task Force testimony that the purpose of a section 341 creditors meeting is to examine the debtor under oath regarding his petition and bankruptcy schedules. Lightfoot TF Hrg. II at 49.

[524] See Creditors Meeting Hearing Transcript (indicating that Judge Porteous was given a copy of the pamphlet) (Ex. 130); see also Chapter 13 Pamphlet (Ex. 148). During his testimony before the Fifth Circuit Special Committee, Judge Porteous acknowledged receiving the pamphlet from the bankruptcy trustee. See Porteous 5th Cir. Hrg. at 60 (Ex. 10).

[525] Chapter 13 Pamphlet at SC00402 (Ex. 148).

[526] Creditors Meeting Hearing Transcript at SC00595-96 (Ex. 130).

[527] Creditors Meeting Hearing Transcript at SC00598 (Ex. 130). During his Fifth Circuit testimony, Lightfoot confirmed that both he and the bankruptcy trustee advised Judge Porteous about not incurring new debt without permission. Lightfoot 5th Cir. Hrg. at 454 (Ex. 124); Lightfoot Dep. at 13-14 (Ex. 123).

[528] Treasure Chest Customer Transaction Inquiry (Ex. 308).

27, 2001 and paid back the remaining $100 on June 5, 2001.[529]

- *June 20, 2001*—Judge Porteous took out a $500 marker at Treasure Chest. He repaid the marker the same day in chips.[530]

F. The June 28, 2001 Confirmation of Judge Porteous's Bankruptcy Plan, and Judge Porteous's Violations of the Order

1. The Order's Prohibition Against Judge Porteous Incurring New Debt

On June 28, 2001, U.S. Bankruptcy Judge William Greendyke[531] signed an Order Confirming the Debtor's Plan and Related Orders (the "June 28 Order"). Among its terms, the June 28 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.[532]

Judge Porteous testified he understood the June 28 Order at the time the order was entered.[533] 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.[534]

2. Judge Greendyke's Decision to Sign the Confirmation Order

Judge Greendyke was asked about his decision to sign the June 28 Order, confirming Judge Porteous's Chapter 13 plan, during his Fifth Circuit testimony:

> Q. Given the sum of these events—the false filing of the name on the initial petition, the omission of the tax refund on the schedules where it should be noted, the preferred payment to certain creditors. . . .
>
> * * *

Given the sum of those events, had you known that, what would have been your course of action while you were the judge super-

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[529] Grand Casino Patron Transaction Request (Ex. 309).

[530] Treasure Chest Customer Transaction Inquiry (Ex. 310).

[531] Judge Greendyke is now in private practice with the law firm of Fulbright & Jaworski LLP. Prior to entering private practice in 2004, Judge Greendyke was the Chief Judge of the United States Bankruptcy Court for the Southern District of Texas. He was specially assigned Judge Porteous's bankruptcy case to avoid having the case heard by a bankruptcy judge from the Eastern District of Louisiana. Judge Greendyke was interviewed by Impeachment Task Force staff on January 7, 2009.

[532] Order Confirming the Debtor's Plan and Related Orders, Docket No. 22, In the Matter of Porteous, Case No. 01-12363 (Bankr. E.D. La. June 28, 2001) (hereinafter "June 28 Order") (Ex. 133).

[533] Porteous 5th Cir. Hrg. at 62 (Ex. 10). Lightfoot also testified before the Impeachment Task Force that Judge Porteous was aware the June 28 Order had been entered and that Judge Porteous had received a copy of the Order.

[534] Lightfoot TF Hrg. II at 50. First, on December 20, 2002, the bankruptcy trustee granted Judge Porteous's request to refinance his home. (See Ex. 339.) And second, on January 2, 2003, the bankruptcy trustee granted Judge Porteous's request to obtain two new car leases. (See Ex. 340).

vising that bankruptcy? Had you known all those events, what action would you have taken?

A. If I had been aware of those items prior to the signing of the confirmation order, I would not have signed the confirmation order. I would probably have sua sponte objected on the basis of lack of good faith. I anticipate if my Houston trustee had been aware of that he would have filed a similar objection. And we would have had a hearing to try and iron things out.

Q. And in bankruptcy filings, is good faith on behalf of the debtor one of the key elements that the judge and the trustee rely on?

A. It's a confirmation requirement.[535]

In response to questioning by Chief Judge Jones, Judge Greendyke further testified that he did not scrutinize Judge Porteous's bankruptcy as closely as he normally would have because Judge Porteous was a Federal judge:

Q. I assume you attributed a higher—a certain level of integrity to this filing because the subject in quest was a Federal judge?

A. I did not scrutinize it——

Q. Right.

A. —particularly because I thought it was a judge and I——

Q. Because you thought a judge would turn square corners?

A. Yes, Judge. That's why I was surprised when I found out the things I found out.[536]

3. Violations of the June 28 Order

Judge Porteous was subject to the terms of his Chapter 13 repayment plan for 3 years.[537] Notwithstanding Judge Greendyke's Order that "[t]he debtor(s) shall not incur additional debt during the term of this Plan except upon written approval of the Trustee," Judge Porteous: (1) took out 42 markers over the course of 14 different gambling trips at 4 different casinos, (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 low-limit credit card. He did not have the permission of the trustee or the bankruptcy court to engage in these activities.

a. Casino Markers

After the June 28 Order was issued, Judge Porteous continued to gamble and to take out markers, i.e., incur debt, at casinos on a regular basis. He obtained these markers on his existing lines of

[535] Greendyke 5th Cir. Hrg. at 384-85 (Ex. 335).
[536] Greendyke 5th Cir. Hrg. at 392 (Ex. 335).
[537] See Discharge of Debtor After Completion of Chapter 13 Plan, Docket No. 49, In the Matter of Porteous, Case No. 01-12363 (Bankr. E.D. La. July 22, 2004) (Ex. 137).

credit at the casinos, and on occasion sought an increase on a line of credit.[538]

Judge Porteous took out at least 42 markers between July 19, 2001 and July 5, 2002. The following table summarizes Judge Porteous's gambling activity during the first year following the June 28 Order:[539]

Table 7. Judge Porteous's Gambling Markers – July 2001 through July 2002

Date	Casino	Number of Markers	Total Dollar Amount	Repayment
7/19/01	Treasure Chest	1	$500	7/19/2001 (same day)
7/23/01	Treasure Chest	1	$1,000	7/23/2001 (same day)
8/20-21/01	Treasure Chest	8	$8,000	8/20-21/2001 ($5,000) (same day) 9/9/2001 ($2,000) 9/15/2001 ($1,000)
9/28/01	Harrah's	2	$2,000	10/28/2001 (check dated 9/28/01, cashed by Harrah's 10/28/01)
10/13/01	Treasure Chest	2	$1,000	10/13/2001 (same day)
10/17-18/01	Treasure Chest	9	$5,900	10/17/2001 ($1,500) (same day) 11/9/2001 ($4,400)
10/31/01-11/1/01	Beau Rivage	6	$3,000	11/01/2001 (same day)
11/27/01	Treasure Chest	2	$2,000	11/27/2001 (same day)
12/11/01	Treasure Chest	2	$2,000	12/11/2001 (same day)
12/20/01	Harrah's	1	$1,000	11/9/2002 (check dated 12/20/01, cashed by Harrah's 11/9/02)
2/12/02	Grand Casino Gulfport	1	$1,000	2/12/2002 (same day)
4/1/02	Treasure Chest	3	$2,500	4/01/2002 (same day)
5/26/02	Grand Casino Gulfport	1	$1,000	5/26/2002 (same day)
7/4-5/02	Grand Casino Gulfport	3	$2,500	7/05/2002 ($1,200) (same day) 8/11/2002 ($1,300) (check dated 8/2/02, cleared casino 8/11/02)
TOTAL		42	$33,400	

Judge Porteous repaid his October 17-18, 2001 debt to Treasure Chest using his undisclosed Fidelity money market account. As Table 7 shows, Judge Porteous left Treasure Chest on October 18,

[538] See Central Credit, Inc. Gaming Report for Judge Porteous (Ex. 326). Agent Horner explained during his Task Force testimony that gamblers are required to fill out credit applications before they can take out markers at casinos, and these applications are very similar to credit card applications. Horner TF Hrg. II at 13.

[539] The documents related to the Treasure Chest transactions are marked as follows: Ex. 311 (July 19, 2001 markers); Ex. 312 (July 23, 2001 markers); Ex. 313(a)-(b) (August 20-21, 2001 markers); Ex. 315 (October 13, 2001 markers); Ex. 316 (October 17-18, 2001 markers); Ex. 318 (November 27, 2001 markers); Ex. 319 (December 11, 2001 markers); Ex. 322 (April 1, 2002 markers). The documents related to the Harrah's transactions are marked as follows: Ex. 314 (September 28, 2001 markers); Ex. 320 (December 20, 2001 markers). The documents related to the Beau Rivage transaction are marked as Ex. 317 (October 31-November 1, 2001 markers). The documents related to the Grand Casino Gulfport transactions are marked as Ex. 321 (February 12, 2002 markers), Ex. 323 (May 26, 2002 markers), and Ex. 325 (July 4-5, 2002 markers). At the Task Force Hearing, the total dollar amounts of the markers were erroneously added up to be in excess of $149,000.

2001, owing $4,400. The following week, on October 25, 2001, Judge Porteous withdrew $1,760 from his IRA. He received those funds by check and, on October 30, 2001, he deposited the check into his Fidelity money market account. On November 9, 2001, he repaid Treasure Chest with $2,600 cash and a $1,800 personal check from the Fidelity money market account into which he had deposited the IRA proceeds.[540]

During his Task Force Deposition, Lightfoot explained that a marker is a form of indebtedness owed to a creditor, that it was clearly prohibited by the June 28 Order, that at no time did Judge Porteous inform him that he [Judge Porteous] had taken markers, and that if the Judge had so informed him, it would have been significant.

> Q. Is there any question in your mind that a marker is a form of indebtedness owed to a creditor?
>
> A. None whatsoever.
>
> * * *
>
> Q. And if he had ever asked you, by the way, is a marker a form of indebtedness which has to be disclosed, what would you have said?
>
> A. I'd say—I would have told him that it's a civil liability that has to be disclosed because it's a debt, but that there are other issues about if you can't pay it, it may be the subject of some sort of criminal bad check prosecution that you need to look into.
>
> Q. Okay. But there's no question it's a form of debt, correct?
>
> A. At a minimum it's that, and at a maximum it could be worse.[541]

Judge Porteous was questioned about his understanding of a marker before the Fifth Circuit Special Committee, and he accepted as accurate the following definition:

> 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.[542]

Judge Porteous's knowledge that a marker constituted an unsecured debt is further evidenced by his pre-bankruptcy efforts to ensure that there were no markers outstanding when he filed for bankruptcy.

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[540] Judge Porteous's financial records related to his use of his Fidelity money market account to repay Treasure Chest are marked as Ex. 381.

[541] Lightfoot Dep. at 9-10 (Ex. 123). See also Lightfoot TF Hrg. II at 64 ("No doubt at all" that a marker is a form of indebtedness.)

[542] Porteous 5th Cir. Hrg. at 6465 (Ex. 10).

While Judge Porteous repaid some of these markers on the same day they were taken out, those markers were no less an extension of credit than the markers that were not repaid until some time later. As Chief Judge Keir explained during his Task Force testimony:

> [T]he debt is incurred when the marker is taken. That is when the debt arises. You owe the money. And it is the incurrence of debt that was prohibited by the order. It was not qualified by saying "unless you pay it off within the same day," or any other words, such as if you pay it off in the same session or something. It is the incurrence of debt. And, of course, when the marker was taken out, there is no way that Judge Porteous knew he was going to be able to or not going to be able to pay it from a particular source or at a particular time. It was gambling. There is a chance. So the only real event in terms of his disobedience of the order was the obtaining of the marker.[543]

b. Judge Porteous's Application for a New Credit Card

On August 13, 2001—less than 2 months after Judge Greendyke's June 28 Order was entered—Judge Porteous applied for a new Capital One credit card. 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.[544] In May 2002, Judge Porteous's credit line was increased to $400, and in November 2002, it was increased again to $600.[545]

Judge Porteous never sought permission from the bankruptcy trustee to apply for this credit card. When asked about a debtor's request to obtain a new credit card, bankruptcy trustee S.J. Beaulieu told the FBI that he objects to all new credit applications by debtors and sends the application to the bankruptcy judge.[546]

c. Judge Porteous's Application for a Casino Credit Increase

On July 4, 2002, Judge Porteous succeeded in increasing his credit limit at the Grand Casino Gulfport from $2,000 to $2,500.[547] Immediately thereafter, Judge Porteous gambled at the casino and took out the full $2,500 in markers.

4. Lightfoot's Knowledge of Judge Porteous's Post-June 28 Conduct

Judge Porteous did not tell Lightfoot that he had taken out markers, applied for a credit card, or sought credit line increases at casinos. When asked at the Task Force Hearing whether he would have considered these acts violations of Judge Greendyke's Confirmation Order, Lightfoot responded: "They clearly would have been."[548]

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[543] Keir TF Hrg. II at 78.

[544] Capital One Credit Application and Statements (Ex. 341(a)-(b)). FBI Agent Horner identified Judge Porteous's Capital One Credit Application during his Task Force hearing testimony. Horner TF Hrg. II at 18.

[545] Capital One Credit Application and Statements (Ex. 341(a)-(b)).

[546] Beaulieu FBI Interview, Jan. 22, 2004 at SC00410 (Ex. 334).

[547] Grand Casino Gulfport Credit Line Change Request (Ex. 324); see also Horner TF Hrg. II at 18.

[548] Lightfoot TF Hrg. II at 51.

G. Intent and Materiality

1. Intent

There are numerous reasons to conclude that the instances of falsity on the Bankruptcy Schedules and Statement of Financial Affairs, and the acts in violation of the June 28 Order, were committed by Judge Porteous knowingly and with intent to deceive and defraud.

First, prior to bankruptcy, Judge Porteous had on numerous other instances signed forms and documents with false information in an effort to conceal material facts. For example, he signed false documents in connection with his background check to become a Federal judge (and made other false statements to the FBI). On an annual basis, he also signed false Financial Disclosure Reports that, among other things, concealed his debts.[549]

Second, the fact that Judge Porteous was dishonest and acted with the intent to conceal and deceive in connection with filing his Initial Petition under a false name and misleading address supports the conclusion that the other false statements at issue were made with a similar intent.

Third, throughout the workout process and up to the time of filing for bankruptcy in March 2001, Judge Porteous updated Lightfoot as to the full extent of his credit card debts (with the exception of the Fleet card, which Judge Porteous concealed entirely), and he did so as late as March 2001 so as to include the most current March credit card balances as of the date of filing. As Lightfoot explained:

> [H]e had a practice of providing me with updated credit card statements. Every so often I would get another collection and I would adjust the balances, because the accrual of interest was making them get larger.[550]

Though Judge Porteous updated Lightfoot on his credit card debts, he did not update Lightfoot on income and assets (including the tax refund), and did not provide information that would disclose his gambling activities. Thus, the evidence demonstrates that Judge Porteous was careful in picking and choosing the information he would tell his attorney—informing Lightfoot only what he wanted him to know and, more to the point, concealing what he did not want to reveal.

Fourth, Judge Porteous is a Federal judge who has presided over bankruptcy matters. Whether some of the acts under scrutiny can be explained as a good faith mistake if committed by someone of lesser sophistication, Judge Porteous was well aware of the signifi-

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[549] As Mr. Schiff noted at the markup:

> Our investigation also uncovered that Judge Porteous falsely reported the full extent of his liabilities in his required financial disclosure reports. These debts, which arose from Judge Porteous'[s] gambling problem, provided further evidence of his willful efforts to conceal his financial situation and the extent of his gambling over the years.
>
> Taken together, it is clear that his false statements in the bankruptcy proceedings were not the result of an oversight or mistake, but reflected instead intentional and willful conduct to conceal his financial affairs and his gambling.

Markup of H. Res. 1031 [and other bills], House Committee on the Judiciary (Hearing Transcript, Jan. 27, 2010) at 33, available at http://judiciary.house.gov/hearings/transcripts/transcript100127.pdf.

[550] See also Lightfoot TF Hrg. II at 43.

cance of the documents he was signing and he well understood that he was signing them under penalty of perjury.

Fifth, the omissions and false statements concerning gambling activities are consistent with, and are explained by, Judge Porteous's powerful motives to keep those activities secret from his attorney, from his creditors, and from the bankruptcy trustee and judge. Judge Porteous may not have known precisely what would happen if his attorney and creditors learned of his gambling, but there is little question that he would have anticipated that the result would have been further scrutiny into his finances and potentially court ordered restrictions on his gambling.

Indeed, Lightfoot testified that it would have been very important to him to learn of Judge Porteous's gambling, and that such information not only would have triggered numerous other questions, but would have resulted in his admonishing Judge Porteous that he could no longer gamble and take on debt to do so. When asked by Mr. Goodlatte what he would have done had he learned that Judge Porteous gambled, Lightfoot testified:

> A. I would want to know where are the gambling debts. They must be listed. You can't gamble anymore. You can't incur debt to gamble. Those admonitions. Have we listed all of the debts or do you have—And then I would get into the area of the markers. Because the markers, although they are a civil liability to pay, as you were explaining, they also could—if the marker is put through as a check and it bounces and then you have a bad check, which is a more serious problem.
>
> Q. Tell me what sorts of questions you would have asked him and what advice you would have given him if he told you he was a frequent gambler?
>
> A. Well, I would have told him exactly what—do you have any gambling debts that you haven't told me about? If so, I need the name, address, account number, balance due. Are you doing it now? Because your budget will not work if you gamble. You have no authority to make any debts to gamble.[551]

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.[552] The casinos would thus be treated the same as other unsecured creditors, and would have received less than full payment on the markers.[553] Further, a default to one casino would jeopardize Judge Porteous's credit at all casinos. As Agent Horner testified, the various casinos participate in a centralized credit sys-

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[551] Lightfoot TF Hrg. II at 64. See also Lightfoot TF Hrg. II at 48-49.

[552] Keir TF Hrg. II at 71.

[553] Keir TF Hrg. II at 72. ("[Trustees] can and on fairly rare occasion do actually launch these adversary proceedings to recover back from the preferred creditor all of the money, and then the creditor has to wait and get their aliquot share from distributions under the plan."). Lightfoot TF Hrg. II at 54.

tem, and "if a gambler gets a negative history on his central credit report, what happens is the other casinos generally cut him off."[554]

Thus, the conduct discussed in this Section is not simply a variety of isolated and unrelated insignificant omissions that can be characterized as mere mistakes. Rather, the omissions and false statements form a sophisticated and coherent pattern of deception that demonstrates a determined effort by Judge Porteous to pick and choose those aspects of the Federal bankruptcy laws with which he would honestly comply and those which he would disregard.

Judge Porteous's conduct consisted of calculated acts at every juncture associated with his bankruptcy. These include:

- His failure to be truthful to his attorney at the very outset as to his gambling debts and as to the Fidelity money market account;
- His conduct in the days immediately preceding his filing the Initial Petition (having Danos pay off the Fleet Card, obtain the P.O. Box, and paying off Treasure Chest markers);
- His causing false statements and omissions to be made on the Initial Petition, the Bankruptcy Schedules, and the Statement of Financial Affairs, and swearing to those documents under penalty of perjury;
- His secretly incurring gambling debt after filing for bankruptcy but prior to the Creditors Meeting, and paying off some of this debt by directing that a check constituting a withdrawal from his IRA be endorsed to Danos, and having her write the check paying the casino;
- His false swearing to the accuracy of the documents he had previously signed, and acknowledging his understanding of the requirement that he was on a "cash basis now" at the Creditors Meeting;
- His applying for and taking out debt at casinos, applying for and using a personal credit card in violation of the June 28 Confirmation Plan Order, and his using his concealed Fidelity money market account to pay some of those debts.

Notwithstanding his knowledge that Chapter 13 bankruptcies are to be characterized by providing to the creditors all disposable income, Judge Porteous knowingly enjoyed substantial disposable income, while creditors were left receiving only a portion of what he owed them, and less than what they would have received had he been honest and acted in good faith.

2. Materiality

Notwithstanding the willfulness of Judge Porteous's conduct, a question at the Task Force Hearing was raised as to the "materiality" of the false statements and omissions. For example, Judge Porteous's attorney sought to make the point in his examination of the witnesses that even though Judge Porteous filed under a false name, the casinos would have ultimately learned of the bankruptcy

[554] Horner TF Hrg. II at 19.

if they had run a credit check that included Judge Porteous's Social Security number.[555]

The false statements were material for numerous reasons. First and foremost, one 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 was asked about his decision to sign the June 28 Order during his Fifth Circuit testimony, and indicated that if he knew all the facts concerning Judge Porteous's conduct, he "would probably have sua sponte objected on the basis of lack of good faith."[556] 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 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.[557]

Second, if Judge Porteous had disclosed accurate information, the proceedings could have taken an entirely different course. For example, the trustee could have ordered that the undisclosed tax refund be distributed to the creditors, or could have determined that the payment plan should be increased to account for that additional amount in Judge Porteous's possession, or that Judge Porteous was over-withholding and thus had more disposable income. "But, by hiding [the refund], he both falsified the amount that the plan was going to have to pay and took away from the trustee the opportunity to obtain the funds to make sure creditors got those funds."[558] Or, as Judge Keir explained, by filing under a false name and by using a P.O. Box, Judge Porteous had "falsified the official record of the United States court." Accordingly, between the time Judge Porteous filed his Initial Petition and his Amended Petition, a lender's credit inquiry would likely have failed to reveal that Judge Porteous had in fact filed for bankruptcy.[559] By failing to disclose the Fleet card, he deprived Fleet of the accurate information whereby it could decide whether it would wish to cancel Judge Porteous's account.[560] Alternatively, if Judge Porteous had disclosed payments to casinos within the 90 days of filing, the trustee may have decided to sue to recover those payments so that those casinos would not end up getting "a greater re-

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[555] Horner TF Hrg. II at 29-30.

[556] Greendyke 5th Cir. at 384-86 (Ex. 335). Judge Keir would have done the same: "It is a requirement under section 1325 that the plan be proposed in good faith. The plan, based upon falsehoods like this, is not proposed in good faith and the confirmation would have been denied right at that point." Keir TF Hrg. II at 74.

[557] Lightfoot Hrg. II at 43.

[558] Keir TF Hrg. II at 70-71. As Judge Keir explained:

> So if you hide $4,100 of your assets, you're reducing the amount that the trustee is going to calculate in making a recommendation to the court as to how high the plan payment has to be. The second thing is, of course, a tax refund is effectively cash to put into your account. You can spend it. If you spend it and then your case for some reason was converted to Chapter 7, it is not going to be available to creditors. It is gone. So, often, at least in my district, the trustee will take the position and if not agreed will file a motion asking for a court order that the refund be paid into the trustee upon receipt and, as in effect, part of the payment required into the plan.

Id. at 70.

[559] Keir TF Hrg. II at 69.

[560] Keir TF Hrg. II at 71.

turn dollar for dollar than unsecured creditors generally in the case."[561]

Third, if Judge Porteous had been truthful as to his gambling activities, he may have invited further and more pointed scrutiny of all his financial affairs, bringing to light his actual income and tax refund—the sort of scrutiny that was not conducted in part because he was so careful and thorough in removing evidence of his gambling from his bankruptcy filings, and because it was assumed that as a Federal judge, he would turn square corners. Judge Keir explained that the bankruptcy system depends on the honesty of the debtors in disclosing financial information. Judge Keir testified:

> All of this information is sworn to under penalty of perjury. So they [the debtors] are taking a court oath as to all of this, and this provides the essential information that both the creditors and the trustee can then use to decide whether further investigation by way of the examination or take action [by] filing [a] particular action before the bankruptcy court. They investigate the liabilities by asking questions of other witnesses or seeking bank records, for example. All of this activity would follow on based upon what the debtor has revealed. It has to be complete or there is no trail for the creditors and the trustee to follow.[562]

Thus, "the whole system demands and depends upon the honesty of the honest but unfortunate person who seeks relief."[563] Individuals can't just simply 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."[564]

XI. THE FACTS UNDERLYING ARTICLE IV—JUDGE PORTEOUS'S FALSE STATEMENTS IN CONNECTION WITH HIS CONFIRMATION

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.

First, Judge Porteous filled out and signed a document entitled "Supplement to Standard Form 86 (SF-86)." That form, at question 10's, sets forth the following question and answer by Judge Porteous:

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[561] Keir TF Hrg. II at 71.

[562] Keir TF Hrg. II at 68.

[563] Keir TF Hrg. II at 72. Keir explained by analogy: "[If] one goes 110 miles an hour the wrong way down a one-way street but by good fortune doesn't hit anybody, they are not exonerated from their intentional misconduct for certain." Keir TF Hrg. II at 69.

[564] Keir TF Hrg. II at 69-70. As one appellate court has noted: "Materiality does not require a showing that creditors are harmed by the false statements. . . . Matters are material if pertinent to the extent and nature of bankrupt's assets, including the history of a bankrupt's financial transactions. . . . Materiality is also established when it is shown that the inquiry bears a relationship to the bankrupt's business transactions or his estate . . . or concerns the 'discovery of assets, including the history of a bankrupt's financial transactions.'" United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir. 1976). See also United States v. Gellene, 182 F.3d 578, 587 (7th Cir. 1998) ("Materiality . . . does not require harm to or adverse reliance by a creditor, nor does it require a realization of a gain by the defendant. Rather it requires that the false oath or account relate to some significant aspect of the bankruptcy case or proceeding in which it was given, or that it pertain to the discovery of assets or to the debtor's financial transactions.")

> [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 [565]

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. [566]

Second, Judge Porteous, when interviewed by the FBI in July 1994, was asked a series of standard questions designed to elicit derogatory information. The FBI Agent, in her 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. [567]

Third, 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. Again, in the FBI Agent's write-up of that interview, Judge Porteous is recorded 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, judgement or discretion." [568]

Fourth, on his United States Senate Committee on the Judiciary "Questionnaire for Judicial Nominees," 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. [569]

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.

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[565] Porteous Background Check Documents, at PORT 00298 (part of Ex. 69(b)).

[566] Porteous Background Check Documents, at PORT 00298 (part of Ex. 69(b)). The form is undated. The date "April 27, 1994" was written by hand. The Standard Form 86 is entitled "Questionnaire for Sensitive Positions (For National Security)."

[567] Porteous Background Check Documents, at PORT 00294 (part of Ex. 69(b)).

[568] Porteous Background Check Documents, at PORT 00493-94 (part of Ex. 69(b)).

[569] Porteous Background Check Documents, at PORT 00049 (part of Ex. 69(a)).

It is signed by Judge Porteous and by a notary.[570]

These four statements each concealed that Judge Porteous had engaged in serious and potentially criminal misconduct on the bench on numerous occasions over several years. These acts involved his assigning curatorships to Creely as part of a kickback scheme. It also involved his setting bonds and setting aside convictions for the Marcottes as part of a course of conduct, quid pro quo relationship with them.

XII. OTHER THINGS OF VALUE RECEIVED BY JUDGE PORTEOUS AS A STATE COURT JUDGE

Judge Porteous's acceptance of other things of value from attorneys and parties, both as a State court judge and as a Federal judge, is relevant to his intent and to address a contention that the conduct discussed in Articles I and II constitute nothing more than a misinterpretation of Judge Porteous's friendship and his motives in relation to a few attorneys and the Marcottes.

Attorney Leonard Cline was a plaintiff's attorney who, in the late 1980's, had at least three cases in front of Judge Porteous for which Judge Porteous awarded his clients large verdicts. In the mid-1990's, an attorney sued Cline, alleging, in substance, that Cline owed him a portion of the fees from one of the cases. In connection with that suit, Cline's secretary, Sharon Konnerup, gave a sworn statement in which she testified that Cline and Judge Porteous were friends, that Cline had given Judge Porteous a unique firearm which she had actually seen, and that Cline also paid for a cruise for Judge Porteous. Her testimony as to the firearm was as follows:

Q. Does Mr. Cline or did Mr. Cline, at the time you were working with him, have any kind of a relationship with Judge Porteous?

A. They were very good friends. Judge Porteous would stop by the office every now and then.

Q. Did they go to lunch together?

A. Yes, they did.

Q. Did Mr. Cline ever give any gifts to Judge Porteous?

A. He gave him a very, very, very unique shotgun that had silver inscriptions on it, all silver scroll, decorative.

Q. Was that during your tenure with Mr. Cline?

A. Yes, it was.

Q. Did you ever see the shotgun?

A. Yes, I did.

Q. Did Mr. Cline tell you he had purchased it for Judge Porteous?

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[570] Thus, both Louis Marcotte and Robert Creely have admitted making false statements when they were interviewed by the FBI in connection with Judge Porteous's background check. Each individual admitted not being candid as to their knowledge of Judge Porteous's drinking habits and his financial circumstances.

A. Yes, he did.[571]

Konnerup also testified that, based on discussions that she overheard, she believed that Cline had paid for a cruise for Judge Porteous.[572]

Konnerup was deposed by Task Force Staff about this incident. At her deposition, Konnerup testified that she worked for Cline roughly between 1988 to 1990. She indicated her current recollection of events was not as clear as it was at the time of the 1995 sworn statement, but she did adopt her 1995 prior statement, stating that she took the oath to tell the truth seriously, and she was confident she told the truth as she knew it at that time.[573]

Attorney Cline, who was deposed by Task Force Staff, acknowledged having three cases in front of Judge Porteous. In the first, Judge Porteous awarded a verdict after a non-jury trial of "[s]omething like a million dollars . . . or $800,000" in May 1987 in a case where Cline's client suffered injuries after tripping over a manhole cover.[574] In the second case, in May 1989, Judge Porteous awarded a default judgement of $1,461,105.18 to Cline's client. The case thereafter settled for about $450,000.[575] In the third case, in June 1989, Judge Porteous awarded a verdict of $1.5 million to Cline's client in an automobile accident case, also after a non-jury trial. The award was reduced on appeal to about $1 million.[576]

Cline was asked at the Task Force deposition whether he ever gave Judge Porteous a firearm or a cruise. He claimed to have no recollection of doing so:

> Q. Now in or about the 1988 to 1990 time frame do you recall giving Judge Porteous any sort of hunting weapon, be it a shotgun, a rifle, or any other hunting weapon?
>
> A. I have no recollection of that one way or another.
>
> Q. And in or about the same time frame, do you recall paying for a cruise for Judge Porteous?
>
> A. I have no recollection of paying for a cruise one way or the another.
>
> * * *
>
> My best guess today is I have no recollection of giving Judge Porteous a gun or a cruise. I have no recollection one way or the other.

---

[571] Konnerup Dep. Ex. 34 at 13-14 (Sworn Statement of Sharon Konnerup, taken in American Motorists Ins. Co. v. American Rent-all, Inc., et al, No. 322-619 (24th Jud. Dist. Ct., Jeff. Par., La., Sept. 7, 1995)) (Ex. 234).

[572] Id. at 14-16.

[573] Konnerup Dep. at 5 (Ex. 194).

[574] Cline Dep. at 11 (Ex. 195). Judge Porteous actually awarded Cline's client $1,126,319.79 after a non-jury trial. The case is described on appeal at Tracy v. Jefferson Parish, 523 So.2d 266 (La. Ct. App. 1988) (Ex. 196(a)).

[575] Cline Dep. at 14-15 (Ex. 195). See also, Judgment, Cabral v. National Fire Insurance Co., No. 374-310 (24th Jud. Dist. Ct., Jeff. Par., La.), May 22, 1989 (Ex. 196(a)).

[576] Cline Dep. at 18 (Ex. 195). That case was American Motorist Ins. Co. v. American Rent-all, No 322-619 (24th Jud. Dist Ct., Jeff. Par., La.). It was reported on appeal at 579 So.2d 429 (La. Sup. Ct. 1991) (Ex. 196(f)).

* * *

Q. Is it possible that you did?

A. I have no recollection.

Q. [S]o you're saying it is possible, you just don't recall?

A. I have no recollection of doing that, and I just can't answer that question. I don't know, I mean, I don't have any recollection.[577]

Cline testified he owned more that ten firearms, though he denied being a "collector."[578]

XIII. OTHER INSTANCES OF JUDGE PORTEOUS ACCEPTING THINGS OF VALUE FROM PARTIES AND ATTORNEYS WHILE A FEDERAL JUDGE, AND HIS NON-DISCLOSURE OF THOSE TRANSACTIONS

A. Introduction

Judge Porteous's acceptance of things of value from attorneys with matters before him in the *Liljeberg* case was not an isolated incident. He also accepted hunting trips and expensive meals at high-end restaurants from parties, their attorneys, and even witnesses, without making appropriate disclosures to the opposing attorneys who appeared before him. Judge Porteous's acceptance of these things of value in cases in addition to the *Liljeberg* case provides additional evidence of his intent to inappropriately use his Federal judgeship to obtain personal benefits.

B. Judge Porteous's Recusal Practices as a Federal Judge

Judge Porteous had no procedures in place to recuse himself in the event of a conflict, in contrast to the practice of other Federal judges.

Judge Porteous's courtroom clerk, Richard Windhorst, testified that he had previously clerked for District Court Judge Morey L. Sear, who provided Windhorst a "conflict list." If a company on the list was a party in a case assigned to Judge Sear, Windhorst was instructed to call the clerk's office and have the case reassigned to another judge. Judge Richard Haik maintained a "recusal list" for the same purpose. As described later in this section, Judge Haik made sure to include on that list companies which provided him

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[577] Cline Dep. at 21-22, 24-25 (Ex. 195). In contrast to Cline's lack of recollection as to whether he gave Judge Porteous a firearm or a cruise, Cline had a detailed memory of the facts of the Tracy v. Jefferson Parish case that took place in the late 1980's, which Cline described as follows:

> Q. [H]ow can you sue Jefferson Parish for somebody slipping on a water meter manhole?
>
> A. Well, because the grass grew about 16 to 18 inches under the cover, which means that the grass, when the cover's not on it, there's not much light in there. So it takes a while for the grass to grow 16 to 18 inches.
>
> So the [P]arish inspected the meters and read the meters supposedly every month or whatever, every other month. I'm not sure what the evidence showed back then. But it showed that they had plenty of notice that the grass was under there.
>
> And after we reported the accident, they came out and cut all the grass and put a nice cover on there and took pictures and said, "Well, look, this is how it was." And, of course, we already had pictures. We had an expert out there, and that wasn't so.

Cline Dep. at 9-10 (Ex. 195).

[578] Cline Dep. at 25-26 (Ex. 195).

with hunting trips.[579] In contrast, Judge Porteous had no such list and had no such procedures. He recused himself only on matters on which his sons, who were attorneys, were involved.[580]

C. The *Alliance General* Case and Other Cases Where Levenson Represented a Party

1. The Alliance General Case

From 1996 to 1999, during roughly the same time that the *Liljeberg* case was pending before him, Judge Porteous was also presiding over *Alliance General Insurance Co. v. Louisiana Sheriffs' Automobile Risk Program.*[581] In that case, which was filed in March 1996, the plaintiff, an insurance company, sued various Sheriffs Associations ("the Sheriffs"), attempting to void an auto insurance policy on the grounds that the Sheriffs made misrepresentations in procuring the policy as to the nature and extent of the claims. The Sheriffs were represented by Allen Usry. Usry, in turn, retained Levenson.

During the pendency of that case, Usry and/or Levenson invited Porteous on at least one, and perhaps two, hunting trips to Usry's Mississippi property. In May 1999, Judge Porteous decided a summary judgement motion in favor of the Sheriffs—Levenson's and Usry's client—which effectively ended the litigation. In December 1999, Levenson and/or Usry paid for Judge Porteous to hunt at the Blackhawk hunting facility.[582]

2. Other Levenson Cases Before Judge Porteous

Levenson had other cases with Judge Porteous as well, and in fact had cases pending before Judge Porteous at all times from March 20, 1996 (prior to his becoming involved in the *Liljeberg* case) through 2007.[583] Judge Porteous's relationship with Levenson prior to and during the *Liljeberg* case has been described in prior sections. That same relationship, whereby Levenson frequently paid for Judge Porteous's meals, continued at least until 2003, when they traveled to Washington, D.C. for a Mardi Gras

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[579] Haik Affidavit (Ex. 186).

[580] Windhorst Dep. at 5-6 (Ex. 184).

[581] Civ. No. 2:96-cv-00961-GTP (E.D. La.), filed March 15, 1995, closed May 28, 1999. See PACER Docket Report (Ex. 28).

[582] This trip occurred while the Liljeberg case was under advisement with Judge Porteous.

[583] These were:

- "First National Bank v. Evans, Civ. No. 2:96-cv-01006-GTP (E.D. La.), filed March 20, 1996, closed September 19, 1997. In this case, Judge Porteous appointed Levenson to represent a missing party. Levenson was paid approximately $470. See PACER Docket Report (Ex. 28(c)); Levenson Dep. at 32-33 (Ex. 30).
- Joseph v. Sears Roebuck & Co., Civ. No. 2:97-cv-001923-GTP (E.D. La.), filed January 21, 1997, closed July 24, 1998. Levenson did not recall this case. See PACER Docket Report (Ex. 28(d)); Levenson Dep. at 33 (Ex. 30).
- Liberty Mutual Fire Insurance v. Ravannack, Civ. No. 2:00-cv-01209-CJB-DEK. (E.D. La.), filed April 19, 2000, closed June 13, 2007. This complicated products liability case was reassigned from Judge Porteous to Judge Carl Barbier in 2006. See PACER Docket Report (Ex. 28(e)); Levenson Dep. at 34 (Ex. 30).
- Holmes v. Consolidated Companies, Inc., Civ. No. 2:00-01447-GTP (E.D. La.), filed May 17, 2000, closed May 22, 2001. Levenson represented the defendant in an employment discrimination case. The case settled for what Levenson described as a "minimal amount." See PACER Docket Report (Ex. 28(f)); Levenson Dep. at 34-36 (Ex. 30).
- Morales v. Trippe, Civ. No. 2:04-02483-GTP-DEK (E.D. La.), filed August 31, 2004, closed April 18, 2005. This personal injury case settled for the insurance policy limits. See PACER Docket Report (Ex. 28(g)); Levenson Dep. at 37-38 (Ex. 30).

event.[584] At no time in any case that Levenson had before Judge Porteous did Judge Porteous disclose to the opposing party that he had a close relationship with Levenson, that they had traveled together frequently (including during the pendency of the case), and that Levenson had paid for meals on those trips.[585]

D. Judge Porteous's Relationship with Richard Chopin and Acceptance of Hunting Trips from Diamond Offshore

1. Attorney Richard Chopin

Attorney Richard Chopin was a friend of Judge Porteous for years. They first met when they taught trial advocacy at Louisiana State University Law School.[586] They were perceived by others to be friends.[587]

Chopin wrote a letter to Second Circuit Judge Ralph Winter, dated March 28, 2008, supportive of Judge Porteous, in which Chopin described Judge Porteous as an "outstanding judge" and among "one of finest judges before whom I have ever appeared." He stated he had never "heard, seen or experienced any impropriety in Judge Porteous'[s] conduct" and characterized the allegations against Judge Porteous as having the appearance of a "witch hunt." Letter from Richard A. Chopin, Esq., to Hon. Ralph K. Winter, March 28, 2008 Chopin Dep. Ex. 58 (Ex. 258). Chopin also solicited other attorneys to write letters in support of Judge Porteous. Chopin Dep. at 70-71 (Ex. 182); Chopin Dep. Ex. 59 (Ex. 259).

Chopin testified that he took Judge Porteous out to lunch, but he stated that Judge Porteous reciprocated.[588] Chopin also testified that Judge Porteous would have used a credit card to charge meals at expensive restaurants in the period subsequent to Judge Porteous filing for bankruptcy and when Judge Porteous was under court-ordered restrictions from incurring new debt.[589]

2. Diamond Offshore

Diamond Offshore ("Diamond") is an oil rig company with headquarters in Houston, Texas, that has been sued on occasion as a result of injuries to others or damage to property that occurs in the operation of Diamond's rigs. If the injuries or damages occurred in the Gulf of Mexico, the civil suits were frequently brought in the Eastern District of Louisiana, and would occasionally be assigned to Judge Porteous. Chopin was frequently retained by Diamond to defend the company in litigation.

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[584] Levenson Dep. at 25 (Ex. 30); Danos Dep. I at 66-67 (Ex. 46).

[585] Levenson Dep. at 38-39 (Ex. 30).

[586] Chopin Dep. at 17-18 (Ex. 182).

[587] Levenson Dep. at 28-29 (identifying Chopin as an attorney who took Judge Porteous to lunch) (Ex. 30); Gardner Dep. at 38 (identifying Judge Porteous and Chopin as friends) (Ex. 36). See also Baynham Dep. at 19 ("My understanding was that they had been friends for a long time.") (Ex. 158); Danos Dep. I at 23 (Porteous and Chopin became friends when Porteous was a State judge) (Ex. 46); Danos Dep. I at 68 (Chopin was one of the attorneys who took Judge Porteous to lunch on occasion) (Ex. 46).

[588] Chopin claimed he and Judge Porteous split the costs of meals. Chopin is the only attorney interviewed who has stated that Judge Porteous paid for more than a small fraction of the meals. Chopin Dep. at 56-57, 65 (Ex. 182).

[589] Chopin Dep. at 64-66 ("I'm going to assume [Judge Porteous] charge[d], but it could have been, you know, where we were just getting a sandwich and paid cash. But certainly he's charged them.") (Ex. 182). Chopin's representation that Judge Porteous paid for meals with him by credit card is not corroborated by any of Judge Porteous's credit card records in the Committee's possession.

3. 2000-2007—Judge Porteous Accepts Six Hunting Trips From Diamond

Diamond owned or leased a hunting property in Texas that it used for entertainment purposes. In the late 1990's, Diamond arranged a hunting trip for attorneys and others in the claims management part of the business. Chopin was invited, and, according to a Diamond employee who had some responsibility for the trips, Chopin, in turn, recommended that Diamond invite Judge Porteous.[590]

The documentary evidence confirms that Diamond perceived Chopin to be associated with Judge Porteous in connection with these trips. In connection with Judge Porteous's attendance on the 2001 trip, the communications from Diamond to Judge Porteous concerning that trip stated that Judge Porteous could provide his information to Chopin and that Chopin would act as an intermediary.[591]

Judge Porteous went on six Diamond-sponsored hunting trips. These occurred in early January in 2000, 2001, 2003, 2005, 2006, and 2007. In each of these 6 years, Chopin was also present. Diamond documents reflect that Judge Porteous and Chopin shared a room on at least the 2005 and 2006 trips.[592]

In connection with the hunting trips, Diamond paid all of Judge Porteous's expenses. Diamond flew Judge Porteous, Chopin and others from New Orleans to the hunting facility in Texas. It provided air transportation (including by private aircraft), meals, lodging, and an open bar, and paid for hunting licenses if necessary. If the guest shot a deer, the deer would be cleaned and butchered, and the processed meat sent to the guest.[593] The only expense a guest was required to cover was the cost of mounting a deer head if this service was requested.

4. Specific Cases Assigned to Judge Porteous Involving Diamond and/or Chopin

Notwithstanding the fact that Judge Porteous had started in January 2000 to attend all-expense-paid, high-end hunting trips sponsored by Diamond, he continued to preside over litigation in which Diamond was a named defendant, without disclosing his receipt of Diamond trips.[594]

The Diamond cases in front of Judge Porteous (since he first started attending the Diamond hunting trips) include:

- *Sylve v. Oceaneering Int'l, Inc., British Borneo Exploration, and Diamond Offshore Drilling, Inc.* was filed March

[590] Chopin did not deny that he was the impetus to Diamond's inviting Judge Porteous, but testified that he did not remember doing that. Chopin Dep. 19-20 (Ex. 182).

[591] Chopin Dep. at 21-22 (Ex. 182); Chopin Dep. Ex. 51 (Ex. 251). As late as November 15, 2006, Chopin was still involved in inviting Judge Porteous on these hunting trips. In an email to Diamond's General Counsel, Chopin wrote: ". . . I had lunch with Judge Porteous yesterday and he asked if I heard anything about the hunt. . . . I know he would be thrilled to be invited again. . . ." Diamond Documents at D0075 (Ex. 177).

[592] Porteous did not disclose the 2000, 2001 and 2003 Diamond hunting trips in his financial disclosure reports. He did disclose the hunting trips as gifts in his 2005, 2006 and 2007 his financial disclosure reports. See Exs. 106(a), 107(a), 109(a), 111(a), 112(a) and 113. By 2006, Judge Porteous knew he was under a criminal investigation.

[593] Bradley Dep. at 27-28 (Ex. 181).

[594] All the Diamond cases assigned to Judge Porteous either settled or were reassigned, so unlike the Liljeberg case, Judge Porteous had only limited opportunities to issue dispositive rulings in those cases. Thus, no particular ruling by Judge Porteous has been subject to judicial scrutiny in his handling of the Diamond cases.

1999.[595] Even though Diamond was a named defendant, any liability on Diamond's part would have been covered by an insurance policy. The insurance company (Oceaneering International) was thus responsible for managing the defense. However, Diamond was not dismissed from the case. Diamond took Judge Porteous hunting in January 2000, while the case was pending and 2 months prior to trial. Trial commenced March 13, 2000, and the parties settled on March 14, 2000.

- *Boothe v. Diamond Offshore Mgt.* was filed February 20, 2001.[596] Diamond was represented by Chopin. This case was filed about a month after Judge Porteous had attended his second Diamond hunting trip with Chopin in January 2001. A year later, in February 2002, the case was reassigned from Judge Porteous to Judge Jay C. Zainey.
- *Johnson v. Diamond Offshore* was filed in September 2003 and was pending until March 2005.[597] Diamond was represented by Chopin until August 2004, at which time Chopin was replaced by another attorney. In January 2005, during the case's pendency, Judge Porteous went on his fourth Diamond hunting trip. In this case, as with the Sylve case above, Diamond was indemnified by a third party. The case settled.
- *Jones v. Diamond Offshore* was filed March 31, 2004 and was resolved in June 2006.[598] In January 2005, during the pendency of the case, Judge Porteous went on his fourth Diamond hunting trip. In 2006, the case was reassigned from Judge Porteous to Judge Carl Barbier and settled for a modest amount.

Although Judge Porteous did not end up presiding over jury or non-jury trials involving Diamond, and was not otherwise significantly involved in determinations as to the liability of Diamond, in none of these four cases were the plaintiffs or their attorneys made aware that Judge Porteous had gone on hunting trips paid for by Diamond.

One additional case, *Farrar v. Diamond Offshore,*[599] deserves specific mention. Diamond was represented by Chopin in a personal injury case brought by plaintiff Farrar alleging negligence. The case was filed in March 2003—2 months after Judge Porteous had taken his third Diamond hunting trip (also attended by Chopin). The parties settled in April 2004 on terms acceptable to plaintiff's counsel, Peter Koeppel. However, Koeppel's observations illustrate the consequences of Judge Porteous's failure to disclose his relationship with both Diamond and Chopin. After testifying that he was unaware that Judge Porteous had gone on one or more hunting trips paid for by Diamond and attended by Diamond's counsel, Koeppel testified that if he had known of that fact, he would have felt "ethically . . . obligated to inform my client . . . to seek their consent in terms of either proceeding forward or ad-

[595] Civ. No. 2:99-cv-00841-GTP (E.D. La.). See PACER Docket Report (Ex. 180(d)).
[596] Civ. No. 2:01-cv-00441-JCZ (E.D. La). See PACER Docket Report (Ex. 180(f)).
[597] Civ. No. 2:03-cv-02505-GTP-ALC. (E.D. La.). See PACER Docket Report (Ex. 180(g)).
[598] Civ. No. 2:04-cv-00922-CJB-ALC (E.D. La.). See PACER Docket Report (Ex. 180(h)).
[599] Civ. No. 2:03-cv-00782-GTP (E.D. La.). See PACER Docket Report (Ex. 178).

vising the court to recuse himself." He further testified that information that the Judge had accepted a trip from Diamond would have been important to his clients: "[P]eople who work out offshore on drilling rigs tend to be rather unsophisticated and wary of the legal system in general. I can't say that for every one of them, but in general. So it would be important to tell Them."[600]

D. Judge Porteous's Acceptance of Hunting Trips from Rowan Companies

1. Rowan, Baynham, Hedrick and Dr. Cenac

Rowan Companies ("Rowan") was an oil rig company with headquarters in Houston, Texas. It also owned and operated drilling rigs in the Gulf of Mexico, and was on occasion sued for damages as a result of injuries or damages to property that occurred in the operation of the rigs. When the injuries or damages occurred in the Gulf of Mexico, civil suits were often brought in the Eastern District of Louisiana. On occasion, Judge Porteous was assigned these cases. Rowan, like Diamond, leased or owned a property in Texas and sponsored hunting trips for invited guests.

The Rowan hunting trips were similar to the Diamond trips. Rowan paid for all expenses, including transportation to and from the location (by private plane on occasion), lodging, meals, liquor, hunting licenses, and meat processing.[601]

Bill Hedrick was the Rowan Vice President who supervised Rowan's claims management process, and was responsible for retaining outside counsel to defend Rowan in litigation. Hedrick would frequently retain T. Patrick Baynham, a New Orleans attorney, to represent Rowan. Baynham, like Chopin, specialized in maritime defense.[602] In mid-November 2001, Hedrick met Judge Porteous for the first time at an overnight hunt at the camp of Dr. Christopher Cenac, Sr.[603]

2. Hunting Trips and Meals with Rowan, Hedrick and Baynham

On January 16, 2002, about 2 months after first meeting Judge Porteous, Hedrick paid for dinner with Judge Porteous and others. The bill was $392 at "Eleven 79" restaurant.[604]

On November 4-7, 2002, Judge Porteous went hunting at the invitation of Hedrick at the Rowan hunting facility in Texas. Hedrick was also in attendance.[605]

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[600] Koeppel Dep. at 6-7 (Ex. 183).

[601] Baynham Dep. at 5 (Ex. 158).

[602] Their firm's offices are on the same floor in the same building. Chopin Dep. at 47-48 (Ex. 182). Over the years, Chopin and Baynham have represented both Rowan and Diamond.

[603] Dr. Cenac is an orthopedist who is frequently retained by Diamond and Rowan, as well as Chopin and Baynham, as a medical expert witness. Hedrick recalled this hunt, and stated he perceived Judge Porteous and Dr. Cenac to be friends. Hedrick Dep. at 5-6 (Ex. 166). It is not known how Judge Porteous initially came to be friends with Dr. Cenac.

[604] Hedrick's receipts and expense report for the meal have been obtained. See Rowan Documents at RH 000110-11 (Ex. 154). These contain a January 16, 2002 entry for "Judge Porteous" with the amount of $392 and the corresponding receipt. Hedrick identified these documents in his deposition. Hedrick Dep. at 12 (Ex. 166); Hedrick Dep. Ex. 92 (Ex. 292).

[605] Several witnesses have described these trips. See Hedrick Dep. at 8-10 (Ex. 166); Baynham Dep. at 28-30 (Ex. 158) and Koeppel Dep. at 11-13 (Ex. 183).

On January 16, 2003, Hedrick paid for dinner with Judge Porteous, his wife, and others. The bill was $591.36, again at Eleven 79.[606]

3. Hanna v. Rowan case before Judge Porteous

On November 21, 2002—2 weeks after the first hunting trip—the complaint in *Hanna v. Rowan Company Inc.*[607] was filed and assigned to Judge Porteous.[608] This case involved a claim for damages allegedly sustained by plaintiff Hanna when a ladder on which he was climbing or standing broke, causing him to fall and injure his back. Rowan was represented by Baynham. As of the date the case was filed, Judge Porteous had already gone on the Rowan hunting trip, and had been the guest of the Rowan Vice President at two meals, where Rowan had paid $392 and $591. This case was pending until August 2005, when settlement was reached in the midst of a jury trial.

During the pendency of the case, on August 25, 2004, Hedrick again took Judge Porteous to lunch. Also in attendance was Magistrate Judge Daniel E. Knowles, III. This time, the meal was at the Steak Knife and the bill was $142.00.[609] Then, on November 16-19, 2004, while the *Hanna* case was still pending, Judge Porteous attended another Rowan hunting trip, where Baynham and Hedrick were both in attendance.[610]

A few days after the hunting trip, at Hedrick's suggestion, Baynham called Judge Porteous to arrange for a lunch for the three of them. It was scheduled for December 9, 2004, to coincide with the date of a scheduled settlement conference with the Magistrate Judge in the Hanna case.[611]

On December 7, 2004—2 days prior to the lunch—Judge Porteous issued an order denying Hanna's Motion for Summary Judgment.[612]

Hedrick was unable to attend the December 9, 2004 lunch. Baynham, knowing that Chopin was a friend of Porteous, asked Chopin to go in Hedrick's place. Baynham did not know Porteous well, so it made things easier for Baynham to invite Chopin. The three of them had what Baynham described as an "extended lunch" at Restaurant 1827.[613] Neither Chopin nor Baynham could locate a receipt for this lunch. Baynham believed that Chopin must have

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[606] Rowan Documents at RH000112-13 (Ex. 154). The first of those pages, RH 000112, references a January 16, 2002 entry for "Judge Porteous" with the amount of $591.36. The second page sets forth the corresponding receipt. Hedrick identified these documents in his deposition. Hedrick Dep. at 12-13 (Ex. 166); Hedrick Dep. Ex. 93 (Ex. 293). Hedrick was reimbursed by Rowan for any meals he spent hosting Judge Porteous. These were treated as business expenses—presumably because it was in Rowan's corporate interest to have good relations with the Judge hearing some its cases.

[607] PACER Docket Report, Hanna v. Rowan Company, Inc., et al, Civ. No. 2:03-cv-03258-GTP-JCW (E.D. La.) (Ex. 156).

[608] PACER Docket Report, Hanna v. Rowan Company, Inc., et al, Civ. No. 2:03-cv-03258-GTP-JCW (E.D. La.) (Ex. 156).

[609] Hedrick Dep. at 13-14 (Ex. 166); Hedrick Dep. Ex. 94 (Ex. 294).

[610] Baynham Dep. at 12; Baynham Dep. Exs. 63-64 (Dep. Exs. 263 and 264); Rowan Documents at RH 000204 (Ex. 151). This trip was reported by Judge Porteous in his 2004 Financial Disclosure Report, which he filed in May 2005. This report was filed while the Hanna case was pending and prior to the settlement of that case in August 2005. See Ex. 105(a).

[611] Baynham Dep. at 16-17 (Ex. 158); Baynham Dep. Ex. 67 (Ex. 267).

[612] PACER Docket Report, Hanna v. Rowan Company, Inc., et al, Civ. No. 2:03-cv-03258-GTP-JCW (E.D. La.) (Ex. 156); Young Dep. at 6 (Ex. 159); Young Dep. Exs. 72, 73 (Exs. 272, 273).

[613] Baynham Dep. at 20 (Ex. 158). Chopin Dep. at 51 (Ex. 182). Both Baynham and Chopin described the lunch as including several drinks. Baynham informed Hedrick in an email the following day, December 10, 2004, that he had had an "extended lunch" with Judge Porteous. Baynham Dep. at 21 (Ex. 158); Baynham Dep. Ex. 68 (Ex. 268).

paid for it,[614] and Chopin believed that Baynham would have paid for it.[615]

On March 24, 2005, while the Hanna case was still pending, Judge Porteous had yet another lunch with Hedrick. Hedrick's expense report reflects that this lunch also took place at Eleven 79 restaurant and cost $130.00.[616]

None of the meals or trips that took place while the case was pending (or prior thereto) were ever disclosed to Hanna's counsel, Timothy Young.[617]

In August 2005, the Hanna trial commenced, and settled mid-trial. Hanna received a cash settlement. Hanna's attorney, Young, was satisfied with the settlement, so this is not a case like *Liljeberg* where a party or counsel was the recipient of an unfavorable verdict by Judge Porteous that was reversed by the Court of Appeals. Young testified that "perhaps" he would have wanted to know about the lunches, and "most likely, yes" he would have wanted to know about the hunting trips.[618] He further testified that if he had known of this information, he would have discussed it with his client.[619] Notably, Baynham himself stated that he expected Judge Porteous to recuse himself.[620]

In October 2006, the fact that Rowan took Judge Porteous hunting during the pendency of the *Hanna* case in 2004 was reported in the New Orleans Times-Picayune. In an article entitled "Company Facing Suit Took Judge Hunting," the New Orleans Times-Picayune reported:

> In 2003, a seaman named Robert Hanna sued his employer, an offshore drilling company, after stairs on one of its ships collapsed beneath him and dropped him several feet to the floor.
>
> His case against the Rowan Companies went to trial in U.S. District Court in New Orleans in August 2005. Within 2 days, attorneys announced they had agreed to a settlement, the judge dismissed the jury and everyone appeared to walk away satisfied.
>
> What Hanna might not have known, however, is that while his personal injury suit was pending, well before trial began, Rowan treated the presiding judge, Thomas Porteous Jr., to a $1,000 hunting trip.[621]

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[614] Baynham Dep. at 21-22 (Ex. 158).

[615] Chopin Dep. at 52 (Ex. 182).

[616] Rowan Documents at RH000105 (Ex. 153) and RH000288 (Ex.165). Hedrick identified these documents in his deposition. Hedrick Dep. at 14 (Ex. 166); Hedrick Dep. Ex. 95 (Ex. 295).

[617] Baynham Dep. at 16 (Ex. 158); Young Dep. at 8 (Ex. 159).

[618] Young Dep. at 9-10 (Ex. 159).

[619] Young Dep. at 10 (Ex. 159).

[620] Baynham Dep. at 26-27 (Ex. 158).

[621] K. Moran, "Company Facing Suit Took Judge Hunting," New Orleans Times-Picayune, Oct. 29, 2006 (Ex. 119(j)).

F. *Turner v. Pleasant*—Another Case Where Counsel Sought Judge Porteous's Recusal

1. Introduction

In 2004, Judge Porteous faced a recusal motion in the case Turner v. Pleasant,[622] arising from his relationship with Pleasant's attorney, Dick Chopin. Just as Lifemark's recusal motion in the *Liljeberg* case threatened to expose Judge Porteous's prior dealings with the attorneys in that case, the recusal motion in *Turner v. Pleasant* threatened Judge Porteous with the disclosure that he had been taking hunting trips from Diamond, including having gone on a Diamond hunting trip with defense counsel Chopin during the pendency of the case. As discussed below, there are striking similarities between how Judge Porteous handled the recusal motions in *Turner v. Pleasant* and *Liljeberg*.

2. Background—Procedural History

On November 30, 2001, the complaint in *Turner v. Pleasant* was filed. This was a personal injury case alleging that the defendant (Pleasant) operated his boat in a negligent fashion, causing an excessive wake that tossed Mrs. Turner in the air and caused her to sustain a compression fracture of her back.

The plaintiffs were represented by Ernest Souhlas and his partner Carter Wright; the defendant was represented by Chopin. The defense medical expert was Dr. Christopher Cenac, with whom Judge Porteous had previously hunted and had a social relationship.[623] On January 3-5, 2003, while the case was pending, Judge Porteous went on a Diamond hunting trip which Chopin also attended.[624]

About 3 months after Judge Porteous and Chopin went on the hunting trip, on April 22-23, 2003, a non-jury trial was held in the Turner case. Dr. Cenac was one of the defendant's medical experts.[625]

Nearly 9 months after trial, on January 27, 2004, Judge Porteous issued his opinion in favor of the defendant.[626] In reaching his decision, he specifically credited the testimony of Dr. Cenac.[627]

3. Souhlas's Motion for a New Trial and Motion to Recuse Judge Porteous

After the April 2003 trial in *Turner v. Pleasant*, and while the case was awaiting Judge Porteous's decision, Souhlas learned that Judge Porteous had gone hunting with Chopin while the case was pending.[628] Accordingly, on February 5, 2004, a week after Judge

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[622] PACER Docket Report, Turner v. Pleasant, Civ. No. 2:01-cv-03572-GTP (E.D. La.) (Ex. 179(a)).

[623] Also, when Turner v. Pleasant was pending, Dr. Cenac had been the King of Mardi Gras in Washington D.C. in 2003. Judge Porteous was a guest at that event.

[624] Guest List for January 3-5, 2003, Diamond Hunting Trip, D0081 (Ex. 177).

[625] PACER Docket Report, Turner v. Pleasant, Civ. No. 2:01-cv-03572-GTP (E.D. La.) (Ex. 179(a)).

[626] Order and Reasons, Turner v. Pleasant, Civ. No. 2:01-cv-03572-GTP (E.D. La., Jan. 22, 2004) (Ex. 179(c)).

[627] Order and Reasons, Turner v. Pleasant, Civ. No. 2:01-cv-03572-GTP (E.D. La., Jan. 22, 2004) at 5 (Ex. 179(c)).

[628] Souhlas testified that after he had tried the case, he "was told by a person that they [Judge Porteous and Chopin] had a close personal relationship and they went on many hunting trips together" and that was the first time he had been made aware of that fact. Souhlas Dep. at 14 (Ex. 185). Chopin did not include in any pleading an allegation that Souhlas was aware of the hunting trip at the time of the trial.

Porteous issued his decision, Souhlas filed a motion for a new trial and also moved to recuse Judge Porteous.[629]

In that motion, after arguing that Judge Porteous's decision was contrary to the facts elicited at trial, Souhlas requested, in the alternative that "this Court grant a new trial and recuse itself in this matter based upon . . . the grounds that the findings of fact and the conclusions of law reflect partially [sic: should be 'partiality'] and bias in favor of the defendant and/or defense counsel in this case."[630]

In his opposition to the motion, Chopin responded primarily by attacking Souhlas:

> In an act of desperation never previously witnessed by the undersigned, the plaintiffs have vituperatively attacked the Court and its integrity. Not only are the plaintiffs' claims flagrantly in violation of all rules, they are reprehensible. Moreover, the plaintiffs do not even attempt to offer any support for their new allegations.
>
> * * *
>
> The defendants will not dignify the plaintiffs allegations by according them any additional print, except to say that the plaintiffs' motion for recusal also should be denied.[631]

Souhlas, in his reply to Chopin's opposition, specifically addressed Chopin's contention that he (Souhlas) had not offered any support for his claims of bias. He specifically alleged that Judge Porteous "may have a close personal relationship with defense counsel, Richard A. Chopin," that "the relationship includes social contacts and hunting trips," and that "some of the social contacts took place while this case was under advisement"[632]—assertions which were in fact true.

On March 22, 2004, Judge Porteous denied Souhlas's motion. In doing so, he did not discuss or address any of the factual assertions, terming them "unsubstantiated." Judge Porteous stated:

> To suggest that the Court has any partiality for the defendant and/or defense counsel is utterly unsubstantiated given that the Court has often demonstrated its complete independence and the absence of any partiality or favoritism in prior cases involving defense counsel. Additionally, in a previous non-jury case involving one of plaintiff's counsel, Mr. Souhlas, where a substantial verdict was rendered in favor of the plaintiff, there was no suggestion of any partiality by the court towards plaintiffs' counsel, even though he has been a friend of this judge for over twenty years. This flagrant attack on the credibility of this Court is not only unfounded and without merit, but not sup-

[629] Plaintiffs' Motion for New Trial and/or Motion to Recuse, Turner v. Pleasant, Civ. No. 2:01-cv-03572-GTP (E.D. La., Feb. 7, 2004) (Ex. 179(d)).

[630] Plaintiffs' Memorandum in Support of Motion for New Trial and/or Motion to Recuse at 7, Turner v. Pleasant, Civ. No. 2:01-cv-02572-GTP (E.D. La., Feb. 7, 2004) (Ex. 179(d)).

[631] [Defendant's] Memorandum in Opposition to Plaintiffs' Motion for New Trial and/or Motion to Recuse at 7, Turner v. Pleasant, Civ. No. 2:01-cv-02572-GTP (E.D. La., Feb. 17, 2004) (Ex. 179(e)).

[632] Plaintiffs' Supplemental Memorandum in Support of Motion for New Trial and/or Motion to Recuse at 3, Turner v. Pleasant, Civ. No. 2:01-cv-02572-GTP (E.D. La., Feb. 17, 2004) (Ex. 179(f)). In fact, the hunting trip occurred while the case was pending trial.

ported by any evidence. This Court finds that no reasonable man would harbor doubts about this judge's impartiality, and therefore, recusal is not warranted.[633]

4. Souhlas's Appeal to the Fifth Circuit

Souhlas appealed to the Fifth Circuit, and raised the same issues as to Judge Porteous's relationship with Chopin that he had raised below. He argued that the factual allegations had neither been addressed nor disputed, by either Judge Porteous or Chopin, in the District Court proceedings.[634]

In response, Chopin relied on Judge Porteous's language in his ruling denying the recusal, including Judge Porteous's statement that he and Souhlas had been friends for 20 years.[635]

In his reply brief to the Fifth Circuit, Souhlas reasserted the specificity of his allegations, i.e., Judge Porteous's ongoing social relationship with and hunting trip with Chopin during the pendency of the proceedings. Souhlas further addressed Judge Porteous's contention that he and Judge Porteous were longtime friends, and specifically denied "that a close personal relationship exists between plaintiffs' counsel and the District Court."[636]

In January 2005, while the case raising the issue of Judge Porteous's relationship with Chopin, Judge Porteous and Chopin shared a room together on another Diamond sponsored hunting trip.[637]

On March 31, 2005, the Fifth Circuit denied the appeal.[638] As to Souhlas's motion to recuse, the Fifth Circuit noted only that the allegation was unsubstantiated.

5. Discussion of Judge Porteous's Handling of the Recusal Motion in Turner v. Pleasant

It is noteworthy that at the time of Souhlas's motion, in February 2004, the Farrar v. Diamond case (a case with Chopin as Diamond's counsel that was discussed above) was pending in front of Judge Porteous. Thus, if either Chopin or Judge Porteous were to have disclosed that they had gone hunting together as guests of Diamond while the Turner case was pending, such a disclosure could have caused problems for Judge Porteous and Chopin in connection with the Farrar case (and also revealed that Judge Porteous had accepted prior Diamond trips as well).[639] Accordingly, the entire thrust of Judge Porteous's (and Chopin's) response to Souhlas's allegations was to assert that the allegations were unproven (not that they were false), to disclose no relevant infor-

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[633] Order and Reasons, Turner v. Pleasant, Civ. No. 2:01-cv-02572-GTP (E.D. La., Mar. 25, 2004) at 4 (emphasis supplied) (Ex. 179(g)). Judge Porteous referenced a personal injury case that Souhlas had filed in1996. The plaintiff in that case had stepped in a hole on a city street, resulting in permanent damage to his right leg. Judge Porteous awarded the plaintiff $650,000. The facts are set forth in Wykle v. City of New Orleans, 154 F.3d 416 (5th Cir. 1998).

[634] Brief on Behalf of Plaintiffs-Appellants [Turner], Turner v. Pleasant, No. 04-30406, 2004 WL 3588422, at *1, 29-30 (5th Cir., Jul. 12, 2004) (Ex. 179(h)).

[635] Original Brief on Behalf of Defendants/Appellees [Pleasant], Turner v. Pleasant, No. 04-30406, 2004 WL 3588420, at *28-29 (5th Cir., Aug. 11, 2004) (emphasis supplied) (Ex. 179(i)).

[636] Reply Brief on Behalf of Plaintiffs-Appellants [Turner], Turner v. Pleasant, No. 04-30406, 2004 WL 3588421, at *14 (5th Cir., Aug. 30, 2004) (Ex. 179(j)).

[637] Room Assignment Sheet [for Diamond Hunting Trip January 7-9, 2005] at D0089 (Ex. 177).

[638] Turner v. Pleasant, No. 04-30406, 2005 WL 744568 (5th Cir. Mar. 31, 2005) (Ex. 179(k)).

[639] A few weeks after Judge Porteous denied Souhlas's recusal motion, on April 20, 2004, Chopin settled the Farrar case with attorney Koeppel. See PACER Docket Report, Farrar v. Diamond Offshore Co., Civ. No. 2:03-cv-00782-GTP (E.D. La.) (Ex. 178).

mation which would permit a fair assessment of the merits of the recusal motion, and to attack Souhlas for raising the issue.

Moreover, Judge Porteous's statement that Souhlas "has been a friend of this judge for over twenty years" deserves particular scrutiny—both for what Judge Porteous may have intended to be the legal or factual significance of that purported relationship, as well as for the veracity of the assertion. One reading of Judge Porteous's "friend" statement was that he intended to imply there was a symmetry between his relationship with Souhlas and his relationship with Chopin—the implication presumably being that if he were friends with both men then Souhlas's complaint could not be meritorious since Judge Porteous would have no more incentive to be partial to Chopin than to be partial to Souhlas.[640] However, not only is this argument indefensible even if it were true; but Souhlas testified at a deposition that he was not a "friend" of Judge Porteous. Souhlas never went to lunch or dinner with Judge Porteous, never traveled with Judge Porteous on any trips, did not go to his swearing-in, had never been to Judge Porteous's house, had never had Judge Porteous to his house, had never invited Judge Porteous to his annual "hoe-downs" (events to which he invited a broad swath of the New Orleans legal community), and had never met Judge Porteous's wife—in fact, did not even know her name.[641]

Thus, as he did in the *Liljeberg* case, Judge Porteous, when faced with allegations that would threaten to disclose his relationship with parties and attorneys who had given him things of value, handled the motion in a manner calculated to seal off further inquiry into those relationships. He disclosed no pertinent material facts about his relationship with Chopin, failed to address the discrete allegations known and raised by the moving counsel, and made deceptive statements that distorted the factual record as to his relationship with the attorney at issue.[642] By so distorting the record, Judge Porteous assured affirmance on appeal of his denial of the recusal motion, and a victory below for Chopin. Souhlas's clients were never informed by the Judge who denied them compensation for their serious injuries that he was a close friend and frequent lunch guest of the defendant's lawyer Chopin and had gone on a hunting trip with him while the case was pending and shortly prior to trial; nor were they informed that Judge Porteous had been a

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[640] This is similar to Judge Porteous's line of questioning of Mole at the Fifth Circuit Hearing, in which he pointed out that Gardner, Lifemark's attorney, also went to Las Vegas as part of his son's bachelor party celebration, just as Amato did.

[641] Souhlas Dep. at 18-21 (Ex. 185).

[642] In addition, the positions taken by counsels in the respective cases are remarkably similar: they attacked the moving party while offering no facts, even in response to specific allegations, and each counsel left it up to Judge Porteous to decide what would be disclosed. Chopin wrote, for example, that Souhlas "vituperatively attacked the Court and its integrity," and characterized plaintiffs' claims as "reprehensible." Similarly, the Liljebergs characterized Lifemark's motion as containing "unsubstantiated innuendo" in support of a "scurrilous conclusion." Chopin, like counsel for the Liljebergs, offered no factual explanations, but argued that the relationship was not proven. Chopin wrote, for example: "[P]laintiffs do not even attempt to offer any support for their new allegations." [Defendant's] Memorandum in Opposition to Plaintiffs' Motion for New Trial and/or Motion to Recuse at 7, Turner v. Pleasant, Civ. No. 2:01-cv-03572-GTP (E.D. La.), Feb. 17, 2004 (Ex. 179(e)). The counsel for the Liljebergs wrote: "Lifemark's motion includes no evidence whatsoever pertaining to the Court's alleged affinity for [counsels] . . ." Memorandum in Opposition to Lifemark's Motion to Recuse at 2, Lifemark Hospitals of La., Inc. v. Liljeberg Enterprises, Inc., No. 93-1794 (E.D. La.), Oct. 15, 1996 (Ex. 53).

house guest of the defendant's expert witness, whose credibility was at issue.[643]

G. Disclosures of Trips Starting in 2005

1. Financial Disclosure Reports

Judge Porteous did not disclose the 2000, 2001, or 2003 Diamond hunting trips on his Financial Disclosure Reports, nor did he disclose his 2002 Rowan hunting trip.

In his report for calendar year 2004 (filed May 12, 2005), Judge Porteous reported the 2004 Rowan hunting trip as a "gift" valued at $1000,[644] and, in his report for 2006 (filed May 14, 2007), he reported the 2006 Rowan hunting trip as a "gift" valued at $800.[645] By 2005, Judge Porteous knew he was under a criminal investigation.

In each of his Reports for calendar years 2005 (filed July 24, 2006),[646] 2006 (filed May 14, 2007)[647] and 2007 (filed May 9, 2008),[648] Judge Porteous reported the respective Diamond hunting trips as a "gift," each valued at $1,000.

2. Judge Porteous's Only Disclosure of Diamond Hunting Trips

In May 2005, the case of *Pioneer Natural Resources, Inc. v. Diamond Offshore*[649] was filed. It was originally assigned to Judge Ivan L. R. Lamelle. In July 2007, the case was reassigned to Judge

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[643] While Judge Porteous's hunting trips may superficially call to mind the duck-hunting trip that Justice Scalia and Vice President Cheney attended together while the case Cheney v. U.S. Dist. Court for Dist. of Columbia, No. 03-475 (Sup. Ct.) was pending, the situations are materially different. Vice President Cheney was named in an institutional capacity only, not in his individual capacity. As Justice Scalia explained:

> Richard Cheney's name appears in this suit only because he was the head of a Government committee that allegedly did not comply with the Federal Advisory Committee Act . . . and because he may, by reason of his office, have custody of some or all of the Government documents that the plaintiffs seek. If some other person were to become head of that committee or to obtain custody of those documents, the plaintiffs would name that person and Cheney would be dismissed, and it was the prerogatives of the Office of the Vice President that were at stake.

Justice Scalia noted that the Vice President was represented by Government lawyers and that throughout the litigation, the Vice President's position had been described as the position of "the government." Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 918 (2004) (Scalia, J., denying recusal motion). In contrast, Diamond and Rowan had substantial personal financial interests at stake in pending and future cases before Judge Porteous at times when Judge Porteous accepted their offers to spend money on him—money that came from the company treasuries and were expended in pursuit of their business interests.

Moreover, the fact of the Scalia-Cheney hunting trip was publicly disclosed and was certainly known to all counsels in the case before Justice Scalia. In contrast, there was a concerted and sustained effort to keep Judge Porteous's hunting trips a secret from litigants who would have reason to believe their interests before the court might be affected.

It should also be kept in mind that there are unique practical, structural considerations to recusal at the Supreme Court level. As to the notion that he should err on the side of recusal, Justice Scalia explained:

> That might be sound advice if I were sitting on a Court of Appeals. . . . There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. . . . Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner.

Id. at 915. In contrast, there was absolutely no structural impediment to Judge Porteous's recusing himself. He could have easily been replaced by another district judge who had not accepted things of value from Diamond or Rowan.

[644] Judge Porteous's Financial Disclosure Report (2004) (Ex. 110(a)).

[645] Judge Porteous's Financial Disclosure Report (2006) (Ex. 112(a)).

[646] Judge Porteous's Financial Disclosure Report (2005) (Ex. 111(a)).

[647] Judge Porteous's Financial Disclosure Report (2006) (Ex. 112(a)).

[648] Judge Porteous's Financial Disclosure Report (2007) (Ex. 113).

[649] Case No. 2:05-cv-00224-DEK. See PACER Docket Report (Ex. 180(1)).

Porteous. On September 26, 2007, Judge Porteous made a disclosure to both counsels indicating that he had been on Diamond hunting trips, that he wanted the attorneys to consult with their clients and affirmatively represent they did not object to his continuing to preside over that case. [650]

This 2007 disclosure, occurring after DOJ had sent its complaint letter to the Fifth Circuit, is the only known instance of Judge Porteous having informed counsel of having taken hunting trips paid for by Diamond or Rowan. [651]

XIV. JUDGE PORTEOUS'S CONDUCT IN RELATION TO THE "GIFT BAN" PROVISIONS OF FEDERAL LAW

A. The Statute

At all pertinent times, the applicable Federal law, 5 U.S.C. § 7353(a)(2) (the Ethics Reform Act of 1989 [652]), provided:

> [Except as permitted by agency ethics regulations] no . . . officer or employee of the . . . judicial branch shall solicit or accept anything of value from a person—. . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.

Thus, to determine whether it was acceptable for Judge Porteous to accept "anything of value" from attorneys and parties with matters before him, it is necessary to examine the Judicial Conference's regulations implementing this provision.

B. The Regulations

The Gift Regulations promulgated by the Judicial Conference of the United States [653] track the statutory prohibition, but address two separate circumstances—a Federal judge's solicitation of a gift and a judge's acceptance of a gift.

The term "gift" is broadly defined, with narrow exceptions, one being for "modest items of food."

> § 3. Definition of "Gift."
>
> "Gift" means any gratuity, entertainment, forbearance, bequest, favor, the gratuitous element of a loan, or other similar item having monetary value but does not include . . . modest items of food and refreshments, such as soft

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[650] This event is noted in the docket entries for September 26, 2007 reads as follows:

> ORDERED that counsel notify Clerk of Court by 10/9/2007 4:00 PM if their clients consent to the undersigned continuing to handle this matter. FURTHER ORDERED that failure to notify the Clerk shall result in the undersigned's recusal from this matter.

PACER Docket Report (Ex. 180()).

[651] In fact, even this disclosure was not entirely complete. On the 2007 Diamond hunting trip, the attorney representing Diamond in the Pioneer case was also in attendance. This fact was not disclosed to Pioneer's counsel.

[652] Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 301 and 303, 103 Stat. 1716 (1989).

[653] Unless otherwise noted, references to the "Gift Regulations" refer to the Regulations of the Judicial Conference of the United States under Title III of the Ethics Reform Act of 1989 Concerning Gifts that were promulgated in 1997. (Ex. 364). The regulations discussed in the text were in effect from August 1997 through August 2003 and thus cover the period when most of the conduct at issue occurred. These Gift Regulations were revised in 2003 in ways that are not relevant to the substance of the discussion. See 2003 Gift Regulations (Ex. 365).

drinks, coffee and donuts, offered for present consumption other than as part of a meal.[654]

As to the solicitation of a gift, the Gift Regulations are unambiguous in prohibiting a judge from soliciting things of value from attorneys or parties with matters in front of him. Those regulations provide:

> § 4. Solicitation of Gifts by a Judicial Officer or Employee.
>
> (a) A judicial officer . . . shall not solicit a gift from any person who is seeking official action from or doing business with the courts (or other employing entity), or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer['s] official duties, including in the case of a judge any person who has come or is likely to come before the judge.[655]

As to the acceptance of a gift, the regulations permit a judge to receive only certain gifts. Section 5 of the regulations provides:

> § 5. Acceptance of Gifts by a Judicial Officer or Employee; Exceptions.
>
> A judicial officer or employee shall not accept a gift from anyone except for——
>
> * * *
>
> (c) ordinary social hospitality;
>
> (d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, birthday, and the gift is fairly commensurate with the occasion and the relationship;
>
> (e) a gift from a relative or close personal friend whose appearance or interest in a case would in any event require that the officer or employee take no official action with respect to the case;
>
> * * *
>
> (h) any other gift only if:
>
> * * *
>
> (2) in the case of a judge, the donor is not a party or other person who has come or is likely to come before the judge or whose interests may be substantially affected by the performance or nonperformance of his or her official duties[.][656]

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[654] There are other narrow exceptions, such as plaques, certificates, and trophies, and certain rewards and prizes, including random drawings.

[655] There is no material difference in this definition in the 2003 Regulations.

[656] The other section 5 exceptions to the Gift Regulations have no application to the facts of this inquiry such as certain gifts incident to a public speaking engagements, or invitations to bar-related functions or activities devoted to the improvement of the law, the legal system, or the administration of justice.

C. Application of the Gift Ban Statute and Regulations to Judge Porteous's Conduct

1. Solicitation and/or Acceptance of Cash, Other Things of Value, and Overnight Trips (other than Meals at Restaurants)

Judge Porteous's solicitation and acceptance of things of value from attorneys and parties with matters before him are proscribed by statute and regulations because they are "things of value" given by attorneys and parties "whose interests may be substantially affected by the performance or nonperformance of the [Judge's] official duties." As to some items—such as Judge Porteous's soliciting money from Amato during the pendency of a case, accepting the payments for his Las Vegas hotel room and payment towards his son's bachelor party dinner from Creely, and accepting hunting trips from Diamond and Rowan—the application of the statute and regulations is straightforward. None of the section 5 exceptions permitted Judge Porteous to accept those items while he had cases with those attorneys or parties in front of him.[657]

2. Meals at Restaurants

Judge Porteous accepted hundreds of meals from attorneys and parties with matters pending before him. Unless there is an exception that would allow him to accept these meals, the statutory prohibition against accepting "anything of value" from attorneys and parties "whose interests may be substantially affected by the performance or nonperformance of the [Judge's] official duties" prohibits his acceptance of these meals. This conduct will be discussed in light of possible exceptions.

The exception in the definition of "gift" for "modest items of food." The definition of "gift" in the regulations provides an exception for "modest items of food and refreshments such as soft drinks, coffee and donuts, offered for present consumption other than as part of a meal." This provision—explicitly permitting a judge to accept light refreshments (even from attorneys and parties with matters before him)—would be unnecessary if a judge were otherwise free to accept expensive meals at high-end restaurants paid for by parties or attorneys with matters before him. Moreover, a lunch consisting of food and drinks at a restaurant such as Ruth's Chris Steak House is not, under any interpretation, a "modest item of food . . . such as soft drinks, coffee and donuts."

The exception under section 5(c) of the regulations for "ordinary social hospitality." Section 5 of the regulations provides that "[a] judicial officer or employee shall not accept a gift from anyone except

[657] Section 5(d) provides an exception to permit a judge to accept a "gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship." Creely's payment of close to $1,000 for Judge Porteous's hotel accommodations as a contribution towards his son's bachelor party dinner is not "fairly commensurate with the occasion." Section 5(e) permits judges to accept a "gift from a relative or close personal friend whose appearance or interest in a case would in any event require that the officer or employee take no official action with respect to the case." This provision appears to permit a Federal judge to accept a gift if, upon accepting the gift, the judge would thereafter recuse himself or herself, that is, "take no official action with respect to the case." Indeed Judge Porteous could have accepted the "gifts" from Creely and Amato. Section 5(h) permits judges to accept "any other gift," but only if "the donor is not a party or other person who has come or is likely to come before the judge or whose interests may be substantially affected by the performance or nonperformance of his or her official duties." In this case, the donor—an attorney or a party (Rowan or Diamond)—would constitute a "party or other person who has come or is likely to come before the judge or whose interests may be substantially affected by the performance or nonperformance of his or her official duties."

for [certain exceptions]." One of those exceptions is set forth in Section 5(c), which permits a judge to accept "ordinary social hospitality." The term "ordinary social hospitality" is not defined in the Judicial Conference regulations, but is similar to and conveys the same meaning in context as the phrase "personal hospitality of any individual" used in the Ethics in Government Act. The latter phrase is defined as "hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property of facilities owned by that individual or his family."[658] If "ordinary social hospitality" included expensive meals at restaurants, then this definition would subsume and render meaningless the narrow carve-out in the definition for "soft drinks, coffee and donuts." It would make little sense for the regulations to explicitly permit a judge to accept donuts from counsel in a meeting during trial when a different provision would permit counsel to take that same judge to an expensive restaurant during the trial.

As Professor Geyh testified, Judge Porteous's acceptance of the meals violated both the gift rules (because they were not "ordinary social hospitality") as well as other ethical canons that prohibit his exploitation of his position for personal gain:

> Codes of conduct permit judges to accept "social hospitality" without running afoul of restrictions on the gifts judges may receive, and friends and former colleagues who take each other to lunch can be a conventional form of social hospitality. This, however, was not ordinary "social hospitality." These lawyers reportedly paid Judge Porteous's lunch bills countless times for years with no meaningful reciprocation by the judge. Moreover, this one-way payment practice appears to be what Judge Porteous wanted and expected. Former State Judge Ronald Bodenheimer testified that when Bodenheimer became a judge, Porteous told him that, once a judge, he would "never have to buy lunch again. . . . There will always be somebody to take you to lunch." In other words, Judge Porteous was trading on his position as a judge in contravention of the ethical principle that a judge should not "lend the prestige of judicial office to advance the private interests of the judge."[659]

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[658] The Ethics and Government Act defines "personal hospitality of any individual" as "hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property of facilities owned by that individual or his family." Ethics in Government Act, Section 109(14), codified at Title 5, United States Code, Appx. 4, Sec. 109(14). Such "personal hospitality" is not required to be disclosed in the Financial Disclosure Reports.

[659] Prof. Geyh TF Hrg. IV at 8-9 (written statement at 2-3). Furthermore, Professor Geyh explained there is no such thing as "ordinary social hospitality" extended by a corporation—an entity that is not in the business of making friends but is instead in the business of making money. Prof. Geyh TF Hrg. IV at 16 (written statement at 10). This discussion does not address the circumstance where a judge and an attorney alternate paying for meals on a rotating basis. As Prof. Geyh stressed, and Judge Porteous himself stated, Judge Porteous sought and expected the attorneys to pay for his meals—not the other way around—and in fact he virtually never reciprocated.

D. Actions by Judge Porteous That Appear to Violate Federal Law

The following actions by Judge Porteous would appear to violate the gift ban of 5 U.S.C. § 7353, and the Judicial Conference regulations promulgated thereunder:

1) Judge Porteous's solicitation and acceptance of approximately $2500 from Amato in June or July 1999 while the *Liljeberg* case was pending. At that time, Amato had a financial interest in the resolution of the *Liljeberg* case that would have been "substantially affected by the performance of [Judge Porteous's] official duties."

2) Judge Porteous's acceptance of Creely's payment for his hotel room and for a portion of his son's bachelor party dinner in Las Vegas in May 1999 while the *Liljeberg* case was pending. At that time, Creely, as Amato's partner, had a financial interest in the resolution of the *Liljeberg* case that would have been "substantially affected by the performance of [Judge Porteous's] official duties."

3) Judge Porteous's acceptance of Creely's and Amato's payment of approximately $1,500 to celebrate Judge Porteous's 5 years on the bench in late 1999 while the *Liljeberg* case was pending. At that time, Amato and Creely had an interest in the resolution of the *Liljeberg* case that would have been "substantially affected by the performance of [Judge Porteous's] official duties."

4) Judge Porteous's acceptance of hunting trips paid for by Diamond without disclosure or recusal. In at least three instances, Judge Porteous accepted Diamond-sponsored trips while Diamond had cases pending in front of him and thus had interests which may have been "substantially affected by the performance of [Judge Porteous's] official duties." Even in the situations where a Diamond case was not actually pending at the time of the hunting trip, based on the routine and predictable nature of his being assigned cases involving Diamond, Judge Porteous would have known that he was accepting something of value from an entity "whose interests may be substantially affected" in subsequent litigation that would be assigned to him.[660] At a minimum, after having attended trips and accepted value from Diamond, Judge Porteous should have disclosed his receipt of the trips to counsel (and recused himself if counsel sought recusal).

5) Judge Porteous's acceptance of three hunting trips paid for by Rowan. In connection with the 2004 trip, when the Hanna case was pending, Rowan had an interest in the resolution of that case which would have been "substantially affected by the performance of Judge Porteous's official duties." Moreover, based on the routine and predictable nature of his being assigned Rowan cases, Judge Porteous would

[660] Judge Haik, who also attended the Diamond hunting trips, immediately recused himself after the first trip from hearing cases where Diamond was a party. See Affidavit of Judge Richard Haik (Ex. 186).

have known that he was accepting something of value from an entity "whose interests may be substantially affected" in subsequent litigation that would be assigned to him. At a minimum, after having attended trips and accepted value from Diamond, Judge Porteous should have disclosed his receipt of the trips to counsel (and recused himself if counsel sought recusal).

6) Judge Porteous's acceptance from various attorneys and parties of hundreds of meals at high-end restaurants while those attorneys had matters pending before him.

XV. THE DOJ'S DECISION NOT TO PROSECUTE JUDGE PORTEOUS

As noted at the outset, DOJ decided not to prosecute Judge Porteous. Several observations are in order.

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 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.

Third, even though aspects of Judge Porteous's conduct may appear to support a criminal prosecution, the Department faced numerous practical obstacles that would necessarily have impacted its considerations as to whether prosecution was in order for certain categories of conduct. One problem in particular involved the statute of limitations—a potentially insurmountable hurdle in a criminal prosecution, but not a bar to impeachment. Some of the most corrupt conduct, such as Judge Porteous's relationship with the Marcottes and his initiation of the "curatorship" scheme with Creely and Amato, was time-barred by the statute of limitations. Nonetheless, such conduct, even if it cannot be used to support a Federal criminal prosecution, is profoundly relevant to the determination of whether Judge Porteous should remain a Federal judge.

Fourth, another problem facing the DOJ was the existence of various procedural and evidentiary rules that would have affected the DOJ's ability to demonstrate before a jury the complete picture of Judge Porteous's conduct. The four Articles of Impeachment involve different types of conduct, in different spheres of activity, and at different times. For example, even assuming no statute of limitations issues existed, a bankruptcy fraud charge could not necessarily have been brought in the same proceeding as a corruption charge; likewise, evidence of Judge Porteous's relationship with the

Marcottes would not necessarily have been admissible in a trial on bankruptcy issues.[661]

Fifth, the Impeachment Task Force has interviewed new witnesses and uncovered new evidence that simply was not considered by the Department, including evidence related to conduct that was time-barred for criminal prosecution. For example, it obtained depositions and public testimony from Louis Marcotte and Lori Marcotte, corroborating court records, as well as the depositions of their employees and associates relating to the Marcottes' relationship with Judge Porteous. Additionally, the Task Force obtained and considered the curatorship records that corroborate and expanded the scale of the financial relationship with Creely and Amato that was not otherwise developed by the DOJ; it obtained the recusal hearing transcript in connection with the *Liljeberg* case; and, finally, the Task Force and the Committee had the benefit of the Fifth Circuit hearings which expanded on the evidence available to the DOJ.

XVI. CONCLUSION

The following language from the House Report accompanying the Judge Walter L. Nixon, Jr., and Samuel B. Kent Articles of Impeachment aptly sets out the core principles underlying and justifying the Impeachment Resolution against Judge Porteous:

> The [House's] role is not to punish [Judge Porteous], but simply to determine whether articles of impeachment should be brought. Under our Constitution, the American people must look to the Congress to protect them from persons unfit to hold high office because of serious misconduct that has violated the public trust. Where, as here, the evidence overwhelmingly establishes that a Federal judge has committed impeachable offenses, our duty requires us to bring articles of impeachment and to try him before the United States Senate.[662]

XVII. COMMITTEE CONSIDERATION

On January 27, 2010, the Committee met in open session and ordered the resolution, H. Res. 1031, favorably reported without amendment by a rollcall vote of 24 to 0, a quorum being present.

XVII. COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following

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[661] These considerations were touched on by the panel of legal scholars who testified at the December 15, 2009 Task Force Hearing. Ms. Jackson Lee asked the panel to opine on the DOJ decision not to seek prosecution. Professor Michael Gerhardt, University of North Carolina School of Law, responded: "I think it has no impact. I think it is of no real consequence." Professor Gerhardt stressed that impeachment is not a criminal proceeding, the burden is different, the House can consider different evidence, and it would not be bound in any event if there were a conviction, as the House must make an independent judgment as to the evidence. Gerhardt TF Hrg. IV at 41. Professor Akhil Reed Amar, Yale Law School, agreed. He noted the different purposes of impeachment and criminal prosecution, testifying that impeachment "remov[es] a position that the judge should never should have had in the first place. It is not like putting someone in prison, taking away their very life. It is not even retributive." Amar TF Hrg. IV at 41. Professor Charles Geyh, Indiana University Maurer School of Law, concurred, specifically noting that the statute of limitations would impact DOJ but not Congress. Geyh TF Hrg. IV at 41-42.

[662] Walter Nixon Impeachment Report, at 33-34.

rollcall votes took place during the Committee's consideration of H. Res. 1031:

1. Impeachment Article 1. Approved 29 to 0.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman	X		
Mr. Boucher	X		
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Gutierrez			
Ms. Baldwin	X		
Mr. Gonzalez			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz			
Mr. Rooney	X		
Mr. Harper	X		
Total	29	0	

2. Impeachment Article 2. Approved 28 to 0.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt			
Mr. Cohen	X		
Mr. Johnson	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Gutierrez			
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan			
Mr. Poe	X		
Mr. Chaffetz			
Mr. Rooney	X		
Mr. Harper	X		
Total	28	0	

3. Impeachment Article 3. Approved 23 to 0.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler	X		
Mr. Scott			
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Gutierrez	X		
Ms. Baldwin	X		
Mr. Gonzalez			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert			
Mr. Jordan			
Mr. Poe	X		
Mr. Chaffetz			
Mr. Rooney			
Mr. Harper	X		
Total	23	0	

4. Impeachment Article 4. Approved 25 to 0, with one Member passing.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Gutierrez	X		
Ms. Baldwin	X		
Mr. Gonzalez			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz			
Mr. Rooney			
Mr. Harper	X		
Total	25	0	

5. Motion to report the resolution. Approved 24 to 0.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler	X		
Mr. Scott			
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Gutierrez	X		
Ms. Baldwin	X		
Mr. Gonzalez			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert			
Mr. Jordan			
Mr. Poe	X		
Mr. Chaffetz			
Mr. Rooney			
Mr. Harper	X		
Total	24	0	

○

Calendar No. 75

111TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 111–159

IMPEACHMENT OF JUDGE SAMUEL B. KENT

JUNE 17, 2009.—Referred to the House Calendar and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 520]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 520) impeaching Samuel B. Kent, judge of the United States District Court for the Southern District of Texas, for high crimes and misdemeanors, having considered the same, report favorably thereon without amendment and recommend that the resolution be agreed to.

I. THE RESOLUTION

H. RES. 520

Impeaching Samuel B. Kent, judge of the United States District Court for the Southern District of Texas, for high crimes and misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

JUNE 9, 2009

Mr. Conyers (for himself, Mr. Smith of Texas, Mr. Schiff, Mr. Goodlatte, Ms. Jackson Lee of Texas, Mr. Sensenbrenner, Mr. Delahunt, Mr. Daniel E. Lungren of California, Mr. Cohen, Mr. Forbes, Mr. Johnson of Georgia, Mr. Gohmert, Mr. Pierluisi, and Mr. Gonzalez) submitted the following resolution; which was referred to the Committee on the Judiciary

79–008

Resolved, That Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas, 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 Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

Incident to his position as a United States district court judge, Samuel B. Kent has engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge, as follows:

(1) Judge Kent is a United States District Judge in the Southern District of Texas. From 1990 to 2008, he was assigned to the Galveston Division of the Southern District, and his chambers and courtroom were located in the United States Post Office and Courthouse in Galveston, Texas.

(2) Cathy McBroom was an employee of the Office of the Clerk of Court for the Southern District of Texas, and served as a Deputy Clerk in the Galveston Division assigned to Judge Kent's courtroom.

(3) On one or more occasions between 2003 and 2007, Judge Kent sexually assaulted Cathy McBroom, by touching her private areas directly and through her clothing against her will and by attempting to cause her to engage in a sexual act with him.

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE II

Incident to his position as a United States district court judge, Samuel B. Kent has engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge, as follows:

(1) Judge Kent is a United States District Judge in the Southern District of Texas. From 1990 to 2008, he was assigned to the Galveston Division of the Southern District, and his chambers and courtroom were located in the United States Post Office and Courthouse in Galveston, Texas.

(2) Donna Wilkerson was an employee of the United States District Court for the Southern District of Texas.

(3) On one or more occasions between 2001 and 2007, Judge Kent sexually assaulted Donna Wilkerson, by touching her in her private areas against her will and by attempting to cause her to engage in a sexual act with him.

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE III

Samuel B. Kent corruptly obstructed, influenced, or impeded an official proceeding as follows:

(1) On or about May 21, 2007, Cathy McBroom filed a judicial misconduct complaint with the United States Court of Appeals for the Fifth Circuit. In response, the Fifth Circuit appointed a Special Investigative Committee (hereinafter in this article referred to as "the Committee") to investigate Cathy McBroom's complaint.

(2) On or about June 8, 2007, at Judge Kent's request and upon notice from the Committee, Judge Kent appeared before the Committee.

(3) As part of its investigation, the Committee sought to learn from Judge Kent and others whether he had engaged in unwanted sexual contact with Cathy McBroom and individuals other than Cathy McBroom.

(4) On or about June 8, 2007, Judge Kent made false statements to the Committee regarding his unwanted sexual contact with Donna Wilkerson as follows:

(A) Judge Kent falsely stated to the Committee that the extent of his unwanted sexual contact with Donna Wilkerson was one kiss, when in fact and as he knew he had engaged in repeated sexual contact with Donna Wilkerson without her permission.

(B) Judge Kent falsely stated to the Committee that when told by Donna Wilkerson his advances were unwelcome no further contact occurred, when in fact and as he knew, Judge Kent continued such advances even after she asked him to stop.

(5) Judge Kent was indicted and pled guilty and was sentenced to imprisonment for the felony of obstruction of justice in violation of section 1512(c)(2) of title 18, United States Code, on the basis of false statements made to the Committee. The sentencing judge described his conduct as "a stain on the justice system itself".

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE IV

Judge Samuel B. Kent made material false and misleading statements about the nature and extent of his non-consensual sexual contact with Cathy McBroom and Donna Wilkerson to agents of the Federal Bureau of Investigation on or about November 30, 2007, and to agents of the Federal Bureau of Investigation and representatives of the Department of Justice on or about August 11, 2008.

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

II. INTRODUCTION

The Committee on the Judiciary, acting through and with the assistance of its duly appointed Impeachment Task Force, has conducted an inquiry into the conduct of Samuel B. Kent, United States District Judge for the Southern District of Texas. In par-

ticular, the Committee has considered whether Judge Kent committed sexual misconduct against two women—Cathy McBroom and Donna Wilkerson—who worked in the courthouse where he presided. The Committee also has considered whether Judge Kent made false statements to his fellow judges who were investigating allegations of sexual misconduct made by one of the two women, and whether he made further false statements to agents of the Federal Bureau of Investigation (FBI) on one occasion, and to FBI and Department of Justice personnel on another occasion.

After a careful study of the evidence, the Committee finds that Judge Kent did commit sexual misconduct against both Ms. McBroom and Ms. Wilkerson, conduct that included unwanted touchings and sexual assaults. The Committee also finds the Judge Kent made false statements to judges investigating this conduct, and made false statements to the FBI agents and Department of Justice prosecutors.

Judge Kent's conduct is wholly unacceptable for a Federal judge and has brought disrepute upon the Federal judiciary. These acts reflect Judge Kent's abuse of his Office and his betrayal of the trust bestowed upon him by the people of the United States. Indeed, Judge Kent, whose duty it was to uphold and enforce the laws, instead thwarted and undermined the laws. It was his duty to use his position to dispatch justice impartially, but he instead abused the power of his position.

As discussed below, Judge Kent has pled guilty to a felony, obstruction of justice, and has been convicted and sentenced to Federal prison. The Committee does not base its recommendation solely on the fact of the guilty plea and conviction, however. Rather, the Committee finds the facts underlying the guilty plea and the evidence regarding his sexual misconduct to overwhelmingly demonstrate that he is unfit to hold office. The Committee therefore recommends that Judge Samuel B. Kent be impeached by the House of Representatives and tried by the United States Senate.

III. A BRIEF DISCUSSION OF IMPEACHMENT

A. Pertinent Constitutional Provisions

The following are the pertinent provisions in the United States Constitution that relate to impeachment:

Article I, § 2, clause 5:

> The House of Representatives . . . shall have the sole Power of Impeachment.

Article I, § 3, clauses 6 and 7:

> 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.
>
> 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 In-

> dictment, Trial, Judgment and Punishment, according to Law.

Article II, § 2, clause 1:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article II, § 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.

In this regard, it has long been recognized that Federal judges are "civil Officers" within the meaning of Article II, Section 4.[1] Finally, as to the life tenure of Federal judges, the Constitution provides:

Article III, § 1:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, ...

B. THE MEANING OF "HIGH CRIMES AND MISDEMEANORS"

Thirteen Federal judges have been impeached in our Nation's history. The precedents from these prior judicial impeachments as to the meaning of the phrase "high crimes and misdemeanors" is highly instructive. The Committee takes note of these precedents in informing its recommendations to the House.

The House Report accompanying the 1989 Resolution to Impeach United States District Judge Walter L. Nixon, Jr., 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 violation of the public trust, not necessarily indictable offenses under criminal laws. Of course, in some circumstances the conduct at issue, such as that of Judge Nixon, constituted

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[1] A commentator wrote in 1825:

> All executive and judicial officers, from the president downwards, from the judges of the supreme court to those of the most inferior tribunals, are included in this description.

W. Rawle, A View of the Constitution of the United States of America, Philip H. Nicklin ed., (1829), 213 (The Law Exchange reprint (2003)). Another prominent commentator, Joseph Story, wrote:

> All officers of the United States . . . who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.

2 Joseph Story, Commentaries on the Constitution of the United States § 790 at 258 (1833) (citing Rawle) (quoted in Statement of Professor Arthur D. Hellman, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009), at 17).

> conduct warranting both punishment under the criminal law and impeachment.[2]

That 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 questions 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.[3]

The Impeachment Report that accompanied the Resolution to Impeach United States District Judge Alcee L. Hastings 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."[4] That Report stressed that impeachment is "non-criminal," designed not to impose criminal penalties, but instead simply to remove the offender from office,[5] 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."[6]

IV. BACKGROUND OF INQUIRY INTO THE CONDUCT OF JUDGE KENT

A. Judge Samuel B. Kent

Samuel B. Kent was and remains a United States District Judge. He was appointed by President George H. W. Bush in 1990, and served nearly his entire judicial career in the Galveston Division of the Southern District of Texas. He was the sole judge in the Galveston courthouse, and wielded substantial power over the employees who worked there.

B. Facts Leading to Judge Kent's Conviction

On May 21, 2007, Cathy McBroom filed a judicial misconduct complaint with the United States Court of Appeals for the Fifth Circuit, alleging sexual misconduct on the part of Judge Samuel B. Kent. In particular, she alleged that he sexually assaulted her in March of that year. In response, the Judicial Council of the Fifth Circuit appointed a Special Investigative Committee to investigate Ms. McBroom's complaint.

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[2] H.R. Rep. No. 101–36, "Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87," 101st Cong., 1st Sess., (1989) [hereinafter "Nixon Impeachment Report"] at 5 (1989) (footnote omitted).

[3] Id. at 12.

[4] H.R. Rep. No. 100–810, "Impeachment of Alcee L. Hastings, Report of the Committee on the Judiciary to Accompany H. Res. 499," 100th Cong., 2d Sess. (1988), at 6.

[5] Id.

[6] Id. at 7. The last three impeachments—those of Judge Walter L. Nixon, Jr., Judge Alcee Hastings, and Judge Harry Claiborne—followed Federal criminal proceedings, and the impeachment articles were to a great extent patterned after the Federal criminal charges. Similarly, the grounds for the Committee's recommendation of impeachment of Judge Samuel B. Kent also involve conduct for which he was indicted (and, in connection with one Article, pled guilty). However, the principles that underpin the propriety of impeachment do not require that the conduct at issue be criminal in nature, or that there have been a criminal prosecution.

On June 8, 2007, Judge Kent, pursuant to his request, was interviewed by the Special Investigative Committee. The Special Investigative Committee sought to learn from Judge Kent whether he had engaged in unwanted sexual contact with Ms. McBroom or with others.

One person whose name came up in this interview was that of Donna Wilkerson, Judge Kent's secretary. As to Ms. Wilkerson, Judge Kent falsely stated that the extent of his non-consensual contact with her was one kiss, when in fact he had engaged in repeated non-consensual sexual contact with Ms. Wilkerson. He also stated to the Special Investigative Committee that once told by Ms. Wilkerson that his advances were unwelcome, no further contact occurred, when in fact he continued his non-consensual sexual contact with Ms. Wilkerson.

On September 28, 2007, in an order signed by Chief Judge Edith H. Jones, the Judicial Council for the Fifth Circuit suspended Judge Kent with pay for 4 months and transferred him to Houston.[7] The Order did not disclose the underlying findings of fact or conclusions of law by the Special Investigative Committee.

The Department of Justice commenced a criminal investigation relating to Judge Kent's conduct, and on August 28, 2008, a Federal grand jury returned a three-count indictment charging Judge Kent with two counts of abusive sexual contact, in violation of 18 U.S.C. § 2244(b), and one count of attempted aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1). The abusive sexual contact counts charged him with "intentional touching, both directly and through the clothing, of the groin, breast, inner thigh, and buttocks of [Ms. McBroom]." The attempted aggravated sexual abuse count charged him with attempting to force Ms. McBroom's head towards his penis.

After various pre-trial proceedings, the grand jury issued a superseding indictment on January 6, 2009.[8] That indictment re-alleged the three counts involving Ms. McBroom. It also added two counts relating to Ms. Wilkerson. Count four of the superseding indictment charged aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1), namely, that "[o]n one or more occasions between January 7, 2004 and at least January 2005, any one and all of which [would constitute the offense]," Judge Kent "did engage in [aggravated sexual abuse of Ms. Wilkerson] by a hand and finger by force. . . ." The superseding indictment also charged "abusive sexual contact" in count five, namely, that Judge Kent engaged in the "intentional touching, directly and through the clothing, of [specified parts of Ms. Wilkerson's body]."

Finally, the superseding indictment charged "obstruction of justice" in Count Six, stemming from Judge Kent's June 2007 lies to the Fifth Circuit concerning his conduct relating to Ms. Wilkerson.

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[7] Order of Reprimand and Reasons, In re: Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent under the Judicial Conduct and Disability Act of 1980, Docket No. 07-05-351-0086, Judicial Council of the Fifth Circuit, Sept. 28, 2007, *available at* http://www.ca5.uscourts.gov/news/news/Judicial%20Council%20Order.pdf.

[8] Superseding Indictment, United States v. Kent, Crim. No. 4:08CR0596-RV (U.S. Dist. Ct., S.D. Tex., Houston Div., Jan. 6, 2009).

C. ADDITIONAL FACTS RELATED TO JUDGE KENT'S CONDUCT DURING THE INVESTIGATION

At sentencing, the prosecutor represented that Judge Kent's obstruction conduct was not limited to the single set of false statements made to the Fifth Circuit. The prosecutor set forth three other incidents of obstructive conduct or false denials.

First, at some point Judge Kent told Ms. Wilkerson that he had falsely denied his repeated attacks on her—and by so doing, according to the prosecutors, "sent a clear and unambiguous statement that she must repeat that lie too. . . . She, in fact, drew from his statements that she was supposed to testify falsely before the grand jury, as well."[9]

In addition, the prosecutor described two other occasions where Judge Kent made false statements in the course of the investigation:

> [O]n two separate occasions, the defendant asked for and was granted a meeting with, first, the Federal Bureau of Investigation, law enforcement agents. And that was in December 2007. . . . He reached out to the FBI and asked to sit down with them.
>
> During the voluntary interview, he was interviewed regarding his conduct, and he repeated the same false statements that he later told to the Special Investigative Committee, both about [Ms. McBroom] and about [Ms. Wilkerson].
>
> Then, [prior to the initial indictment in August 2008], defendant through his attorney asked for a meeting at Main Justice Headquarters, and there in the Assistant Attorney General's conference room, he sat down with his attorney and met with, among others, the trial team, the FBI agents, the [C]hief of the Public Integrity Section and the Acting Assistant Attorney General. And during the interview portion of that meeting, he again repeated the same lies.
>
> He said that he had been honest with the FBI in December 2007. He said that any attempt to characterize the conduct between him and [Ms. McBroom] as nonconsensual was absolutely nonsense. And that's in stark contrast, Your Honor, to the factual basis for his plea during which he admitted engaging in repeated nonconsensual sexual contact with [Ms. McBroom] without her permission.
>
> Then as to [Ms. Wilkerson], the defendant falsely stated that he had kissed her on two separate occasions when, in fact, it was over a much longer period of time and it was much more serious conduct. Again, as the defendant admitted in his factual basis.
>
> * * *
>
> [H]is false statements both to the FBI and to the DOJ trial team and his implication that [Ms. Wilkerson] should

[9] Transcript of Sentencing, United States v. Kent, CIM. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tex., Houston Div.), May 11, 2009 [hereinafter "Transcript of Sentencing"], at 5.

testify falsely before the grand jury did significantly obstruct and impede the official investigation.[10]

D. THE PLEA PROCEEDING

On February 23, 2009, Judge Kent pleaded guilty to Count Six of the superseding indictment, obstruction of justice, pursuant to a plea agreement. As part of the plea agreement, the Government agreed to dismiss the remaining five counts at sentencing. In addition, the Government promised that it would not seek a sentence in excess of 36 months incarceration.

In connection with the plea, the defendant signed a "Factual Basis for Plea" that was filed with the court and set forth the conduct that constituted the offense. That factual statement represented, among other facts:

> 4. In August 2003 and March 2007, the defendant engaged in non-consensual sexual contact with [Ms. McBroom] without her permission.
> 5. From 2004 through at least 2005, the defendant engaged in non-consensual sexual contact with [Ms. Wilkerson] without her permission.
>
> * * *
>
> 10. [On June 8, 2007], [t]he defendant falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the [Fifth Circuit Special Investigative] Committee that the extent of his non-consensual contact with [Ms. Wilkerson] was one kiss, when in fact and as he knew the defendant had engaged in repeated non-consensual sexual contact with [Ms. Wilkerson] without her permission.
> 11. The defendant also falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the Committee that when told by [Ms. Wilkerson] that his advances were unwelcome, no further contact occurred, when in fact and as he knew the defendant continued his non-consensual contacts even after she asked him to stop.[11]

At the plea proceeding, Judge C. Roger Vinson placed Judge Kent under oath, and inquired of him as to whether the representations in the "Factual Basis for Plea" were accurate:

> THE COURT [JUDGE VINSON]: I have a factual basis that has been filed in this case, which has three numbered pages and appears to have been signed by you and your attorney Mr. DeGuerin and Mr. Ainsworth on behalf of the Public Integrity Section of the Department of Justice. That is your signature on this agreement?
>
> THE DEFENDANT [JUDGE KENT]: Yes,
>
> THE COURT: And have you carefully read and gone over this factual basis for the plea with Mr. DeGuerin?
>
> THE DEFENDANT: Yes, sir.

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[10] Id. at 5–8.

[11] "Factual Basis for Plea," United States v. Kent, Crim. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tex., Houston Div., [Feb. 23, 2009]) [hereinafter "Factual Basis for Plea"], at 2–3.

THE COURT: Are those facts true and correct?
THE DEFENDANT: Yes, sir.[12]

Thereafter, Judge Vinson questioned Judge Kent as to his understanding of the rights Judge Kent would be giving up by pleading guilty, Judge Kent's understanding of the terms of the plea agreement, and Judge Kent's mental competence to enter the plea. Judge Kent then pleaded guilty to Count Six of the Superseding Indictment:

> THE COURT: I find that the facts which the government is prepared to prove with evidence at trial and which are set out in the factual basis for this plea and which you have admitted under oath are true [and] are sufficient to sustain a plea of guilty to Count 6 of the superseding indictment.
>
> I find that you're fully aware of the possible sentence or punishment that may be imposed under the law for this offense and you're aware of the operation and effect of the sentencing guidelines and how those guidelines may possibly affect your sentence.
>
> And, most importantly, I find that you have made your decision to plead guilty to this charge freely and knowingly and voluntarily and you have made that decision with the advice of counsel, an attorney with whom you've indicated your full satisfaction.
>
> So, let me ask you now, Mr. Kent: How do you plead to Count 6 of the superseding indictment?
>
> THE DEFENDANT: Guilty.[13]

Sentencing was set for May 11, 2009.

E. The Sentencing

The May 11 sentencing proceeding commenced with a lengthy colloquy concerning the calculation of the Federal sentencing guidelines. Thereafter, the two victims each addressed the court.

First, Ms. McBroom spoke. She stated, in part:

> When I think of the events leading up to his conviction, I'm consumed with emotion. Even though I have been able to move on in both my personal life and my career, I will forever be scarred by what happened to me in Galveston.
>
> * * *
>
> The abuse began after Judge Kent returned to work intoxicated. He attacked me in a small room that was not 10 feet from the command center where the court security officers worked. He tried to undress me and force himself upon me while I begged him to stop. He told me he didn't care if the officers could hear him because he knew everyone was afraid of him. I later found out just how true that was. He had the power to end careers and affect everyone's livelihood. That incident left me emotionally wrecked and

[12] Transcript of Plea Hearing, United States v. Kent, Crim. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tex., Houston Div.), Feb. 23, 2009 at 12.
[13] Id. at 17–18.

humiliated. It was so difficult to face my coworkers when I knew they had seen what happened to me.

* * *

[E]ach time an assault occurred, he would later promise to leave me alone and behave professionally, and I so wanted to believe that.

What I didn't know was that behind the scenes he was telling a much different story. Now that the truth has been exposed, I know so much more about his evil and deliberate manipulation, and I'm utterly disgusted. He was telling his staff members that I was the one pursuing him. He even told his secretary that I would do anything to have her job. . . . After the criminal investigation began, he even bragged about his gift of manipulation, which he thought would save him from conviction. People were asking him to just resign, and he would tell them if he had just 15 minutes with a jury, he would be exonerated.

There were times that other employees warned me that judge was intoxicated, and that he was asking for me. And during those times, I would refuse to answer my phone or I would hide in an empty office.

* * *

The last assault I had was more terrifying and threatening than ever before. After forcing himself upon me and asking me to do unspeakable things, he told me that pleasuring him was something I owed him. That was it for me. He had finally won. He had broken me and forced me out. I could handle no more of his abuse.

Keep in mind that I had already reported his behavior to my manager. She knew about the assaults from the very beginning. . . . She was also very afraid of him. She had experienced his inappropriate behavior herself.

* * *

Even though my children have been supportive and mature from the beginning, I cringe when I think of how they must have felt when they read in the paper Judge Kent's claims that their mother was enthusiastically consensual. . . .

This judge has hurt so many people in so many ways. Every employee in Galveston has been afraid of his power and control. . . .[14]

Ms. Wilkerson spoke next:

For the last 7 years, I was sexually and psychologically abused and manipulated. Sexual abuse began on the fifth day, the fifth day of my career working with Sam Kent. I knew Sam Kent better than anyone and sadly no one really knows Sam Kent or the truth of his life and how he has conducted himself. . . .

[14] Transcript of Sentencing, United States v. Kent, Crim. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tx., Houston Div.), May 11, 2009 [hereinafter "Sentencing Transcript"] at 48–51.

> I would like to tell you about the real Sam Kent. Sam Kent has spent his life manipulating people and abusing his relationships with people. Certainly this has been my experience the time I have known him. He has also spent this time lying to everyone. He will never acknowledge what he has done to the people around him. He continues to try to manipulate the system and make excuses for his aberrant behavior. Some of his lies have now been uncovered by his own admission, yet because of his narcissism and inability to admit fault and accept fault, except in an instant—or an instance such as today when he thinks it will gain him some mercy, or the day he pled guilty, he turns to even more lies by publishing ridiculous statements in the newspaper and blaming everyone and everything but himself.
>
> * * *
>
> He continues his manipulative behavior in seeking a mental disability when just 2 years ago he fought hard to make his accusers and the investigators know that he was fully capable of keeping his bench.[15]

Thereafter, Judge Kent's attorney addressed the court. He requested that Judge Kent be sentenced to a medical facility, and that the court order drug and alcohol counseling. He further noted that "although [Judge Kent] says that he is not an alcoholic, [he] is an alcoholic."[16]

Then Judge Kent addressed the court on his own behalf. He said he was a "completely broken man, but in some ways a better person. . . ."[17] He apologized to his staff—though he did not mention the two women directly—and to "my wife and family and to my marriage, all of whom and which I have likely irretrievably lost."[18] He apologized "to all who seek redress in the Federal system for tarnishing its image and because never again can I vouchsafe their interest[.]"[19] He continued:

> I have had the benefit of 26 months of absolute sobriety, a wonderful pretrial officer, a sensitive and thoughtful presentencing officer, terrific attorneys and excellent medical help. Through their assistance, I have come to see what a flawed, selfish, thoughtless and indulgent person I have been, and I have already begun to try and put myself right and emerge from this a better person.[20]

The prosecutor spoke and after summarizing Judge Kent's conduct requested a 36-month sentence, consistent with the plea agreement.

Finally, Judge Vinson imposed the sentence:

> The consequence to you of your wrongful conduct is not only the loss of a job which many feel is the best job in

[15] Id. at 52–54. Judge Kent sought to retire on a medical disability. On May 27, 2009, Chief Judge Edith H. Jones of the Fifth Circuit denied this request.
[16] Id. at 58.
[17] Id. at 59.
[18] Id. at 59.
[19] Id. at 59–60.
[20] Id. at 60.

> the world, but also punishment under the law. And as you well know, the law is no respecter of persons, and everyone stands equal in this Court. And former judges are no exception.
>
> Your wrongful conduct is a huge black X on your own record. It's a smear on the legal profession, and, of course, it's a stain on the justice system itself. And, importantly, it is a matter of grave concern within the Federal courts.[21]

Judge Vinson thereafter imposed upon Judge Kent a sentence of 33 months incarceration to be followed by 3 years of supervised release, a $1,000 fine, and restitution to Ms. McBroom of $3,300 and to Ms. Wilkerson of $3,250. Judge Kent was permitted to remain on release and required to surrender voluntarily to the prison designated by the Bureau of Prisons no later than 12:00 noon on June 15, 2009.

V. COMMITTEE ACTIONS

A. Establishment of the Impeachment Task Force

On May 12, 2009, one day after Judge Kent's sentencing for obstruction of justice, the House passed House Resolution 424, providing that "the Committee on the Judiciary shall inquire whether the House should impeach Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas." The next day, May 13, 2009, the Committee passed a resolution amending its January 22, 2009 resolution (which had established a Task Force to inquire into whether a different Federal judge should be impeached) to provide that the Task Force was to additionally conduct "an inquiry into whether United States District Judge Samuel B. Kent should be impeached."

B. Task Force Hearing of June 3, 2009

The Task Force held an evidentiary hearing on its inquiry into whether Judge Kent should be impeached on June 3, 2009. Testimony was received from Alan Baron, Esq., the lead Task Force attorney, Ms. Cathy McBroom, Ms. Donna Wilkerson, and Professor Arthur Hellman, University of Pittsburgh School of Law. Judge Kent was also invited to appear and testify before the Task Force. However, both Judge Kent and his lawyer declined to appear.

1. Statement of Alan Baron

Alan Baron, Esq., the lead Task Force attorney, provided an overview of the investigation. As part of his statement to the Task Force, he identified and introduced into the record the following documents:

1) The original Indictment dated August 28, 2008, and the Superseding Indicment dated January 6, 2009;
2) The transcript of the February 23, 2009 Plea Proceeding;
3) The February 23, 2009 "Factual Basis for Plea;"
4) The transcript of the May 11, 2009 Sentencing Proceeding;

[21] Id. at 70.

5) The Court's Judgment (setting out Judge Kent's sentence), signed by Senior United States District Judge Roger Vinson, May 11, 2009;
6) The May 27, 2009 letter from Chief Judge Edith H. Jones to Judge Kent c/o his attorney denying Judge Kent's disability claim;
7) The June 1, 2009 letter from Judge Kent to the Task Force declining its invitation for him to testify;
8) The June 2, 2009 letter of Judge Kent to President Obama purporting to resign effective June 1, 2010.

One issue in particular that Mr. Baron highlighted was the fact that the prosecutor at Judge Kent's sentencing proceeding represented to the Court that Judge Kent had made false statements to law enforcement in connection with the Federal investigation.

In addition, Mr. Baron informed the Task Force that Judge Kent and his attorneys had been provided the opportunity to make submissions to the Task Force or to appear before it. The invitation to appear personally had been declined.

2. Testimony of Cathy McBroom

Ms. McBroom submitted a lengthy written statement which she adopted under oath as truthful.

In her written statement she described the following encounters in specific:

> [I]n August 2003, I encountered my first incident of sexual assault by Judge Kent after he returned from a long lunch, obviously intoxicated. After going to his chambers to check my outbox, he greeted me in the hallway next to the command center on the 6th floor. Several court security officers were in the command center at the time. Judge Kent asked me to show him the workout room, which was about ten feet from the command center. The security officers had set up some weight equipment and used the room as a make-shift gym. Judge Kent's speech was slurred, so I suspected he was drunk, but felt I should respect his request. Once inside the small room, he grabbed me and forced his tongue into my mouth while trying to remove my clothing. He had one arm around my waist and was using the other hand to pull up my blouse and my bra, exposing my entire breast. He also tried to force his hand down my skirt. All the while, I tried to push him away, begging him to stop. I tried to reason with him by telling him his actions were inappropriate, but I became more and more panicked, because he was not letting up. The door was partially cracked open and I knew the guards must have heard the struggle. I told Judge Kent that the guards were right outside and could hear him, but he laughed and said that he didn't care who heard him, or what they thought. Finally, I threatened to scream. He stopped abruptly, looked down at me with disgust, and left the room. I sat down on the bench and cried for several min-

utes before I was able to collect myself enough to leave the room.[22]

She described another encounter as follows:

> Once a security guard had warned me of Judge Kent's drunken condition, and when I refused to answer his calls, he came down to the 4th floor, into my office, and sat in the chair in front of me. He started telling me jokes and was being very loud and obnoxious. Suddenly he stood up and started around my desk. I stood up and backed up as far as I could, but he pinned me between my desk and credenza, and started kissing me, while grabbing my backside and breasts. While trying to fight him off, I caught a glimpse of someone in my doorway, but couldn't tell who it was. The person left immediately without a sound. Again, after struggling with me for a few minutes, Judge Kent gave up and left. I felt humiliated, scared, and shaken. A coworker came in sometime later and noticed that I had perspiration stains on my blue silk blouse, and that I looked disheveled. When she asked what was wrong, I confessed to her that Judge Kent had tried to force himself on me.[23]

She described the March 2007 encounter that resulted in her filing a formal complaint as follows:

> The last and final sexual assault occurred on March 23, 2007. I was summoned to chambers to discuss an internal administrative action that had occurred in the clerk's office. After a brief discussion, he got up and asked me for a hug. I told him that I would rather not, but he indicated that he thought I owed him that much. I finally agreed, but when I reached up to give the hug, he grabbed my butt. I tried to pull away and told him that I didn't consider that a hug. Judge Kent asked if he could have just 5 minutes with me, pulled up my sweater and my bra all at once, and quickly got his mouth on my breast. I told him to stop and tried to push him away. His bulldog started getting excited and barking when he saw the struggle. I dropped some paperwork that I had taken to chambers and the dog started stepping on the papers, which momentarily distracted the Judge. When I tried to leave, he grabbed me again and reminded me that I owed this to him. He tried to push my head towards his crotch and told me to "[commit oral sex]." I resisted and he grabbed my hand and forced me to rub his crotch. Suddenly he heard someone enter the outer reception area and he became irritated. He went to investigate and I was able to break free. As I was leaving his office he said "you know, Cathy, I keep you around because you are a great case manager and do great work. That doesn't change the fact that I want to spend about 6 hours [performing oral sex on you]." I just turned and left the office. By the time I reached the

[22] Statement of Cathy McBroom, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009) [hereinafter "McBroom Statement"], at 1.

[23] Id. at 2.

> elevators, I was in tears. A court security officer asked me if the judge had tried to hit on me and I just shook my head "yes."[24]

She generally described Judge Kent's efforts to gain access to her alone, sexual references that he made when speaking to her, and her efforts to avoid him. She also described the power that Judge Kent had and exercised as the only Judge in the Galveston Federal courthouse.

3. Testimony of Donna Wilkerson

Ms. Wilkerson submitted a lengthy written statement which she adopted under oath as truthful. Ms. Wilkerson described generally Judge Kent's conduct towards her as follows:

> His sexual abuse and misconduct with me began on the fifth day of my job. I had worked the first week at my job with Judge Kent's secretary of 20 years. She was retiring. On Friday of that first week, a retirement luncheon was given for her at a local restaurant. I was invited to and attended the luncheon, which lasted approximately 2–3 hours where food and alcohol were served. Mr. Kent, with others, became intoxicated, being loud and obnoxious. During the party, pictures were taken of several groups, including Sam Kent with his wife, former law clerks, attorneys and his retiring secretary. During the taking of those photos Judge Kent joked and laughed and grabbed his wife's breasts and buttocks in front of the room full of people. After the party, everyone left except the few courthouse staff and Judge Kent, who returned to the courthouse. Once there, while his retiring secretary and others were in the reception area of his chambers, he called me into his office and shut the door. He sat behind his desk and I sat in a chair in front of his desk. He told me that he was very excited to have me coming on board to take Ms. Henry's place, that he thought I would be an asset to him and the operations of the court, and that he thought I was intelligent and pretty, and other random compliments. As he got up, appearing to be showing me out of his office, I was walking in front of him to the door. He reached for the door as if to open it for me, but put one of his hands on the door and the other one on the other side, putting me between the door and him. He leaned in and placed a kiss on my mouth. After that, he told me how beautiful he thought I was and that, again, he was glad I was there. I did not know what to do, but in my shock, I did nothing but exit the room, thinking, "what in the world was that and how am I supposed to handle this?" From that point forward, the abuse became more frequent and more severe. The number of these incidents, from minor to the most severe, can be averaged at 1–2 times per month over a year's time, for a period of approximately 5–5½ years, from 2001–2007. However, there were periods of time during these years that the incidents did not occur as frequently as 1–2 times per month because he had periods

[24] Id. at 3.

of weeks and months of not drinking, as well as several periods of extended time that he was out of the office. These episodes were routinely followed by Judge Kent's returning from long lunches wherein he was intoxicated. I have explained in the past that the severity of the sexual abuse can be described using a Bell Curve as an example—starting with the most minor of incidents of hugs and kisses, then escalating to worse incidents of touching me inappropriately, groping me outside my clothes, then inside my clothes (top and bottom), then attempting to and gaining penetration of my genitals with his hand, placing my hand on his crotch, and then topping the curve at the most severe episode of once, and possibly twice, pulling down my pants and performing oral sex on me. These episodes always occurred inside of his chambers—sometimes in his office, and sometimes in the reception area or wherever in chambers he could corner me. Preceding the incidents, he would always begin speaking in a vulgar and inappropriate way to me and telling me graphically what he wanted to do to me. Statements of "you have the cutest [breasts]," "let me see those cute [breasts]," "you have the cutest ass," "I want to [commit oral sex on you]," and "why don't you [commit oral sex on me]" were common to the more severe episodes. During these episodes, I repeatedly told him "no," "stop," "stop acting like a pig," "quit," "cut this out," "you/we can't be doing this," "I don't want to do that/this," "behave yourself," and so on and so on. There were times when he would approach me from behind while I was sitting at my desk and working at my computer. He would quickly come up behind me and put his hands over my shoulders and grope me on the outside of my clothes and down my shirt and into my bra.

* * *

During the most severe episode, he pinned me to a chair in his office after pulling my pants and underwear down.[25]

She also elaborated on Judge Kent's views of his own power:

During my interview for this job and several times subsequent to my being hired, Sam Kent told me that he was the sole person responsible for his personal staff's hiring and firing (his personal staff consisted of me and his two law clerks). He also told me that he was the Government—"I am the Government"; "I'm the Lion King—it's good to be king," "I'm the Emperor of Galveston," and "the man wearing the horned hat, guiding the ship." He warned me of three things which he said would not be tolerated and would be grounds for my/our immediate dismissal: disloyalty to him, "talking out of school," and by engaging in

[25] Statement of Donna Wilkerson, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009) [hereinafter "Wilkerson Statement"], at 1–3.

behavior which would be an embarrassment to the Court.[26]

Ms. Wilkerson claimed that she was afraid of speaking out and losing her job, and thus had not been forthright with investigators and law enforcement when initially questioned about Judge Kent's conduct towards her. It was not until her third grand jury appearance that Ms. Wilkerson described the full extent of Judge Kent's non-consensual sexual contact with her.

4. Testimony of Professor Arthur Hellman

Professor Hellman provided expert testimony that, in essence, concluded that Judge Kent's conduct in making false statements to fellow judges (and thereby obstructing justice), as well as abusing his power as a Federal judge to sexually assault women, constituted independent grounds to justify his impeachment and removal from office.

First, Professor Hellman reviewed the history of the phrase "high crimes and misdemeanors" including the views of the Framers, the accepted body of scholarly interpretation, and the House impeachment precedents. He concluded that this phrase generally described acts that constituted an abuse of power, or otherwise generally rendered the judge unfit to hold office—including a judge's exercise of "arbitrary power."[27] As but one example, Professor Hellman cited from an influential 19th-century treatise in making that point:

> [William] Rawle then explains why the availability of impeachment is particularly valuable as a means of dealing with misconduct by members of the judiciary:
>
> > We may perceive in this scheme one useful mode of *removing from office him who is unworthy to fill it*, in cases where the people, and sometimes the president himself would be unable to accomplish that object. A commission granted during good behaviour can only be revoked by this mode of proceeding.
>
> The premise, then, is that the purpose of impeachment is to remove from office "him who is unworthy to fill it." It follows, I think, that it is a sufficient ground for impeachment of a civil officer—particularly an Article III judge—that he has engaged in behavior that makes him "unworthy to fill" that particular office.[28]

Professor Hellman concluded that, as a legal matter, there were "two broad (and overlapping) categories of conduct that may justify impeachment. The first is serious abuse of power. The second is conduct that demonstrates that an official is 'unworthy to fill' the office that he holds."[29]

Professor Hellman likewise concluded that the facts in the record rose to the level necessary to warrant Judge Kent's impeachment. As to Judge Kent's false statements to the Fifth Circuit (the basis

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[26] Id. at 1.

[27] See Statement of Professor Arthur D. Hellman, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009), at 13–20 ("abuse of power" discussed at 18–19; "arbitrary power" at 18).

[28] Id. at 19 (emphasis supplied by Hellman) (quoting William Rawle, A View of the Constitution of the United States of America, (2d ed. 1829), at 218 (1970 reprint)).

[29] Id. at 21–22.

of his criminal conviction), Judge Hellman noted: "False testimony by a Federal judge in a judicial misconduct proceeding falls easily within the realm of 'high crimes and misdemeanors' that warrant impeachment."[30]

As to Judge Kent's sexual misconduct towards Ms. McBroom and Ms. Wilkerson, Professor Hellman stated that if the evidence showed that Judge Kent abused his position in committing the acts and otherwise exhibited conduct that demonstrated his unfitness for office, then impeachment would be warranted on the basis of his sexual misconduct. As Professor Hellman stated:

> If [Ms. McBroom and Ms. Wilkerson] describe their experiences in the way they did at the sentencing hearing, and if the House credits their testimony, the record will make a strong case for serious abuse of power that does warrant Judge Kent's impeachment.
>
> * * *
>
> The evidence would then point to the conclusion that Judge Kent relied on his position of authority and control in the Galveston Division of the District Court to coerce employees of that court to engage in sexual acts for his personal gratification—and to remain silent rather than to report his attacks to a higher authority. Such behavior is, in Wooddeson's words, "official oppression" that "introduce[s] arbitrary power." It is a high crime and misdemeanor.[31]

Professor Hellman provided the following analogy to support his conclusion why the sexual misconduct would support impeachment:

> If Judge Kent had demanded that court employees give him 10 percent of their salaries as a condition of holding their jobs, no one would doubt that he committed an impeachable offense. The sexual coercion described at the sentencing hearing is no less "obnoxious," and the result should be the same.[32]

5. Judge Kent's Letter

In his letter of June 1, 2009, Judge Kent stated, in pertinent part:

> For several years, influenced by misguided emotions that probably stemmed from innate personality flaws exacerbated by alcohol abuse and a series of life tragedies (most notably the emotional horror I endured for years in connection with my first wife, Mary Ann's slow, excruciating death from brain cancer), I began relating to Mrs. McBroom and Mrs. Wilkerson in inappropriate ways. . . . In doing so, I allowed myself to maintain unrealistic views of how they perceived me and my actions. I sincerely re-

[30] Id. at 26.

[31] Id. at 28–29 (citation omitted). Richard Wooddeson—the individual quoted by Professor Hellman—was an English historian of the late 18th century, a contemporary of the Framers. Professor Hellman, in his Task Force Statement, described Wooddeson's writings as having been relied on by the Supreme Court in other contexts associated with Constitutional interpretation.

[32] Id. at 31 (internal footnote omitted).

gret that my actions caused them and their families so much emotional distress.[33]

C. FACTUAL DEVELOPMENTS SUBSEQUENT TO THE HEARING

1. Obtaining Information Regarding Judge Kent's False Statements to Law Enforcement

Alan Baron, Esq., has interviewed the FBI agent who was in attendance when Judge Kent was interviewed by the FBI on November 30, 2007, and when Judge Kent made statements to the FBI and Department of Justice in a meeting of August 11, 2008, where he attempted to persuade the Department not to seek an indictment of him. In both instances, his testimony was inconsistent with that of Ms. McBroom and Ms. Wilkerson, and misrepresented the nature and duration of his non-consensual sexual contact with both women. Mr. Baron provided a copy of his memorandum describing those interviews to the Task Force.[34]

2. Prior Statements of Donna Wilkerson

As noted in the discussion of her testimony, Ms. Wilkerson acknowledged that she was not fully forthright with law enforcement when first questioned about Judge Kent's conduct towards her. She provided some explanation for this, describing generally that Judge Kent told her what his story was (namely, a few kisses that stopped when she told him they were unwelcome) as a signal for how she should testify, and otherwise manipulated her by suggesting, prior to her first grand jury appearance, that her appearance might provoke him to commit suicide.[35]

The prosecutors at sentencing specifically referenced that Ms. Wilkerson had not been truthful in her initial grand jury appearances—a fact they attributed to Judge Kent's attempts to influence her testimony. In the context of a discussion of the applicability of the "obstruction" enhancement under the Sentencing Guidelines, the prosecutor stated:

> The defendant in telling [Ms. Wilkerson] that he had—he himself had falsely denied his repeated attacks on her, he was sending a clear and unambiguous statement that she must repeat that lie too. . . . She, in fact, drew from his statements that she was supposed to testify falsely before the grand jury, as well.[36]

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[33] Letter from Judge Samuel B. Kent to Task Force Members, Re: Statement of Judge Samuel B. Kent, Provided to The Task Force to Consider the Possible Impeachment of Judge Samuel B. Kent (June 1, 2009), at 1. He also represented he had no pension or retirement and needed health insurance for his medical and mental health problems. Id. at 2.

[34] The Task Force also obtained the FBI "302" statements of interviews from the two dates on which Judge Kent met with the FBI and Department of Justice and which detail his effort to mislead investigators during those meetings.

[35] Ms. Wilkerson testified:

> Before my first grand jury appearance after he returned from administrative leave—20 minutes before my scheduled appearance—he came to my desk and told me, "If anyone from Dr. Hirschfield's office [his psychiatrist] calls, please put them through right away—you know they have me on suicide watch again, right?" He even instructed his law clerk, Carey Worrell, in my presence, to research his life insurance policy to make sure that it did not contain "suicide exclusion" so that if he killed himself, his wife would still be paid the benefits. On another occasion before my last grand jury appearance, he told Ms. Worrell that if I "rolled" on him, it would be all he could take and he would kill himself.

Wilkerson Statement at 7.

[36] Sentencing Transcript at 5.

Similarly:

> [I] need to point out also that [Ms. Wilkerson] also denied that involvement continuously until the third time she appeared before the grand jury.[37]

Subsequent to the hearing, the Task Force obtained and reviewed the prior grand jury testimony of Ms. Wilkerson.

D. TASK FORCE MEETING AND INTRODUCTION OF RESOLUTION

On June 9, 2009, the Task Force met and approved a proposed resolution containing four articles of impeachment for recommendation to the Committee. Also at this meeting, four additional documents were submitted into the record. They were:

1) The Judgment of Conviction of Judge Kent;[38]
2) Memorandum of Interview signed by Alan Baron, Special Impeachment Counsel to the Task Force, summarizing an interview with FBI Special Agent David Baker;
3) Memorandum of Interview signed by Kirsten Konar, Esq., counsel assisting the Task Force, summarizing an interview with Ms. Donna Wilkerson;
4) Medical and mental health records of Judge Kent submitted by Ms. Jackson Lee

Later that day, H. Res 520 was introduced by Chairman John Conyers, Jr., along with Ranking Member Lamar Smith, Task Force Chairman Adam Schiff, Task Force Ranking Member Bob Goodlatte, and every other member of the Task Force. The resolution was referred to the Committee.

E. JUDICIAL CONFERENCE CERTIFICATE TRANSMITTED TO HOUSE

By way of a letter dated June 9, 2009, the Judicial Conference of the United States transmitted to Speaker of the House Nancy Pelosi a certificate setting forth its "determination that consideration of impeachment of United States District Judge Samuel B. Kent, of the Southern District of Texas, may be warranted."[39] The Judicial Conference noted, as a basis for its determination:

> In sum, Judge Kent has stipulated, as the basis for his plea of guilty, that
>
> (a) in August 2003 and March 2007, he engaged in non-consensual sexual contact with a person ([Ms. McBroom]) without her permission;
>
> (b) from 2004 through at least 2005, he engaged in non-consensual sexual contact with a person ([Ms. Wilkerson]) without her permission; and
>
> (c) in connection with a judicial misconduct complaint against him, he testified falsely before a Fifth Circuit special investigative committee regarding his unwanted, non-consensual sexual contact with [Ms. Wilkerson], by understating the extent of that contact

[37] Id. at 10.
[38] That document was also made part of the record at the Task Force Hearing of June 3, 2009.
[39] A copy of the transmittal letter and Certificate is attached to this Report.

and by falsely stating that it had ended after [Ms. Wilkerson] told him it was unwelcome.[40]

F. Full Committee Markup on June 10, 2009

On June 10, 2009, the Committee on the Judiciary voted to consider the four Articles of Impeachment set forth in House Resolution 520. In connection with that Markup, two additional documents were identified and made part of the record:

1) Letter from Judge Kent's attorney, Dick DeGuerin to the Committee on the Judiciary (June 9, 2009);
2) "Certificate To The Speaker, United States House of Representatives [regarding District Court Judge Samuel B. Kent]," from the Judicial Conference, dated June 9, 2009.

VI. DISCUSSION OF THE ARTICLES OF IMPEACHMENT

Article I charges that Judge Kent "engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge." In particular, Article I charges that "[o]n one or more occasions between 2003 and 2007, Judge Kent sexually assaulted Cathy McBroom, by touching her private areas directly and through her clothing against her will and by attempting to cause her to engage in a sexual act with him." Ms. McBroom testified to facts consistent with this Article, and Judge Kent, in his signed "Factual Basis for Plea," admitted: "In August 2003 and March 2007, the defendant engaged in non-consensual sexual contact with [Ms. McBroom] without her permission."[41] The Article thus provides: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

Article II charges that Judge Kent "engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge," in particular, that "[o]n one or more occasions between 2001 and 2007, Judge Kent sexually assaulted Donna Wilkerson, by touching her in her private areas against her will and by attempting to cause her to engage in a sexual act with him." Ms. Wilkerson testified to facts consistent with this Article, and Judge Kent, in his signed "Factual Basis for Plea," admitted: "From 2004 through at least 2005, the defendant engaged in non-consensual sexual contact with [Ms. Wilkerson] without her permission."[42] The "Factual Basis" also sets forth Judge Kent's admissions that he "had engaged in repeated non-consensual sexual contact with [Ms. Wilkerson] without her permission[,]" and that he "continued his non-consensual contacts even after she asked him to stop."[43] The Article thus con-

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[40] Factual Basis for Plea at 2. 28 U.S.C. §§ 351 et seq sets forth the procedures for the judicial branch to refer concerns regarding judges that might warrant impeachment to the House of Representatives. 28 U.S.C. § 355(b)(1) provides:

> **In general.**—If the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the Hosue of Representatives considers to be necessary.

[41] Factual Basis for Plea at 2–3.

[42] Id.

[43] Id.

cludes: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

Article III charges that on June 8, 2007, when Judge Kent appeared before the Special Investigative Committee appointed by the Fifth Circuit to investigate Ms. McBroom's complaint, he made false statements concerning his non-consensual sexual contacts with Ms. Wilkerson. Judge Kent has admitted this during the February 2009 plea proceeding, and specifically admitted in the "Factual Basis" the substance of the false statements, as follows:

> 10. [On June 8, 2007], [t]he defendant falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the [Fifth Circuit Special Investigative] Committee that the extent of his non-consensual contact with [Ms. Wilkerson] was one kiss, when in fact and as he knew the defendant had engaged in repeated non-consensual sexual contact with [Ms. Wilkerson] without her permission.
>
> 11. The defendant also falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the Committee that when told by [Ms. Wilkerson] that his advances were unwelcome, no further contact occurred, when in fact and as he knew the defendant continued his non-consensual contacts even after she asked him to stop.[44]

Article III goes on to note that Judge Kent was indicted, pled guilty, and was sentenced to imprisonment for the felony of obstruction of justice (in violation of title 18, United States Code, section 1512(c)(2)) arising from that conduct, and that the sentencing judge described the conduct as "a stain on the justice system itself." The Article thus concludes: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

Article IV charges that on or about November 30, 2007, Judge Kent made material false and misleading statements about the nature and extent of his non-consensual sexual contact with Ms. McBroom and Ms. Wilkerson to agents of the Federal Bureau of Investigation, and that on or about August 11, 2008, he made similar material false and misleading statements to agents of the Federal Bureau of Investigation and representatives of the Department of Justice. These statements were described by the prosecutor at Judge Kent's sentencing, and were confirmed by a Federal Bureau of Investigation Special Agent during the Impeachment Task Force investigation. The Article thus concludes: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

VII. CONCLUSION

The following language from the House Report accompanying the Judge Walter L. Nixon, Jr., articles of impeachment also aptly sets out the core principles underlying and justifying the Impeachment Resolution against Judge Kent:

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[44] Id.

> The [House's] role is not to punish [Judge Kent], but simply to determine whether articles of impeachment should be brought. Under our Constitution, the American people must look to the Congress to protect them from persons unfit to hold high office because of serious misconduct that has violated the public trust. Where, as here, the evidence overwhelmingly establishes that a federal judge has committed impeachable offenses, our duty requires us to bring articles of impeachment and to try him before the United States Senate.[45]

VIII. Committee Consideration

On June 10, 2009, the Committee met in open session and ordered the resolution, H. Res. 520, favorably reported without amendment by a rollcall vote of 29 to 0, a quorum being present.

IX. Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes took place during the Committee's consideration of H. Res. 520:

1. Impeachment Article 1. Approved 30 to 0.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		

[45] Nixon Impeachment Report, at 33–34.

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	30	0	

2. Impeachment Article 2. Approved 28 to 0.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin			
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	28	0	

3. Impeachment Article 3. Approved 30 to 0.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	30	0	

4. Impeachment Article 4. Approved 28 to 0, with one Member passing.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			Pass
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	28	0	

5. Motion to report H. Res 520 favorably. Passed 29 to 0.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Lungren			
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	29	0	

X. LETTER FROM JUDICIAL CONFERENCE REGARDING JUDGE KENT

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

June 9, 2009

Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

At a special session held today, the Judicial Conference of the United States, by its members present, determined unanimously to transmit to the House of Representatives, under 28 U.S.C. § 355(b)(1)-(2), the enclosed Certificate and attachments in a proceeding under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364. One member was not present and did not participate in the Conference's deliberations on this matter.

Please be advised that the Certificate is a "determination" within the meaning of the following provision in 28 U.S.C § 355(b)(1): "Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination." The Judicial Conference will make no public statement on this matter, but has transmitted the Certificate and attachments to the subject judge and to the Chief Judge of the Fifth Circuit Court of Appeals in her capacity as chair of the Judicial Council of the Fifth Circuit.

Sincerely,

James C. Duff

James C. Duff
Secretary

Enclosures

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

CERTIFICATE

TO THE SPEAKER, UNITED STATES HOUSE OF REPRESENTATIVES:

Pursuant to 28 U.S.C. § 355(b), the Judicial Conference of the United States certifies to the House of Representatives its determination that consideration of impeachment of United States District Judge Samuel B. Kent, of the Southern District of Texas, may be warranted. Having been informed that Judge Kent was convicted of a felony, and that the judgment has become final by the exhaustion or termination of all rights of direct judicial review, the Conference, under Rule 1 of its *Rules for the Processing of Certificates from Judicial Councils that a Judicial Officer Has Engaged in Conduct that Might Constitute Grounds for Impeachment*, accepts the judgment as conclusive and has determined in its discretion to issue this certificate.

The Conference's determination in this matter is based on

(1) the court record in Case No. 4:08-cr-00596, *United States* v. *Samuel B. Kent*, filed in the Southern District of Texas at Houston, which reflects Judge Kent's February 23, 2009, plea of guilty to obstruction of justice in violation of 18 U.S.C. § 1512(c)(2); the resulting judgment of conviction, dated May 11, 2009, in which Judge Kent is sentenced to a term of 33 months' imprisonment; and the absence of any timely notice of appeal of that judgment; and

(2) the certification of the Fifth Circuit Judicial Council, premised on the judgment of conviction in said case, that Judge Kent has engaged in "conduct which constitutes one or more grounds for impeachment under Article II of the Constitution."

This certificate is transmitted with the certification of the Fifth Circuit Judicial Council and relevant portions of the court record.

TO THE SPEAKER, UNITED STATES HOUSE OF REPRESENTATIVES
Page 2

In sum, Judge Kent has stipulated, as the basis for his plea of guilty, that

(a) in August 2003 and March 2007, he engaged in non-consensual sexual contact with a person ("Person A") without her permission;

(b) from 2004 through at least 2005, he engaged in non-consensual sexual contact with a person ("Person B") without her permission; and

(c) in connection with a judicial misconduct complaint against him, he testified falsely before a Fifth Circuit special investigative committee regarding his unwanted, non-consensual sexual contact with Person B, by understating the extent of that contact and by falsely stating that it had ended after Person B told him it was unwelcome.

Judge Kent's conduct and felony conviction, as described above, have brought disrepute to the Judiciary.

Executed this 9th day of June, 2009.

James C. Duff
Secretary

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

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; W. Eugene Davis, U. S. Circuit Judge; James L. Dennis, U. S. Circuit Judge; Edith Brown Clement, U. S. Circuit Judge; Jennifer Walker Elrod, U. S. Circuit Judge; Leslie H. Southwick, U. S. Circuit Judge; Eldon E. Fallon, U. S. District Judge; James J. Brady, U. S. District Judge; Robert G. James, 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; Hayden Head, U. S. District Judge; David Folsom, U.S. District Judge; Orlando L. Garcia, U. S. District Judge

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DOCKET NO. 07-05-351-0086

IN RE: Samuel B. Kent
United States District Judge
Southern District of Texas

Pursuant to Title 28, Section 354 (b)(2)(A), the Judicial Council of the Fifth Circuit, based on the court record in Case No. 4:08-cr-00596, *United States of America v. Samuel B. Kent*, filed in the Southern District of Texas at Houston, and the subsequent lapse of fifteen days after sentencing without a notice of appeal or any post-judgment motion being filed, determines that Samuel B. Kent, a United States District Judge for the Southern District of Texas, has pled guilty to obstruction of justice in violation of 18 U.S.C. § 1512(c)(2) and has thus

by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution, and so certifies its determination to the Judicial Conference of the United States.

The Judicial Council urges the Judicial Conference of the United States to take expeditious action on this matter pursuant to 28 U.S.C. § 355(b).

The foregoing events and certification, together with the facts that Judge Kent has voluntarily moved out of his chambers and ceased handling cases, moot this Council's reopening of the disciplinary proceeding against Judge Samuel B. Kent.**

FOR THE COUNCIL

Edith H. Jones

Chief Judge

Dated: May 27, 2009

*United States Circuit Judge Catharina Haynes stood recused and did not participate in this Judicial Council decision.

**Copies of this Council certification and resolution are being contemporaneously delivered to the complainant and to Judge Kent pursuant to 28 U.S.C. § 354(b)(3).

101st Congress
1st Session

HOUSE OF REPRESENTATIVES

Report
101-36

IMPEACHMENT OF WALTER L. NIXON, JR.

April 25, 1989.—Referred to the House Calendar and ordered to be printed

Mr. Brooks, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 87]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 87) impeaching Walter L. Nixon, Jr., judge of the United States District Court for the Southern District of Mississippi for high crimes and misdemeanors, having considered the same, report favorably thereon with an amendment and recommends that the resolution as amended be agreed to.

The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, be 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 Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi (Hattiesburg Division) to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

ARTICLE II

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Judge Nixon had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in Federal court or State court; and that Judge Nixon "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

ARTICLE III

By virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts by the following:

After entering into an oil and gas investment with Wiley Fairchild, Judge Nixon conversed with Wiley Fairchild, Carroll Ingram, and Forrest County District Attorney Paul Holmes concerning the State criminal drug conspiracy prosecution of Drew Fairchild, the son of Wiley Fairchild, and thereafter concealed those conversations as follows:

(1) Judge Nixon concealed those conversations through one or more material false or misleading statements knowingly made to an attorney from the United States Department of Justice and a special agent of the Federal Bureau of Investigation during an interview of Judge Nixon conducted in Biloxi, Mississippi, on April 19, 1984. The substance of the false or misleading statements included the following:

(A) Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case.

(B) Wiley Fairchild never brought up his son's case.

(C) At the time of the interview Judge Nixon has no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview.

(D) Nothing was done or nothing was ever mentioned about Wiley Fairchild's son.

(E) Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case.

(F) Judge Nixon had done nothing to influence the Drew Fairchild case.

(G) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case.

(2) Judge Nixon further concealed his conversations with Wiley Fairchild, Paul Holmes, and Carroll Ingram concerning the Drew Fairchild case by knowingly giving one or more material false or misleading statements to a Federal grand jury during testimony under oath in Hattiesburg, Mississippi, on July 18, 1984. The substance of the false or misleading statements included the following:

(A) Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

(B) To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

(C) Judge Nixon gave the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony.

(D) Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court.

(E) Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case.

(F) Judge Nixon never had a thing to do with the Drew Fairchild case at all.

(G) Judge Nixon "never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr. is guilty of an impeachable offense and should be removed from office.

I. Introduction

The Committee on the Judiciary has conducted an extensive, independent inquiry into the conduct of Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi. In particular, the Committee has considered whether Judge Nixon was truthful during an investigation conducted by the Public Integrity Section of the U.S. Department of Justice and a special federal grand jury empaneled in Hattiesburg, Mississippi. The investigation focused upon Judge Nixon's financial relationship with Wiley Fairchild, a Hattiesburg, Mississippi businessman, and the handling of the state and federal criminal prosecution of Mr. Fairchild's son, Drew Fairchild, for drug smuggling.

After a careful study of the evidence, the Committee finds that Judge Nixon consciously and repeatedly gave false and misleading information during the federal investigation. Judge Nixon lied to federal investigators during an interview conducted in his chambers, and he thereafter testified falsely under oath before the Hattiesburg special federal grand jury.

Judge Nixon was convicted of two counts of making false declarations before the grand jury, each a felony and a form of perjury. He is only the second federal judge in the history of the United States to be convicted of a crime during his judicial tenure. Judge Nixon is currently in prison serving a five-year sentence.

Judge Nixon's conduct was wholly unacceptable for a federal judge and his tainted the integrity of the federal judiciary. The Committee therefore recommends that Judge Walter L. Nixon, Jr., be impeached by the House of Representatives and tried by the United States Senate.

II. A Brief History of Impeachment and the Standard of Conduct Required of Federal Judges

The Constitution gives Congress the ultimate, albeit rarely used, power to remove federal officials from office. The Framers of the Constitution adopted the remedy of impeachment as an essential component of the system of checks and balances integral to our form of government. Alexander Hamilton characterized impeachment "as a method of National Inquest into the conduct of public men." [1] The Farmers sought to protect the institutions of govern-

[1] *The Federalist* No. 65, at 427 (A. Hamilton) (The New American Library, New York, 1971).

ment by providing for the removal of persons who are unfit to hold positions of public trust.

Framers of the American Constitution used British precedent as a model.[2] The British practide of impeachment dates back to the 14th century. In the 150 years prior to the constitutional convention of the United States in 1787, more than 50 impeachments were presented to the House of Lords.[3] At the time of the American constitutional convention, claims of oppression, fraud, cruelty and bribery against Warren Hastings in his capacity as Governor General of India were being presented in an ongoing impeachment trial in London. The notorious Hastings impeachment trial lasted until 1795.[4]

Though modeled on the British example, the American constitutional right to impeach differs in certain fundamental respects. In England, impeachment was a criminal process and the House of Lords held the power to impose imprisonment and even death as punishment.[5] In contrast, Article III, Section 3 of the Constitution states that "Judgment in Case 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. * * *" Moreover, in England anyone could be impeached except the monarch and the royal family. In the United States only the President, Vice President and civil officers are subject to impeachment. American impeachment is neither a criminal prosecution nor civil litigation, but is a remedial process designed to remove from office those public officials who have abused the public trust.[6] The intent is not to punish the individual but to protect the public "from injury at the hands of their own servants and to purify the public service." [7]

Provisions relating to impeachment are found in the first three articles of the Constitution. Under Article I, Section 2, "The House of Representatives * * * shall have the sole Power of Impeachment." The House considers whether articles of impeachment are warranted. If the House finds sufficient cause for impeachment, the matter is referred to the Senate for trial. Article I, Section 3 grants to the Senate "the sole power to try all Impeachments * * * [a]nd no Person shall be convicted without the Concurrence of two thirds of the Members present."

Article II, Section 4 defines an impeachable offense as "Treason, Bribery, or other high Crimes and Misdemeanors." This phrase was the product of considerable debate at the Constitutional Convention, with several alternative phrases including "Mal or corrupt conduct," "treason, bribery or corruption," and "mal-administration" considered at various times. Some felt that "treason and bribery" was too narrow. George Mason recommended the addition of

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[2] Berger, Raoul, *Impeachment: The Constitutional Problems* (Harvard University Press, Cambridge, Mass., 1973), at 54.

[3] Holdsworth, W.S., *A History of English Law* (12 vols.) (London) Vol. 1 at 384.

[4] Berger, *Impeachment* at 2-3. See generally, Marshall, *The Impeachment of Warren Hastings* (Oxford, 1965).

[5] Berger, *Impeachment* at 55.

[6] *Constitutional Grounds for Presidential Impeachment*, Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, U.S. House of Representatives, 93rd Congress, 2d Sess. (February, 1974) at 24.

[7] 6 Cannon 643.

"mal-administration." However, James Madison opined that "mal-administration" was too broad, leaving the impeachment process open to corrupt use. George Mason then proposed inclusion of "other high crimes and misdemeanors against the state." This wording stood until the final weeks of the convention when the last three words were removed, leaving the remaining phrase "Treason, Bribery, or other high Crimes and Misdemeanors." [8]

The question of what constitutes a "high crime or misdemeanor" has been raised throughout the history of impeachment proceedings in the United States. The phrase has been characterized as a "term of art" harking back to British precedent. 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 the criminal laws. Of course, in some circumstances the conduct at issue, such as that of Judge Nixon, constitutes conduct warranting both punishment under the criminal law and impeachment.[9]

The term "Misdemeanor" as used in Article II does not mean a minor criminal offense as the term is generally employed in the criminal law. 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." [10] James Iredell at the North Carolina ratifying convention noted that impeachable misconduct included not only bribery or corruption, but also lack of candor. He stated that the President

> * * * must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induce them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them, in this case, I ask whether, upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him.[11]

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[8] Farrand, Max (ed.), *The Records of the Federal Convention of 1787* (Yale Univ. Press, New Haven, 1937) at 443, 545–550.

[9] *Constitutional Grounds for Presiential Impeachment* at 24.

[10] 11 *Annals of Congress* (1982 reprint) at 90.

[11] *Constitutional Grounds for Presidential Impeacehment* at 14.

At the time the impeachment process was included in the Constitution, the Framers were concerned primarily with providing a check on the President. They intended impeachment to be one means to assure the integrity of the Executive Branch. Federal judges were added to the impeachment provision at the end of the drafting process by making "all civil officers of the United States" subject to impeachment, in addition to the President and Vice President.[12]

The legislative trial is unique in our system of government. Congress is the only governmental body with the authority and duty to remove from office a federal judge who has violated the public trust. The unique nature of Congressional impeachment authority is underscored by Article II, Section 2, which precludes the President from exercising his power to pardon in cases of impeachment.

While the remedy of impeachment has been exercised infrequently, history attests to the care with which Congress has discharged this important responsibility. The House of Representatives has exercised its authority to impeach only fifteen times in the 201-year history of the United States Constitution. The fifteen federal officers impeached by the House include one President, one cabinet officer, one Senator and twelve federal judges. The Senate has convicted five of these officers, all federal judges.

The first impeachment occurred in 1797-1799 against Senator William Blount. The Senate ultimately dismissed the charges against Senator Blount for lack of jurisdiction because a Senator was not a "civil officer" and Mr. Blount had already been expelled from the Senate.[13] On February 24, 1868, the House of Representatives voted to recommend impeachment of President Andrew Johnson. President Johnson was acquitted by the Senate.[14] In 1876 William W. Belknap, then Secretary of War, resigned his post prior to a vote by the House. The House of Representatives nevertheless voted to impeach, but the Senate refused to convict for lack of jurisdiction due to Mr. Belknap's resignation.[15]

The remaining twelve impeachments involved federal judges, with five convictions resulting from trial by the Senate.

1. John Pickering (1803–1804)

Judge Pickering was charged in articles of impeachment with refusing to respect the rights of the United States as a party in a case involving the disposition of a ship confiscated by the government, and with profanity and drunkenness while on the bench. Judge Pickering's conduct suggested he was insane at the time of his impeachment. Judge Pickering was convicted on all articles and removed from the bench.[16]

2. Samuel Chase (1804)

Justice Chase was charged with eight articles of impeachment, six alleging that he handled a treason trial and a libel case in an oppressive, unjust and intemperate manner, and two charging him

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[12] Id. at 7.
[13] *Extracts from the Journal of the U.S. Senate* at 15.
[14] Id. at 321–327.
[15] Id. at 423–444; *Constitutional Grounds for Presidential Impeachment* at 49–50.
[16] *Constitutional Grounds* at 42; *Extracts from the Journal of the U.S. Senate* at 32–34.

with making partisan political statements to a grand jury. Justice Chase was acquitted on all articles.[17]

3. James Peck (1830–1831)

Judge Peck was charged with exceeding the limits of his contempt power by imprisoning an attorney who had published an article critical of the judge. Judge Peck was acquitted.[18]

4. West Humphreys (1862)

Judge Humphreys accepted an appointment as a Confederate judge at the outset of the Civil War without resigning as a Federal judge, and proceeded to support the Southern cause while serving on the Confederate bench. Judge Humphreys did not contest the charges and was convicted on all but one of seven impeachment articles.[19]

5. Mark Delahay (1873)

The House passed a resolution of impeachment on the grounds that Judge Delahay had been intoxicated both on and off the bench and was thereby rendered unfit to serve. Judge Delahay resigned before articles of impeachment were voted upon by the House.[20]

6. Charles Swayne (1903–1905)

Judge Swayne was impeached for filing false claims for travel expenses, commandeering a railroad car in receivership for his own personal use, residing outside his judicial district and misusing his contempt power in imprisoning two attorneys and a litigant. The Senate voted to acquit on all twelve articles.[21]

7. Robert W. Archbald (1912–1913)

Judge Archbald, a Circuit Judge of the U.S. Commerce Court and also a district court judge, was charged in thirteen articles with abusing his judicial position by inducing litigants to enter into favorable financial transactions with him.[22] The Senate found Judge Archbald guilty of five of the thirteen articles, including an omnibus article that summarized the other articles and sought the Judge's removal based upon his collective misconduct. During the Archbald proceedings it was debated whether a judge could be impeached for actions not precisely criminal in nature but that nonetheless amounted to misconduct and the appearance of impropriety. One commentator has noted:

> Much conduct on the part of a judge, while not criminal, would be detrimental to the public welfare. Therefore it seems clear that impeachment will lie for conduct not indictable nor even criminal in nature. It will be remembered that Judge Archbald was removed from office for

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[17] Constitutional Grounds at 43–45; *Extracts from the Journal of the U.S. Senate* at 54–60.
[18] *Constitutional Grounds* at 45–46; *Extracts from the Journal of the U.S. Senate* at 141–144.
[19] *Constitutional Grounds* at 46; *Extracts from the Journal of the U.S. Senate* at 152–160.
[20] *Constitutional Grounds* at 49.
[21] Id. at 50; *Extracts from the Journal of the U.S. Senate* at 583–594.
[22] *Constitutional Grounds* at 51–52.

conduct which, in at least one commentator's view, would have been blameless if done by a private citizen.[23]

8. George W. English (1925–1926)

Judge English was charged with misbehavior in the treatment of litigants. He summoned attorneys and public officials on an imaginary case and threatened them with prison. Judge English was also charged with improperly appointing bankruptcy receivers and wrongfully disposing of bankruptcy funds. Judge English resigned, and the Senate dismissed the charges on motion of the House managers.[24]

9. Harold Louderback (1932–1933)

Judge Louderback was charged with appointing an unqualified receiver who then used excessive fees to pay off the Judge's debts.[25] A majority of the Senators conclude the case had not been proven and voted not guilty. However, the debates were helpful in defining the standard for impeachment. The Congress reasoned that if a judge's conduct casts substantial doubt on the integrity of the judiciary, he has committed an impeachable offense. This was articulated by the House managers in the Senate proceedings:

> From an examination of the whole history of impeachment and particularly as it relates itself to our system of government, when the facts proven with reference to a respondent are such as are reasonably calculated to arouse a substantial doubt in the minds of the people over whom that respondent exercises authority, that he is not brave, candid, honest, and true, there is no other alternative than to remove such a judge from the bench, because wherever doubt resides confidence cannot be present. It is not in the nature of free government that the people must submit to the government of a man as to whom they have substantial doudt.[26]

10. Halsted Ritter (1933–1936)

Judge Ritter was charged in seven amended articles with corrupt and unlawful receipt of funds, practicing law and receiving fees while on the bench, and willfully failing to report and pay tax on income he had received.[27]

The Ritter trial produced significant debate over the standard for impeachment. The House managers asserted that any conduct by a judge that casts doubt upon his integrity constitutes an impeachable offense. They argued that public confidence in the judiciary demands a strict standard of behavior from judges. Representative Sumners, Chairman of the House Judiciary Committee and lead

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[23] *Legal Materials on Impeachment*, Committee on the Judiciary, H. Res. 93, 91st Congress, 2d Session (1970) at 18, citing Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684, 704–05 (1913).

[24] *Constitutional Grounds* at 52–54; *Congressional Record* 297 (1926) at 344–348.

[25] *Constitutional Grounds* at 54.

[26] *Proceedings of the U.S. Senate in the Trial of Impeachment of Harold Louderback*, H. Res. 403, 73rd Congress, 1st Session, Doc. No. 73 (1933) at 815.

[27] *Constitutional Grounds* at 55–57.

manager, explained the meaning of the constitutional standard of "good behavior" in his final summation before the Senate:

> It means obey the law, keep yourself free from questionable conduct, free from embarrassing entanglements, free from acts which justify suspicion, hold in clean hands the scales of justice. That means that he shall not take chances that would tend to cause the people to question the integrity of the court, because where doubt enters, confidence departs * * * When a judge on the bench, by his own conduct, arouses a substantial doubt as to his judicial integrity he commits the highest crime that a judge can commit under the Constitution. It is not essential to prove guilt. There is nothing in the Constitution and nothing in the philosophy of a free government that holds that a man shall continue to occupy office until it can be established beyond a reasonable doubt that he is not fit for the office. It is the other way. When there is resulting from the judge's conduct, a reasonable doubt as to his integrity he has no right to stay longer.[28]

In Congressman Sumner's view, one should focus on the effect the judge's conduct has on public confidence in his integrity. If his integrity can reasonably be questioned, confidence is lost and the judge should be removed from the bench.

Judges must be held to a higher standard of conduct than other officials. As noted by the House Judiciary Committee in 1970, "Congress has recognized that Federal judges must be held to a different standard of conduct than other civil officers because of the nature of their positions and the tenure of their office." [29]

The standard of behavior expected of federal judges was perhaps most vividly described during the Halsted Ritter proceedings by Senator McAdoo in a statement later quoted by House Judiciary Committee Chairman Peter Rodino in the Harry Claiborne and Alcee Hastings impeachments:

> Good behavior, as it is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. No judge can besmirch the robes he wears by relaxing these standards, by compromising them through conduct which brings reproach upon himself personally or upon the great office he holds. No more sacred trust is committed to the bench of the United States than to keep shining with undimmed effulgence the brightest jewel in the crown of democracy—justice.[30]

Judge Ritter did not object to the standard applied, but merely attempted to prove that his conduct was proper. The Senate applied a similar standard when it voted to convict Judge Ritter on the last article. Senators Borah, LaFollette, Frazier and Shipstead stated in a joint opinion:

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[28] *Proceedings of the U.S. Senate in the Trial of Impeachment of Halsted Ritter*, 74th Congress, 2d Session, Doc. No. 200 (1936) at 611.

[29] *Legal Materials on Impeachment* at 20.

[30] *Proceedings of the U.S. Senate in the Trial of Impeachment of Halsted Ritter* at 662.

> It is our view that a Federal judge may be removed from office if it is shown that he is wanting in that "good behavior" designated as a condition of his tenure of office by the Constitution, although such acts as disclose his want of "good behavior" may not amount to a crime. * * * If a judge is guilty of such conduct as brings the court into disrepute, he is not to be exempt from removal simply because his conduct does not amount to a crime. * * * [W]e sought only to ascertain from these facts whether his conduct had been such as to amount to misbehavior, misconduct—as to whether he had conducted himself in such a way that was calculated to undermine public confidence in the courts and to create a sense of scandal.[31]

11. Harry Claiborne (1986)

Judge Claiborne was the first federal judge in the history of our nation convicted of a crime while in office. A jury found Judge Claiborne guilty of two counts of filing false income tax returns. Judge Claiborne was in prison serving his sentence at the time of his impeachment and Senate trial. The articles of impeachment focused on Judge Claiborne's false tax returns and under-reporting of income. In addition, in a separate article the House urged the Senate to remove Judge Claiborne from the bench solely because of his criminal conviction.[32]

For the first time in impeachment history, the Senate chose to make use of a committee to hear the evidence pursuant to Senate Impeachment Rule XI, rather than holding trial before the full Senate. The standard for impeachment was examined thoroughly by the Senate impeachment committee that heard evidence and arguments involving Judge Claiborne. The specific issue of what constitutes "High Crimes and Misdemeanors" was confronted by House Manager Kastenmeier in response to questions posed by the Chairman of the Senate Rule XI committee:

> The CHAIRMAN. Thank you very much, Representative Kastenmeier. I have one question, and that is this. Article IV alleges misbehavior and misdemeanor. It does not allege, in the constitutional phrase, "high crime and misdemeanor," and I wonder what thought went into that particular choice of language.
>
> Mr. KASTENMEIER. It was in fact meant to be of lesser magnitude in terms of construing the conduct of the respondent. It was intended, incidentally, to suggest to the Federal Judiciary of this country, for purposes of precedent, that we were not relying strictly on a jury finding relating to a felony or a conviction. That we still were interested in the demeanor, the behavior of this civil officer, a judicial officer. And that his actions, having brought disrepute on that institution, were relevant as regarded in a distinct sense. For that reason, we felt article IV to be im-

[31] Id. at 644–645.
[32] H. Res. 461, 99th Congress, 2d Session (1986).

portant, to be at least as important as the others, in stating the whole case against the repondent.[33]

Senator George Mitchell of Maine, a former federal judge, articulated the following standard of conduct in deciding that Judge Claiborne should be convicted:

> I am convinced that Judge Harry Claiborne knowingly and willfully committed the crimes for which he was convicted.
>
> Let me say, those are the most difficult words I have had to speak since entering the Senate. The proudest moment of my life was when I was sworn in as a Federal Judge. It is an honor that is difficult to put into words. But with that honor comes a commensurate responsibility. Those persons who are invested with the awesome power to pass judgments on their fellow citizens must themselves adhere to the highest standards. Otherwise, public respect and support for our judicial system will collapse. * * *
>
> A convicted felon simply cannot sit as a Federal judge. I repeat that, a convicted felon cannot be permitted to sit as a Federal judge. It would totally undermine respect for law and authority in our country.[34]

Judge Claiborne was convicted on all articles except that which urged his removal from office solely on the basis of the felony tax fraud convictions. Forty-six Senators voted "guilty," 17 voted "not guilty" and 35 voted "present" on this article, resulting in less than the two-thirds vote necessary for conviction. A number of Senators opposed this article because they believed it improperly delegated the impeachment function to the judicial branch by forcing the Senate to rely solely on the jury verdict with no independent examination of the facts.[35]

12. Alcee L. Hastings (1988–1989)

On August 3, 1988, the House voted to impeach Judge Alcee L. Hastings of the Southern District of Florida. In seventeen articles of impeachment, the House alleged that Judge Hastings knowingly participated in a bribery conspiracy, willfully testified falsely with the intent to mislead the jury at his criminal trial, and improperly disclosed confidential wiretap information that he learned in his official capacity as a United States District Judge.[36]

During consideration of the Hastings impeachment resolution by the House Subcommittee on Criminal Justice, Congressman Hamilton Fish stated:

> Judge Hastings, according to clear and convincing evidence, engaged in criminal conduct by lying repeatedly during his trial, a course of conduct that led to his acquit-

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[33] *Report of the Senate Impeachment Trial Committee*, Senate Hearing 99–812, Part 1 (September 10, 1986) at 82.

[34] *Proceedings of the U.S. Senate in the Impeachment Trial of Harry E. Claiborne*, 99th Congress, 2d Session (1986) at 338–339.

[35] Id., e.g. at 294–295, 314 (Statement of Senator Specter), 340–341 (Statement of Senator McConnell), 343 (Statement of Senator Mathias).

[36] *Impeachment of Judge Alcee L. Hastings*, Report of the Committee on the Judiciary to accompany H.Res. 499, No. 100–810, 100th Congress, 2d Session (1988) at 5.

tal of conspiracy to commit bribery. The fact that an individual succeeds through crimes committed at trial in winning an acquittal in a criminal case does not release us from our responsibility to bring before the Senate the issue of his removal from public office.

Judge Hastings, according to clear and convincing evidence sought to sell his judicial office for private gain, and later perverted the legal process by lying under oath. Such conduct cannot be tolerated in a public official responsible for dispensing equal justice under law.[37]

In pre-trial proceedings the Senate rejected by a vote of 92 to 1 Judge Hastings' motion to dismiss many of the articles on the ground that his acquittal by the jury created a double jeopardy bar to impeachment for the same conduct as had been at issue in his criminal case. The Senate also rejected by a vote of 93 to 0 a challenge to the final article of impeachment, an "omnibus" article that alleged various misconduct including repeated false testimony at his criminal trial and sought Judge Hastings' removal from office based on the totality of his conduct.[38]

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.

III. Background of Inquiry Into the Conduct of Judge Walter L. Nixon, Jr.

On August 29, 1985, Walter L. Nixon, Jr., a United States District Judge for the Southern District of Mississippi since 1968 and Chief Judge of that district since 1982, was indicted by a federal grand jury sitting in Hattiesburg, Mississippi on one count of accepting an illegal gratuity in violation of 18 U.S.C. Section 201(g), and three counts of perjury (false declaration before a grand jury) in violation of 18 U.S.C. Section 1623.[39]

On February 9, 1986, following a two-week trial presided over by Judge James H. Meredith of the Eastern District of Missouri, and after deliberating for 18 hours, the jury unanimously acquitted Judge Nixon of the illegal gratuity count and one perjury count, but convicted him of the two other perjury counts. On March 31, 1986, Judge Meredith denied Judge Nixon's post-trial motions for acquittal and a new trial, and imposed a sentence of five years on each of the perjury counts, to run concurrently. Judge Nixon was released on his own recognizance pending appeal of his convictions.

On September 24, 1986, while his appeal was pending, the Supreme Court of Mississippi suspended Judge Nixon's license to

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[37] *Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary*, H.Res. 128, Impeachment Inquiry, Serial No. 11, July 7, 1988 at 498.

[38] *Congressional Record*, Vol. 135, No. 30, 101st Congress, 1st Session (March 16, 1989) at S2802–2803.

[39] *United States* v. *Walter L. Nixon, Jr.*, Cr. No. H85–00012 (L) (S.D. Miss., Hattiesburg Div.).

practice law in that state, finding that perjury is a felony involving "dishonesty, misrepresentation and deceit" such as to warrant suspension of his professional license.[40] The State of Louisiana also suspended Judge Nixon's license to practice law, pending disbarment proceedings in that state.[41]

On April 30, 1987, the Fifth Circuit Court of Appeals affirmed the criminal convictions,[42] and thereafter denied Judge Nixon's petition for rehearing en banc.[43] On January 19, 1988 the United States Supreme Court denied Judge Nixon's petition for a writ of certiorari.[44]

On February 11, 1988, following exhaustion of Judge Nixon's appellate rights, the Judicial Council of the Fifth Circuit certified to the Judicial Conference, as provided by 28 U.S.C. Section 372(c)(7)(B), that Judge Nixon had engaged in conduct that might constitute grounds for impeachment under Article I of the United States Constitution. On March 15, 1988, based solely on the criminal convictions, the Judicial Conference certified and transmitted to the Speaker of the House of Representatives a determination that Judge Nixon's impeachment may be warranted.

On March 23, 1988, Judge Nixon reported to Eglin Air Force Base Prison Camp in Florida to begin serving his sentence. Judge Nixon relinquished all judicial responsibilities following his indictment in August, 1985, and has not performed the duties of his position since that date. However, he will continue to draw his judicial salary for life, currently $89,500 per year, unless and until he resigns or is removed from the bench by impeachment by the House and conviction by the Senate.

The certification of the Judicial Conference that Judge Nixon had "engaged in conduct which might constitute one or more grounds for impeachment" led to the introduction on March 17, 1988 of House Resolution 407, impeaching Judge Nixon. The resolution was referred to this Committee, and subsequently to the Subcommittee on Civil and Constitutional Rights for investigation.

While the subcommittee was conducting its independent impeachment investigation, Judge Nixon sought to vacate his criminal conviction and sentence through a petition filed pursuant to 28 U.S.C. Section 2255 for post conviction relief. The matter was assigned to Chief Judge John F. Nangle of the Eastern District of Missouri, and an evidentiary hearing on the petition was held in Jackson, Mississippi on August 29 and 30, 1988. After considering the evidence and extensive argument by the parties, Judge Nangle denied the motion to vacate the convictions on December 19, 1988.[45]

IV. Committee Consideration and Vote

The Constitution requires that impeachment proceedings have two separate and distinct stages. Article I, Section 2 states that the

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[40] *Mississippi State Bar* v. *Nixon*, 494 So. 2d 1388 (1986).
[41] Order of the Louisiana Supreme Court in Docket No. 88-0699, April 6, 1988.
[42] *Nixon* v. *United States*, 816 F.2d 1022 (5th Cir. 1987).
[43] *Nixon* v. *United States*, 827 F.2d 1019 (5th Cir. 1987) (en banc).
[44] *Nixon* v. *United States*, — U.S. —, 108 S.Ct. 749 (1988).
[45] *Nixon* v. *United States*, Civ. No. H88-0052 (G) (S.D. Miss., Hattiesburg Div.). Judge Nangle's December 19, 1988 opinion is reported at 703 F. Supp. 538 (S.D. Miss. 1988).

House of Representatives "shall have the sole Power of Impeachment," while Article I, Section 3 provides that "The Senate shall have the sole Power to try all Impeachments." The House of Representatives, therefore, inquires into whether an officer of the United States should be impeached, while the Senate conducts the trial if the House adopts articles of impeachment.

Mindful of principles of separation of powers, the need for an independent judiciary, and the House of Representatives' sole and solemn responsibility to determine whether to present articles of impeachment, the subcommittee conducted a thorough, independent investigation into the conduct of Judge Walter L. Nixon, Jr. The subcommittee is aware of the jury verdict in Judge Nixon's criminal trial, but did not feel bound either by the jury's conclusions or by predicate findings of fact that may have led to the guilty verdict.

The subcommittee's investigation began with an exhaustive review of Judge Nixon's criminal case, including pre-trial pleadings, testimony and exhibits from the two-week jury trial, post-trial motions and accompanying testimony, and appellate and post-conviction materials. The trial transcript alone consists of approximately 2200 pages.

The subcommittee also examined the public files regarding the prosecutions of Wiley Fairchild, Redditt Andrew "Drew" Fairchild, and Paul H. "Bud" Holmes, three of the principal witnesses who testified in Judge Nixon's criminal trial. Among other records reviewed were certain grand jury transcripts released by order of Chief Judge John F. Nangle of the Eastern District of Missouri in connection with the action filed by Judge Nixon seeking to vacate his criminal conviction.

The subcommittee conducted seven full days of hearings, during which nine witnesses testified. The subcommittee admitted and reviewed over 100 exhibits during the hearings, and also accepted proffers and affidavits of several other witnesses in lieu of live testimony.

The subcommittee provided Judge Nixon with a full opportunity to present evidence establishing his fitness to remain on the bench. By letter dated March 18, 1988, Committee Chairman Rodino notified Judge Nixon of the introduction of H. Res. 407 and stated that he would have the opportunity to appear and present evidence before the subcommittee. Chairman Rodino again advised Judge Nixon of his opportunity to appear and testify by letter dated May 31, 1988. Throughout the hearings Judge Nixon was present and represented by counsel—David Stewart, Esq., of the Boston and Washington, D.C. law firm of Ropes and Gray, and Boyce Holleman, Esq., and Michael Holleman, Esq., of Gulfport, Mississippi.

Prior to the outset of subcommittee hearings in June, 1988, Judge Nixon, through counsel, declined to testify under oath, saying it was "impossible for him to prepare adequately to present full testimony and respond to questions." Instead, Judge Nixon requested the opportunity to make an opening statement under oath without being subject to questions by the subcommittee. This request was granted. In addition, Judge Nixon asked that his counsel, David Stewart, be permitted to make lengthy argument as an advo-

cate rather than as a fact witness. The subcommittee also granted this request.

Throughout the hearings Judge Nixon through his counsel was afforded the full opportunity to cross-examine witnesses. Notwithstanding the fact that impeachment proceedings have in most cases been ex parte, the subcommittee decided to afford broad latitude to Judge Nixon and his counsel with respect to their opportunity to participate in the subcommittee's public hearings.

Although Judge Nixon declined the initial invitation to give testimony, the subcommittee desired to hear the Judge's own version of the events and extended to him a second opportunity to testify. By letter from his counsel dated July 1, 1988, Judge Nixon accepted this second invitation, subject to a request that he be permitted to testify after all other scheduled witnesses, and that unlike all other witnesses, he be allowed to give his direct testimony under questioning by his own counsel rather than by Special Counsel to the Committee. The subcommittee granted these requests, and Judge Nixon ultimately testified on July 12, 1988.

In addition to affording Judge Nixon and his counsel the opportunity to testify, present evidence, give oral argument and conduct cross-examination, the subcommittee also carefully considered hundreds of pages of written argument presented by Judge Nixon's counsel prior to, during, and after the hearings. The subcommittee made certain that all issues of concern were made known to Judge Nixon so that he could present his position. Accordingly, by letter from Special Counsel to counsel for Judge Nixon dated August 15, 1988, the subcommittee solicited additional argument from the Judge concerning the truthfulness of certain of his statements in his interview and his grand jury testimony that were not directly the subject of criminal charges, but that the Committee ultimately concluded were false. Judge Nixon's counsel submitted lengthy written argument on these statements in response to the subcommittee's invitation.

At the request of Committee Chairman Rodino, the Federal Bureau of Investigation and the Department of Justice assisted the Committee's investigation by making records available for review and by permitting law enforcement officials to be interviewed by the Committee. By letter to Chief Judge Nangle of the Eastern District of Missouri, Chairman Rodino also requested that the Committee be given access to the record of the Hattiesburg grand jury, to determine whether the grand jury had unearthed information that did not ultimately result in criminal charges but that nevertheless might shed light on Judge Nixon's fitness to remain on the bench. Judge Nangle granted the Committee's request by order dated December 5, 1988.[46] The grand jury materials were reviewed as part of the subcommittee investigation.

H. Res. 87, impeaching Judge Walter L. Nixon, was introduced on February 22, 1989, and referred to the Subcommittee on Civil and Constitutional Rights. On March 21, 1989, the subcommittee by vote of 8 to 0 favorably reported to the Committee H. Res. 87, as

[46] *Nixon* v. *United States*, Civ. No. H88-0052(G)(S.D. Miss., Hattiesburg Div.).

amended, which contains three articles of impeachment against U.S. District Judge Walter L. Nixon, Jr.

Article I deals with Judge Nixon's false statement to the grand jury that the state prosecutor never discussed the Drew Fairchild state drug smuggling case with him. Drew Fairchild is the son of Wiley Fairchild, a local businessman who had provided Judge Nixon with a lucrative oil investment. This same statement was found by the jury to be false and resulted in Judge Nixon's conviction on one of the perjury counts.

Article II deals with Judge Nixon's statement to the grand jury that he had nothing whatsoever, officially or unofficially, to do with Drew Fairchild's case; never talked to anybody, including the State prosecutor, about the case; and never influenced anyone with respect to the case. This statement was also found by the jury to be false and resulted in Judge Nixon's conviction on a second count of perjury.

Article III charges Judge Nixon with undermining the integrity of the judiciary, disobeying the law, and bringing disrepute on the courts by making a series of fourteen false statements during a recorded interview with federal investigators and in grand jury testimony. These fourteen statements show a deliberate effort by Judge Nixon to conceal his knowledge of and involvement in the Drew Fairchild case from federal authorities and the grand jury.

On April 25, 1989, the Committee marked up H. Res. 87. By vote of 34 to 0, the Committee ordered the resolution reported favorably with an amendment in the nature of a substitute containing the three articles recommended by the subcommittee.

V. Statement of Facts

A. Judge Nixon's Oil and Gas Investment with Wiley Fairchild

In February , 1979, Judge Nixon approached Carroll Ingran, who was both a friend and a Hattiesburg, Mississippi, attorney who practiced before him. Hampered by the limitations of hs judicial salary and hoping to generate additional income, Judge Nixon specifically asked Mr. Ingram about the possibility of making an oil investment with one of Mr. Ingram's clients, Hattiesburg construction and oil millionaire Wiley Fairchild. Judge Nixon had never met Mr. Fairchild at the time this request was made, but knew Mr. Fairchild was in the construction business.

In the spring of 1979, Judge Nixon attempted to contact Mr. Ingram to reiterate the Judge's continued interest in investing with Wiley Fairchild. Judge Nixon called periodicaly to check if Mr. Ingram had discussed his request with Mr. Fairchild. Mr. Ingram testified that he felt "on the spot" about Judge Nixon's request and was reluctant to present the matter to Mr. Fairchild, to the point of avoiding the Judge's calls. However, Mr. Ingram ultimately approached Wiley Fairchild and asked him to "put the Judge in a good oil deal."

Wiley Fairchild did not know Judge Nixon personally, but understood he was a federal judge. Mr. Fairchild had previously helped a former Governor of Mississippi and the Mayor of Hattiesburg with investments so as to have "friends" in public office, and saw Judge Nixon as an "influential man" who might be able to help him in

the future. Wiley Fairchild never offered mineral interests to the public. Rather, he purchased oil and gas leases and then developed wells and kept the profit. Judge Nixon knew Mr. Fairchild was not in the business of selling oil interests to the public at large.

Mr. Fairchild finally agreed to convey to the Judge partial interests in three wells, two in Mississippi and one in Alabama. Wiley Fairchild selected the wells himself, without any discussion with Judge Nixon. Mr. Fairchild testifed that he selected three wells that he felt would be profitable for the Judge, although both Mr. Fairchild and Judge Nixon claim they understood the investment to be a "gamble."

In the sumer of 1979, Carroll Ingam told Judge Nixon that Wiley Fairchild would be "delighted" to put in an investment, and by late 1979 Mr. Ingram advised the Judge of the three specific wells Mr. Fairchild had selected. Judge Nixon contacted Mr. Ingram "a couple of times" thereafter to conclude the transaction, and was told by Mr. Ingram that Wiley Fairchild "is the kind of man you cannot push. He will take his own sweet time."

In February or March of 1980, Judge Nixon met Wiley Fairchild for the first time at the office of W.R. Fairchild Construction Company in Hattiesburg. By the end of the meeting, according to Judge Nixon, the two men had reached an agreement to enter into the investment. There was no negotiation over the price or other terms of the investment.

Judge Nixon has testified that, over the next year, he telephoned Wiley Fairchild frequently, perhaps more than ten times. Then in late February, 1981, Mr. Fairchild directed Robert L. ("Skip") Jarvis, an employee in his office, to draw up documents conveying royalty interests in the three wells he had chosen for Judge Nixon. Mr. Fairchild did not identify the grantee and told Mr. Jarvis to leave the grantee portion blank. Mr. Jarvis completed an initial draft of the conveyances and forwarded them to Carroll Ingram for review. Mr. Ingram returned the draft documents to Wiley Fairchild. Mr. Fairchild then instructed Mr. Jarvis to revise the draft documents by tripling the acreage to be sold to Judge Nixon and by backdating the documents a year. During the first week of March, 1981, Mr. Jarvis prepared new documents backdated to February 25, 1980, with increased acreage.

The participants disagree as to the reasons for the backdating. By March, 1891, when the documents were backdated, Wiley's son Drew had been identified by federal authorities as a co-conspirator in a major marijuana smuggling effort at the Hattiesburg Airport. Wiley Fairchild testified that the deeds were backdated on Mr. Ingram's advice "so that it would look better," Judge Nixon testified that Carroll Ingram told him the deeds were backdated to conform to the approximate date of the "gentleman's agreement," i.e. when Wiley Fairchild first agreed to sell the interests to Judge Nixon. Mr. Ingram, however, disputes both Judge Nixon's and Mr. Fairchild's testimony on this point.

The deeds ultimately executed by Wiley Fairchild and Judge Nixon stated that the conveyances were not effective until the date the wells began production. The language of the conveyances indicates that if the wells failed to produce, Judge Nixon had no obligation to pay for the investment.

As part of the loan Judge Nixon executed three promissory notes. Wiley Fairchild testified that these notes were prepared substantially after the deeds were executed. Carroll Ingram testified that someone in his law office prepared the notes at the same time the deeds were prepared. The notes were signed by Judge Nixon in February, 1981, though they are dated February, 1980. The notes were not reported on the Fairchild Construction Company books until the spring of 1982, after Judge Nixon received royalty payments and began to pay off the notes.

Wiley Fairchild met again with Judge Nixon in the late spring of 1981 after the mineral deeds had been delivered to the Judge by Mr. Ingram. On this occasion, Judge Nixon told Mr. Fairchild of his desire to generate additional income because of the anticipated expense of putting his children through college. Judge Nixon has acknowledged that at the meeting, he thanked Mr. Fairchild for "putting him a deal" and told him, "* * * if I can ever help you, I will and if I can't, I'll just tell you I can't."

Judge Nixon began receiving royalty checks from Fairchild Construction Company in February, 1982. By the date of his criminal trial in early 1986, Judge Nixon had received over $60,000 from the three wells, which were expected to produce for another 12 to 20 years. By January 24, 1989, Judge Nixon had received over $73,000 from the Fairchild investment, and continues to receive income from the investment. Judge Nixon paid back the $9,500 notes with interest, but only after receiving royalty payments from Fairchild Construction Company in excess of the initial investment so that he was never out-of-pocket.

B. The Drew Fairchild Drug Smuggling Case

On August 4, 1980, an airplane with 2,200 pounds of marijuana was seized by federal and local drug enforcement agents at the Hattiesburg Municipal Airport. Arrests were made at the scene and on August 19, 1980, an indictment was returned in federal court against three of the smugglers.[47] Drew Fairchild, Wiley Fairchild's 50 year-old son, was a participant in the smuggling conspiracy, but was not prosecuted at that time. Drew Fairchild's role in the conspiracy, as manager of the airport, was to give the plane permission to land and refuel so it could reach its destination.

Shortly after the indictment of the smugglers, Drew Fairchild and his lawyer, Bill Porter, approached Forrest County District Attorney Paul H. "Bud" Holmes to discuss Drew Fairchild's legal situation. Mr. Holmes sent them to George Phillips, United States Attorney for the Southern District of Mississippi, who was overseeing the federal prosecution of the drug case. As a result of discussions with the U.S. Attorney's office, on November 19, 1980, Drew Fairchild entered into a "Memorandum of Understanding" under which he agreed to plead guilty to felony charges, pay a $15,000 fine, and receive a sentence of 5 years probation in return for cooperating with the government in the drug case. Drew Fairchild was subsequently debriefed by agents working with the U.S. Attorney's office, who concluded that Drew Fairchild was not being completely

[47] *United States* v. *Malcolm Nathan, et al.*, Crim. No. H. 80-00005 (C) (S.D. Miss., Hattiesburg Div.)

cooperative. The U.S. Attorney's office determined, therefore, that Drew Fairchild would be prosecuted for his involvement in the drug smuggling conspiracy.

In March, 1981, Bill Porter sued Drew Fairchild to collect a $10,000 legal fee in connection with his representation of Drew Fairchild in the drug case. Approximately one quarter of the fee was paid by Wiley Fairchild on July 3, 1981, but Mr. Porter complained to Bud Holmes about his inability to collect the full fee from Drew Fairchild. Mr. Holmes thereafter called U.S. Attorney Phillips and discussed the status of Drew Fairchild's case. Mr. Holmes offered to take over the case and indict Drew Fairchild on state drug charges. Mr. Phillips agreed to transfer the case. In his testimony before the subcommittee, Mr. Holmes stated that he assumed control over Drew Fairchild's case both to carry out his law enforcement duties and to help his friend Bill Porter collect the full fee.

On August 26, 1981, the Forrest County grand jury returned an indictment against Drew Fairchild and Robert Watkins, the pilot in the drug-smuggling conspiracy.[48] Mr. Watkins was then a fugitive. Drew Fairchild was arraigned on September 3, 1981 with his attorney, Bill Porter, present. Mr. Porter demanded the remainder of his $10,000 fee "up front." In order to obtain the money, Wiley Fairchild made his son Drew turn over numerous oil leases owned by Drew. Wiley Fairchild then paid Mr. Porter the remainder of the fee.

In December, 1981, Robert Watkins was apprehended in Texas. This spurred negotiations between Drew Fairchild, his counsel and District Attorney Holmes. Drew Fairchild entered a guilty plea to the state charges on January 12, 1982. Messrs. Holmes and Porter orally agreed that if Drew Fairchild cooperated against Robert Watkins, he would receive five years probation and a $5,000 fine, with sentencing to occur after the prosecution of Mr. Watkins was completed. Wiley Fairchild believed that with this plea agreement and his fee payment to Mr. Porter, he would be troubled no more by his son's case, which had generated considerable media attention because of Wiley Fairchild's wealth and standing in the Hattiesburg community.

Drew Fairchild's sentencing was scheduled for March 19, 1982, but was delayed due to his back surgery. In May, 1982, Robert Watkins failed to appear at a scheduled hearing and his bond was revoked. Drew Fairchild's case was continued through the summer of 1982. In October, 1982, Mr. Watkins was apprehended in Florida, and extradition proceedings began. Drew Fairchild's sentencing was continued again in November, 1982, because Mr. Watkins had been apprehended.

On December 23, 1982, pursuant to a motion prepared at the direction of Bud Holmes, Drew Fairchild's drug case was "passed to the file." As a matter of local practice, this meant that Drew Fairchild's case was put on the inactive list. A number of witnesses testified at Judge Nixon's trial that this was an unprecedented disposition for a defendant who has pled guilty. In his subcommittee testimony, Mr. Holmes stated that by passing the case to the files, he intended to "sweep the case under the rug" so that Drew Fairchild

[48] *State* v. *Redditt Andrew Fairchild and Robert L. Watkins*, No. 10,041 (Cir. Court of Forrest Co., Miss.)

would not even have to pay the fine or serve probation as contemplated under the plea agreement. Drew and Wiley Fairchild were extremely pleased with the passing of the case to the file and believed that Drew's legal problems were finally at an end. This disposition of the case was neither requested nor anticipated by Drew Fairchild. Indeed, Drew Fairchild's attorney, Bill Porter, had asked Bud Holmes to carry out the plea agreement and have Drew sentenced before a particular judge who was presiding over the case left the bench.

District Attorney Holmes repeatedly testified, both at trial and before the subcommittee, that a primary reason for sweeping the Drew Fairchild case "under the rug" was a meeting between Mr. Holmes and Judge Nixon at Mr. Holmes' farm and a telephone call that same evening involving Judge Nixon, Bud Holmes and Wiley Fairchild concerning Drew's case. Bud Holmes verified, both in his trial testimony and his appearance before the subcommittee, that had it not been for Judge Nixon's involvement, the Drew Fairchild case would never have been passed to the files.

In early January, 1983, Forrest County Circuit Court Judge Dickie McKenzie took office after defeating the incumbent, Judge Jack Weldy, in an election. Judge McKenzie observed that the Drew Fairchild case had been passed to the file, expressed his concern about what had occurred, and the matter was reported in the local news media. Robert Watkins was returned to Hattiesburg and arraigned on January 26, 1983. On that same date, one month after passing the case to the files, Mr. Holmes reinstated Drew Fairchild's case to the active docket. In the motion to reinstate the case, Mr. Holmes stated that Mr. Watkins' return to Mississippi justified reactivation of Drew Fairchild's case. Mr. Holmes testified at Judge Nixon's trial, however, that a primary reason for having the case reinstated was negative publicity concerning the passing of the case to the file.

C. Judge Nixon's Involvement in Drew Fairchild's Case

Drew Fairchild's drug prosecution generated a great deal of negative publicity in Hattiesburg. It was a source of embarrassment and humiliation to Wiley Fairchild, who was concerned about his family's reputation. Mr. Fairchild felt he was being extorted in connection with his son's case because of the different treatment of Robert Royals, Drew Fairchild's comanager at the airport and a participant in the smuggling conspiracy. Royals had not been prosecuted by federal or state authorities. Wiley Fairchild testified that Mr. Royals told him that Bill Porter had said Wiley should "get off his money" to help Drew, who had his "tail in a crack."

Convinced that Bud Holmes and possibly others were, in Mr. Fairchild's words, "blackmailing" him in connection with his son's case, Wiley Fairchild sought help from Judge Nixon. Mr. Fairchild testified that he telephoned Judge Nixon and, when the Judge was unavailable, left a message asking the Judge to stop by the W. R. Fairchild Construction Company office in Hattiesburg. Wiley Fairchild specifically wanted Mr. Holmes to take care of his son's case as promised, and sought out Judge Nixon because of the Judge's previous offer of help—"* * * if I can ever help you I will and if I can't, I'll just tell you I can't"—and because he knew Judge Nixon and Mr. Holmes were very good friends.

Judge Nixon visited Wiley Fairchild's office in Hattiesburg for a fifteen or twenty-minute meeting. Wiley Fairchild [illegible] call

when this meeting occurred, although he testified at Judge Nixon's trial that it occurred before he learned his son's case had been passed to the file. At the meeting, Wiley Fairchild told the Judge he was being "blackmailed" by Mr. Holmes and possibly Carroll Ingram concerning the handling of Drew Fairchild's drug case. Mr. Fairchild emphasized the unfairness of his son's predicament compared to the treatment of Robert Royals. Wiley Fairchild told Judge Nixon, "* * * if they will go ahead and prosecute Bob Royals they won't hear a damn word out of me. He's guilty and my son's guilty, but I just don't like them picking on my son because I got money." Mr. Fairchild does not recall Judge Nixon's response to his "blackmail" allegations, other than that the Judge may have "grunted a little something or another."

Judge Nixon met with Bud Holmes shortly after hearing of Wiley Fairchild's complaints of "blackmail" in connection with Drew Fairchild's case. Mr. Holmes believes that this occurred on May 14, 1982.[49]

According to Mr. Holmes, he and Judge Nixon had a couple of drinks at the District Attorney's office and then drove to Mr. Holmes' farm outside Hattiesburg. Mr. Holmes testified that during the drive Judge Nixon said that Wiley Fairchild had "asked me [Nixon] if you [Holmes] and I weren't good friends and I told him, yes, you know, we were. And he said, well, would you mind putting in a good word for my boy?" Mr. Holmes testified that Judge Nixon expressly said he did not want Mr. Holmes to do anything wrong, embarrassing, or against his oath of office, but that he [Nixon] was "just saying that Mr. Fairchild asked me to put in a good word."

Mr. Holmes testified that he reacted to these statements from his friend Judge Nixon by asking, "What is it you want? You want an apology? I don't know. What does the man want?" When Judge Nixon reiterated that he was simply "putting in a good word" and not asking Mr. Holmes to do anything, Mr. Holmes responded, "* * * hell, I'm District Attorney, I'll pass it to the files." Judge Nixon then told him, "* * * I'm not asking you to do that. Now I'm not asking you do do anything now."

Bud Holmes testified that after they arrived at the farm, he and Judge Nixon continued to talk about the Drew Fairchild case. Mr. Holmes told Judge Nixon about the oral plea agreement already negotiated with Bill Porter, calling for probation and a fine in exchange for Drew Fairchild's cooperation. Mr. Holmes testified that after hearing the terms of Drew Fairchild's plea arrangement, Judge Nixon asked if Wiley Fairchild knew of the deal, and said he wished to telephone Mr. Fairchild and tell him about the arrangement. Mr. Holmes testified that Judge Nixon then telephoned Wiley Fairchild.

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[49] Mr. Holmes bases his recollection upon unrelated events, particularly a wedding ceremony he attended in Jackson, Mississippi the following day. A marriage certificate made a part of the record before the Subcommittee corroborates Mr. Holmes' recollection of May 14, 1982 as the probable date. Mr. Holmes has repeatedly stated that his meeting with Judge Nixon could well have been another date. Visitor logs from the Forrest County District Attorney's office reflect Judge Nixon's presence at Mr. Holmes' office on May 13, 1982, as well as June 24, July 16, and October 20 of that year.

Wiley Fairchild confirmed that he received a telephone call from Judge Nixon around seven o'clock one night. Mr. Fairchild had been drinking that evening but remembers the call because of its significance. Mr. Fairchild testified that Judge Nixon said, "Wiley, you know that man we was talking to this evening? * * * I'm in his house, and everything (is) going to be taken care of to your satisfaction." Thereafter, according to Mr. Fairchild, Bud Holmes got on the line and said, "Wiley, when this man asks me to do something, I don't ask no questions, I just go ahead and do it."

In this trial testimony Wiley Fairchild specifically recalled that Judge Nixon was on the phone first. Mr. Fairchild testified that this call made him very happy because it meant that his son's case was "done away with once and for all." The next thing he recalled about his son's case was that it was passed to the file.

Mr. Holmes' recollection of the phone call in his trial testimony was similar to Wiley Fairchild's—that Judge Nixon placed the call and told Mr. Fairchild, "I'm out at his farm and he tells me your son isn't going to jail, and I just wanted to call and tell you that." According to Mr. Holmes, Judge Nixon then went on to thank Wiley Fairchild for the profitable oil investment opportunity. Mr. Holmes testified that he then took the phone and told Mr. Fairchild he would pass the case to the file, adding that Judge Nixon should get the credit for helping Drew Fairchild.

Carroll Ingram learned of Judge Nixon's conversations with Bud Holmes and Wiley Fairchild concerning the Drew Fairchild case from all three participants—Wiley Fairchild, Bud Holmes and Judge Nixon himself. Mr. Ingram testified that in the fall of 1982, Wiley Fairchild told him that he (Fairchild) had asked Judge Nixon to talk to Bud Holmes about Drew's case, that Judge Nixon had talked to Mr. Holmes and that the results were "positive" such that "Drew Fairchild's case was going to be okay."

Mr. Ingram testfied that Judge Nixon told him that he (Nixon) had talked to Bud Holmes about the Drew Fairchild case because Wiley Fairchild had asked him to do so. Judge Nixon told Mr. Ingram that Mr. Holmes said he would consider this request and that Drew Fairchild's case "was okay, that there was not anything going to happen in Drew Fairchild's case."

Following his meeting with Judge Nixon and the telephone call to Wiley Fairchild from the farm, District Attorney Holmes let Drew Fairchild's case "just sit" until he passed the case to the file in late 1982 at the end of Judge Weldy's term. Mr. Holmes told the subcommittee that he planned on sweeping Drew Fairchild's case "under the rug" in part because of his discussion with Judge Nixon and promise to Wiley Fairchild. Mr. Holmes testified that while Judge Nixon did not specifically ask him to pass the case to the file, the Judge's "putting in a good word for Drew * * * caused enough influence on me to go ahead and do what I did." Mr. Holmes repeatedly testified, both at trial and before the subcommittee, that but for Judge Nixon's intervention he would not have passed the case to the file in December, 1982.

Mr. Holmes gave a copy of the order passing Drew Fairchild's case to the file to Carroll Ingram, with a request that Mr. Ingram pass it along to Wiley Fairchild. Wiley Fairchild testified that Mr.

Ingram did so and that Mr. Ingram told him upon delivery, "I got you a Christmas present."

D. The FBI/Department of Justice Interview of Judge Nixon on April 19, 1984

On November 3, 1983, an anonymous caller telephone the Federal Bureau of Investigation claiming there was an improper relationship between Wiley Fairchild and Judge Nixon. The caller suggested that Wiley Fairchild may have conveyed mineral interests to Judge Nixon as a bribe for favorable treatment in Drew Fairchild's drug case. The caller advised the FBI that the mineral interests had been backdated to make it appear that the transfer had taken place before Drew Fairchild's drug trouble, and not as a result of the drug case. He also claimed that the notes to be repaid by Judge Nixon were not prepared in the normal course of business, but appeared only after Wiley Fairchild had been challenged by one of his employees on his relationship with Judge Nixon. The informant ultimately came forward and identified himself as Robert Jarvis, a former employee of Wiley Fairchild. Mr. Jarvis is presently an Assistant State's Attorney in Florida.

During the subsequent investigation conducted by the FBI and the Public Integrity Section of the Department of Justice, Mr. Jarvis recorded a meeting with Wiley Fairchild, in which Mr. Fairchild maintained that there was nothing illicit about his relationship with Judge Nixon, but admitted that "certainly I'd rather do something for a judge or a prosecuting attorney. No, a judge. I'd rather do something for them than the average fellow. Because they're the ones who help you if you ever need it."

As part of the investigation, a lawyer from the Department of Justice and an FBI agent interviewed Judge Nixon in his chambers in Biloxi, Mississippi on April 19, 1984. The interview was taped-recorded with the Judge's consent. Judge Nixon was advised prior to and during the interview that the investigation was examining Judge Nixon's investment with Wiley Fairchild and the unusual handling of the Drew Fairchild case. During the interview, Judge Nixon denied, at several times and in the broadest possible terms, any knowledge of or participation in Drew Fairchild's case:

> Q. Did he [Wiley Fairchild] have anything on his mind that he wanted with you——
>
> Judge NIXON. You'd have to ask him because he's never asked——
>
> Q. I mean, did——
>
> Judge NIXON. Anything that or demanded anything. Of course, anything to do with his [Fairchild's] son's case absolutely had nothing whatsoever, cause I don't, I'm not even aware of really what that's about. I think I read something in the paper one time about it since then.
>
> Q. Did you——
>
> Judge NIXON. But if you can——
>
> Q. Detect anything——
>
> Judge NIXON. If you can detect or know of anything at, all where I ever had any connection with his son's case or

the disposition of it or handling of it or anything to do with it, I sure wish you'd tell me, and I'll——

Q. I, well, I——

Judge NIXON. Because there has——

Q. I can assure you, we have no information to that effect——

Judge NIXON. There has, because there has been nothing.

Q. No, I, I guess what I'm asking you is whether or not you detected anything untoward from either——

Judge NIXON. Abso——

Q. Mr. Fairchild——

Judge NIXON. Absolutely not. If I had, I'da pulled back immediately and would't have had a darn thing to do with it.

Q. From the time of that bust until ba-basically me talking to you about the case——

Judge NIXON. Uh-huh——

Q. You've had no connection, no knowledge of it, no participation in——

Judge NIXON. Correct——

Q. The Drew Fairchild case?

Judge NIXON. Absolutely, except something I read in the paper. It was either an editorial or state, or, or news article or something, a few years ago, I think——

* * * * *

Q. Do you recall any knowledge of the case, meaning the Fairchild case, while you were dealing with Wiley Fairchild?

Judge NIXON. No.

Q. And he certainly never brought it up?

Judge NIXON. Not to my recollection. I think I would recall that.

* * * * *

Q. Does he [Drew Fairchild] work with his father?

Judge NIXON. I have no idea. Didn't even know he existed, except from what I read about that and what you just told me. Absolutely no.

* * * * *

Q. I mean, I, our earnest desire is to wrap this end of it——

Judge NIXON. I understand——

Q. Completely, and often times judges are victimized by others——

Judge NIXON. Yeah, well, I don't——

Q. I mean, you're a savvy guy. You know that this happens.

Judge NIXON. Well, I don't know about that part of it, but all I know is ah nothing was done or nothing was ever mentioned about Wiley Fairchild's son, and I defy anybody to, and I say defy, I don't mean (unintelligible), but I challenge anybody to show any connection or anything I've

ever done in connection with Wiley Fairchild's son's case I certainly would (unintelligible) to begin with. And if I even suspected something like that was going on, I certainly wouldn't have ah invested or have any dealings, absolutely.

* * * * *

Q. Okay, so I'm—Just to complete the picture——

Judge NIXON. That's what I was, that's what I wanted to ask you, what allegation—I've never heard, you know, never had the [Drew Fairchild] case never heard about the case except what I told you, and ah certainly had nothing to do with it.

* * * * *

Judge NIXON. I understand, but regardless, what connection have I had with ah Fairchild's son's case? Isn't that the bottom line?

Q. It, it basically——

Judge NIXON. I mean——

Q. Could well be the bottom line.

Judge NIXON. Yeah, what, what——

Q. And that's why——

Judge NIXON. Could I have conceivably done?

Q. Well, that's why I had to ask you——

Judge NIXON. To influence the case? Ah, I certainly didn't do a thing in the world. I don't know a thing about—But what could I have done?

Q. Well, I mean, I don't know what you could have done. I mean it——

Judge NIXON. As United States District Judge.

Q. If someone wanted to use their imagination, I suppose they, they could think of things, and, I, that's why we ask you the question did Bud Holmes ever talk to you about the case?

Judge NIXON. Oh, no.

During the April, 1984, interview Judge Nixon did not disclose his meeting with Wiley Fairchild in which Mr. Fairchild had complained that he was being "blackmailed" by Bud Homes in connection with Drew Fairchild's case. Judge Nixon did not disclose his visit to Bud Holmes' farm and susequent telephone conversation with Wiley Fairchild concerning Drew's case. Nor did Judge Nixon reveal his later telephone conversation with Carroll Ingram concerning Drew Fairchild. Instead, Judge Nixon repeatedly and categorically denied any knowledge or involvement whatsoever concerning Drew Fairchild and the drug case. The Committee finds that Judge Nixon deliberately refused to disclose these important facts, and lied to law enforcement officials in an effort to cover up his involvement.

E. Judge Nixon's Sworn Testimony Before the Grand Jury on July 18, 1984

In the summer of 1984 a special federal grand jury was enpaneled in Hattiesburg to investigate possible criminality associated

with the Fairchild-Nixon investment and the handling of the Drew Fairchild drug prosecution. Judge Nixon appeared voluntarily and testified under oath on July 18, 1984, the first day the grand jury was convened. Judge Nixon retained counsel prior to his grand jury appearance, and was represented by counsel at the time of his testimony.

Judge Nixon was convicted of one count of making a false declaration before the grand jury,[50] a felony and a form of perjury, for the following testimony before the grand jury:

> Q. The grand jury has heard evidence that the prosecutor, the state prosecutor, who eventually handled the case was an individual named Bud Holmes. Is he a friend of yours?
>
> A. Very good friend of mine, long time friends, yes.
>
> Q. Did he ever discuss the Drew Fairchild case with you?
>
> A. No, not to the best of my recollection. I think I would recall if he had.

The jury also found Judge Nixon guilty of making a second false declaration based on the following grand jury testimony:

> Q. All right. Judge, do you have anything you want to add?
>
> The WITNESS. Yes, I do.
>
> I want to say this. I—Here (indicating) are your notes too, copies of your instruments, rather.
>
> I came here voluntarily and am very to cooperate with this grand jury and give them all the information that I have and that I could. And I have always thought everyone should do that, and that goes for the grand jury over which I'm supervising now, the other federal grand jury that's sitting at this time. I have nothing at all to—had nothing to hide or nothing to withhold and I brought everything that you asked me to bring.
>
> And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.
>
> I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal

[50] 18 U.S.C. Section 1623 provides that "Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both." In order to convict Judge Nixon of this form of perjury, the jury was required to find beyond a reasonable doubt that Judge Nixon's grand jury testimony was false, and that Judge Nixon knew his testimony was false. See *United States* v. *Nixon*, 816 F.2d 1022, 1029 (5th Cir. 1987). In addition, to establish this offense, the false statements must be material to the grand jury's investigation. At Judge Nixon's trial the question of materiality was resolved out of the presence of the jury by the trial judge. On appeal Judge Nixon did not challenge the correctness of the trial court's ruling that the subject matter of Judge Nixon's statements to the grand jury was, as a matter of law, material to the grand jury's investigation. 816 F.2d at 1029.

court. As you said, Judge Cox handled it. I don't know where—someone told me maybe Judge Russell handled one of the other defendants also and—but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence anybody with respect to this case. Didn't know anything about it until I read that account in the newspaper. Didn't even know Mr. Fairchild had a son when I was dealing with him in the business transaction.

So I want to say that because I understand that's what this is all about. The investigation is apparently, if the news media is correct, and if I understand it correctly, that's what this is about, the Drew Fairchild criminal case.

The Committee learned through its independent inquiry, that this closing statement to the grand jury was not spontaneous, but was prepared in writing by Judge Nixon prior to his grand jury appearance.

In addition to the foregoing grand jury testimony that was the focus of criminal charges and led to his convictions, Judge Nixon described to the grand jury his meetings with Wiley Fairchild as follows:

Q. If the first meeting [with Wiley Fairchild] produced the deal, what would the other meetings have been for?

A. I met with him several times. One time he told me that he thought he was over—maybe overcharging me for these and would maybe put me in another later. He mentioned something about the name of a well was—I don't know, remember when this was—it had something to do with the name School in the property. But he never did and there never was any mention of it.

And, as I say, I don't know of any reason I would have met with him after the transaction was finalized in the first part of 1981, but I can't say for sure. It's possible.

You're asking me about—I—I don't like to keep repeating it—but three or four years ago, and I'm trying to reconstruct this to the best of my recollection and knowledge.

As with the other grand jury and interview excerpts cited above, the Committee finds this response to be another instance of deliberate dissembling by Judge Nixon in an effort to conceal his meeting with Wiley Fairchild, his visit to Bud Holmes and the telephone call to Wiley Fairchild about the Drew Fairchild drug case. Although Judge Nixon was under the sworn obligation "to tell the whole truth and nothing but the truth" in his grand jury testimony, the Committee finds that he deliberately chose to conceal pertinent information from the grand jury.

F. The Prosecution of Wiley Fairchild, Bud Holmes and Drew Fairchild

On September 6, 1984, the Hattiesburg grand jury indicted Wiley Fairchild on charges of perjury and paying an illegal gratu-

ity to Judge Nixon. The perjury count alleged that Mr. Fairchild had instructed his employees to cover up his mineral transactions with Judge Nixon, and had failed to testify truthfully about this matter before the grand jury. The gratuity count was based upon the royalty payments to Judge Nixon.[51]

Prior to trial Wiley Fairchild told his attorneys about Judge Nixon's involvement in his son's case. During plea bargain discussions Mr. Fairchild's attorneys made government prosecutors aware for the first time of the meeting with the Judge in which Mr. Fairchild complained of being "blackmailed" in connection with his son's case and the telephone call by Judge Nixon from Bud Holmes' farm. On November 26, 1984, Wiley Fairchild pled guilty to the illegal gratuity charge. The perjury count was dismissed as part of the plea bargain, and in September, 1985, Mr. Fairchild was sentenced to two months of incarceration, which he served at a halfway house in Jackson, Mississippi.

On November 28, 1984, following the consummation of his plea agreement with the government, Wiley Fairchild appeared again before the Hattiesburg grand jury. Mr. Fairchild admitted he had not been completely honest in his initial grand jury appearance, and stated that he was not approached by Carroll Ingram on Judge Nixon's behalf about the investment until after the drug bust at the airport. Mr. Fairchild told the grand jury that the mineral conveyances to Judge Nixon were backdated to a date before the drug bust so that "they couldn't connect" the conveyances with his son's case. He also told the grand jury that he "wasn't concerned" with being paid by Judge Nixon for the mineral interests, which he said were actually worth three times the price Judge Nixon paid. Mr. Fairchild then told the grand jury about his meeting with Judge Nixon concerning his son's case, the subsequent telephone call from Bud Holmes' farm, and the passing of Drew Fairchild's case to the files.

Federal prosecutors learned more about the telephone call from Bud Holmes' farm through an interview of Carroll Ingram in January, 1985. Mr. Ingram then told Mr. Holmes that the government knew about the phone call and Judge Nixon's involvement in the Drew Fairchild case.

Shortly thereafter, Bud Holmes appeared before the grand jury. In his grand jury testimony Holmes admitted there had been a phone call to Wiley Fairchild about the Drew Fairchild case.

In March, 1985, Bud Holmes was indicted by the Hattiesburg grand jury on charges of perjury and obstruction of justice that in part alleged he had concealed evidence about the phone call with Wiley Fairchild from the farm.[52]

Bud Holmes' criminal trial began on June 17, 1985. After jury selection Mr. Holmes agreed to plead guilty to a criminal information charging him with contempt, with part of his contemptuous behavior being that he " * * * refused to disclose the substance of

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[51] *United States* v. *Wiley Fairchild*, Crim. No., H84-00009 (S.D. Miss., Hattiesburg Div). Count 1 of the indictment charged Mr. Fairchild with a violation of 18 U.S.C. Section 201(f), since amended, which prohibits the giving of a thing of value, such as royalty interests or a favorable loan, to a public official for and because of official acts to be performed by the public official. Mr. Fairchild pled guilty to this count of his indictment.

[52] *United States* v. *Paul H. (Bud) Holmes*, Crim. No. H.85-00004 (S.D. Miss., Hattiesburg Div.)

the aforementioned telephone call * * * ." As part of his plea, Mr. Holmes agreed to cooperate with the government and provide truthful testimony. Mr. Holmes appeared again before the grand jury following his plea, apologized for covering up his knowledge of the telephone call and told the grand jury of Judge Nixon's involvement. Mr. Holmes was fined $10,000 and sentenced to one year in prison following his guilty plea.[53]

The special federal grand jury investigation also brought to a close the criminal prosecution of Drew Fairchild for his role in the drug smuggling conspiracy. After the passing of the case to the files in December, 1982, and the restoration of the case to the active docket in January, 1983, Drew Fairchild's case had been continued because of delays in the Watkins prosecution until March of 1985. At that point and as a consequence of the special federal grand jury investigation into the handling of his case, Drew Fairchild was indicted on federal drug conspiracy charges, pled guilty and received a 3-year sentence with all but six months of the sentence suspended.[54] Drew Fairchild was also sentenced to 3 years imprisonment on his state charges, to be served concurrently with his federal sentence. As a result of a letter agreement between Drew Fairchild's counsel and current Forrest County District Attorney Glen White, Drew Fairchild served no time in state prison.

The Department of Justice also prosecuted Robert Royals, Drew Fairchild's co-manager at the airport who had never been prosecuted by Mississippi authorities. Mr. Royals was indicted by the special imprisonment for his role in the conspiracy.[55] Robert Watkins, the pilot of the drug-smuggling plane, remains a fugitive.

G. Judge Nixon's Post-Indictment Testimony

In both his April, 1984, interview with law enforcement authorities and his July, 1984, grand jury testimony under oath, Judge Nixon made no mention of his meeting with Wiley Fairchild at the offices of W.R. Fairchild Construction Co. in Hattiesburg, his conversation with Bud Holmes concerning Drew's case, his subsequent telephone call to Wiley Fairchild from Mr. Holmes' farm, and his later conversation with Carroll Ingram concerning Drew Fairchild. It was only during his testimony at his criminal trial, after Mr. Holmes, Mr. Ingram and Wiley Fairchild cooperated with the government, that Judge Nixon finally acknowledged his participation in these events.

Judge Nixon admits that he met with Wiley Fairchild at the offices of Fairchild Construction Company, although he claims that he did not do so at Mr. Fairchild's request. Rather, Judge Nixon contends that he simply stopped by the Fairchild office to "Keep in touch" with Wiley Fairchild and to discuss the progress of his investment. Judge Nixon also concedes that Wiley Fairchild raised the subject of "blackmail' in connection with Drew Fairchild's case,

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[53] After paying his fine Mr. Holmes challenged the remainder of his sentence and, on appeal, the fifth Circuit Court of Appeals held that under the criminal contempt statute Mr. Holmes could be sentenced to a fine or imprisonment, but not both. Accordingly, Bud Holmes served no time in prison for his crime. *United States* v. *Holmes*, 822 F.2d 481 (5th Cir. 1987).

[54] *United States* v. *Redditt Andrew Fairchild*, Crim. No. H85-00005 (S.D. Miss., Hattiesburg Div.).

[55] *United States* v. *Royals*, 777 F.2d 1089 (1985).

and complained about the disparate treatment between his son's case and the non-prosecution of Robert Royals, the co-conspirator. Judge Nixon claims that when confronted with Mr. Fairchild's allegation of "blackmail," he did not probe more deeply because he was "not a law enforcement officer," or Mr. Fairchild's attorney. According to Judge Nixon, Mr. Fairchild's complaints were "nonsense," but at the same time he was "shocked" by Mr. Fairchild's story.

Judge Nixon insists that Wiley Fairchild did not ask him to do anything in connection with Drew Fairchild's case. Nevertheless, Judge Nixon admits that he "had the impression" Mr. Fairchild wanted him to speak with Mr. Holmes, and Judge Nixon relayed Mr. Fairchild's complaints to Bud Holmes that very same day, purportedly because Mr. Fairchild's "blackmail" concerns were "weighing on my [Nixon's] mind."

Judge Nixon denies meeting Mr. Holmes at the District Attorney's office, and contends he did not drive with Mr. Holmes to the farm. However, the Judge admits meeting with Bud Holmes at the farm and speaking with Mr. Fairchild on the telephone. Judge Nixon contends that he did not "discuss" the facts of Drew Fairchild's case and specifically told Mr. Holmes he did not want to discuss the case, but it is undisputed that Drew Fairchild's case was a subject of his conversation with Mr. Holmes. Judge Nixon claims that Mr. Holmes was on the telephone, suddenly handed him the phone and said, "here, talk to Wiley Fairchild." Judge Nixon admits that during this telephone conversation Wiley Fairchild told him, "I'm glad you mentioned that matter to Bud * * * I'm satisfied."

Judge Nixon disputes the date of his meeting with Wiley Fairchild, his visit to Bud Holmes' farm and his telephone conversation with Mr. Fairchild. Both Bud Holmes and Wiley Fairchild have repeatedly placed these events as occurring before Drew Fairchild's case was passed to the file, and Carroll Ingram testified that his conversation with Wiley Fairchild about these events took place before Drew Fairchild's case was passed to the file. In contrast, Judge Nixon contends that these events took place in March 1983, after Drew Fairchild's case was passed to the file, such that his dialogue with Bud Holmes and Wiley Fairchild could have played no role in the handling of the Drew Fairchild drug prosecution.

At trial, Judge Nixon denied having been in Hattiesburg on May 14, 1982, the date Mr. Holmes believes the phone call may have taken place. Judge Nixon claimed that he was in Biloxi, 81 miles away, preparing for an asbestos trial. However, Judge Nixon's testimony was proven to be false during post-trial proceedings. Dental records confirmed that the Judge received treatment in Hattiesburg on May 14, 1982. Judge Nixon urged the subcommittee to accept his explanation that his testimony concerning May 14, 1982 was simply an "honest mistake" rather than deliberately false testimony.

It is impossible to reconcile Judge Nixon's own, post-indictment testimony regarding the key events with his repeated denials during his interview and grand jury testimony. Judge Nixon's various explanations—i.e., that he misunderstood the focus of the investigation, that the grand jury questions were vague, that the gov-

ernment trapped him into perjured testimony, etc.—cannot resolve to the Committee's satisfaction the contradictions between his interview statements and grand jury testimony on the one hand, and his post-indictment testimony on the other.

Judge Nixon conceded in his subcommittee testimony that he "didn't know" what question could have been asked of him in his interview and grand jury testimony that would have elicited the truth. He also told the subcommittee that in the grand jury he deliberately chose not to reveal Wiley Fairchild's blackmail allegations, the meeting at Holmes' farm and the telephone call. His stated justification—that he believed the blackmail complaint was "nonsense," hand been "resolved" and that it would have been "irresponsible" for him to reveal his knowledge to the grand jury—is inadequate. Judge Nixon consciously decided what portion of the truth federal investigators and the grand jury were entitled to hear. No witness, including a federal judge under investigation, may parcel the truth to serve his own purposes.

VI. Analysis of Articles of Impeachment

ARTICLE I

Article I charges Judge Nixon with giving false or misleading testimony during his appearance before the grand jury on July 18, 1984. During his grand jury testimony Judge Nixon denied, without qualification of any kind, that Forrest County District Attorney Paul Holmes ever discussed the Drew Fairchild case with him. This specific testimony was the subject of Count III of the criminal indictment against Judge Nixon. After hearing evidence the Mississippi jury unanimously found beyond a reasonable doubt that Judge Nixon's testimony on this point was intentionally false.

The Committee finds clear and convincing evidence that Judge Nixon made false or misleading statements to the grand jury regarding his conversations with District Attorney Holmes about the Drew Fairchild case. Even if one ignores the testimony of Bud Holmes concerning his conversations with Judge Nixon and the subsequent cover-up of the Judge's involvement, it is impossible to reconcile Judge Nixon's own version of the events in his trial and subcommittee testimony with his qualified denial in the grand jury in response to this question.

Judge Nixon claims that his testimony was true because he and Bud Holmes talked about Wiley Fairchild's complaint about "blackmail" in connection with the Drew Fairchild case, not about the "case" itself. Judge Nixon concedes that the alleged "blackmail" was about Drew Fairchild's case, that his talk with Holmes "related to" the case, and that certain details about the case, such as the terms of Drew Fairchild's plea agreement, were the subject of the conversation.

Judge Nixon's other principal defense in connection with this Article, both in his judicial proceedings and before the subcommittee, was that the word "discuss" is ambiguous. The Committee does not find this semantic argument to be persuasive. In the Committee's view Judge Nixon's conversation with Holmes was sufficiently a "discussion" for the Judge, having been sworn to tell the whole truth and nothing but the truth, to reveal fully his dialogue with

Mr. Holmes. Judge Nixon's failure to do so was a deliberate effort to mislead the grand jury.

Having found clear and convincing evidence that Judge Nixon testified falsely under oath about his contacts with Bud Holmes concerning Drew Fairchild's case, the Committee concludes that such conduct by a federal judge warrants his impeachment by the House and trial by the Senate.

ARTICLE II

Article II charges Judge Nixon with giving false or misleading testimony during his closing statement to the grand jury on July 18, 1984. This specific testimony was the subject of Count IV of the criminal indictment, and was found to be false beyond a reasonable doubt by the Mississippi jury.

The Committee finds clear and convincing evidence that Judge Nixon made false and misleading statements to the grand jury regarding his involvement in the Drew Fairchild case. In contrast to his defenses on Article I, Judge Nixon cannot claim that the question was "ambiguous," because the prosecutor simply asked Judge Nixon if he had anything else to tell the grand jury. Moreover, in his subcommittee testimony Judge Nixon revealed for the first time that his closing remarks to the grand jury were not angry, spontaneous utterances as first suggested by his counsel, but rather a prepared statement written prior to his grand jury appearance.

It is not necessary to credit the testimony of Bud Holmes, Wiley Fairchild or Carroll Ingram in determining whether Judge Nixon's closing remarks to the grand jury were truthful. The committee has compared Judge Nixon's trail and grand jury testimony and finds the two irreconcilable, particularly given the Judge's admission that he in fact recalled his "blackmail" meeting with Wiley Fairchild, his meeting with Mr. Holmes and the telephone call from Mr. Holmes' farm at the time of his grand jury appearance.

Contrary to the grand jury testimony set forth in Article II, Judge Nixon did indeed have "unofficial" involvement in the Drew Fairchild case and talked to three persons—Bud Holmes, Wiley Fairchild and Carroll Ingram—about the case. Moreover, according to Messrs. Holmes, Fairchild and Ingram, Drew Fairchild's case was passed to the files only after the Judge became involved. Mr. Holmes testified that he passed the case to the files in part because of Judge Nixon's influence, and Mr. Fairchild told Judge Nixon he was "satisfied" during the telephone call from Mr. Holmes' farm after Judge Nixon's intervention. Indeed, Judge Nixon acknowledged that he had exerted a "positive" influence over Drew Fairchild's case when he advised Mr. Ingram of his involvement.

Judge Nixon's denials in the grand jury were a deliberate effort to conceal his involvement and avoid any adverse publicity and embarrassment that might flow from the revelation that a federal Judge had played a role in a state criminal case, particularly the drug-smuggling prosecution of the son of a prominent businessman who had provided the Judge with lucrative oil investments. The Committee finds that Judge Nixon's false or misleading statements under oath before the grand jury warrant his impeachment by the House and trial by the Senate.

ARTICLE III

Article III charges Judge Nixon with undermining public confidence in the integrity and impartiality of the judiciary, betraying the trust of the people of the United States, disobeying the laws of the United States and bringing disrepute on the Federal courts and the administration of justice through his behavior during the federal investigation.

This Article charges Judge Nixon with a series of fourteen false or misleading statements given during his April 19, 1984 interview and his July 18, 1984 grand jury testimony that, taken as a whole, conclusively establish his conscious and deliberate effort to conceal his conversations with Wiley Fairchild, Carroll Ingram and Bud Holmes concerning the criminal drug prosecution of Drew Fairchild. Some of the statements set forth in Article III—i.e., that Mr. Holmes never "talked" to Judge Nixon about the Drew Fairchild case; that "nothing was ever mentioned about Wiley Fairchild's son"; that Judge Nixon "did not know of any reason" he would have met with Wiley Fairchild after the investment was finalized—are perhaps even more untruthful than the grand jury testimony in Articles I and II that led to the perjury convictions.

Judge Nixon's interview answers were false. His denials of any involvement in the Drew Fairchild case were repeated in response to questions that reasonably should have uncovered the truth.

Three months passed between the interview and his grand jury appearance. In his grand jury appearance, Judge Nixon repeated his falsehoods under oath before the grand jury. He again chose to make repeated, unqualified denials of any involvement in or knowledge of the Drew Fairchild matter, rather than reveal the truth.

Judge Nixon's interview statements and grand jury testimony fell far short of the standard of truthfulness required of any ordinary witness, much less a man privileged to wear the robe of a federal judge. The Committee finds that such conduct justifies Judge Nixon's impeachment by the House and trial by the Senate.

VII. Conclusion

The impeachment process protects our society by ensuring that those favored with high positions of public trust are held accountable for their actions. This is especially true of federal judges who, but for the rare instance of impeachment, enjoy life tenure in office. By providing federal judges with life tenure, the Constitution insulates the federal judiciary from political pressure. The Constitution, however, does not permit abuse of office.

The evidence before the Committee establishes that Judge Nixon lied to federal investigators and gave false testimony under oath to a federal grant jury. Such conduct impugns the integrity of the judiciary and renders Judge Nixon unfit to hold a high office of trust that daily requires him to judge credibility and seek the truth. Judge Nixon's decision to hide the truth and the predictable consequences of his conduct—his indictment, conviction, incarceration and suspension from the practice of law—stand as an embarrassment to the federal judiciary.

The Committee's role is not to punish Judge Nixon, but simply to determine whether articles of impeachment should be brought.

Under our Constitution, the American people must look to the Congress to protect them from persons unfit to hold high office because of serious misconduct that has violated the public trust. Where, as here, the evidence overwhelmingly establishes that a federal judge has committed impeachable offenses, our duty requires us to bring articles of impeachment and to try him before the United States Senate.

VIII. Oversight Findings

No oversight findings were made by the Committee.

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100TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
100-810

IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

REPORT

OF THE

COMMITTEE ON THE JUDICIARY

TO ACCOMPANY

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100TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPORT 100-810

IMPEACHMENT OF ALCEE L. HASTINGS

AUGUST 1, 1988.—Referred to the House Calendar and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary submitted the following

REPORT

[To accompany H. Res. 499]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 499) impeaching Alcee L. Hastings, Judge of the United States District Court for the Southern District of Florida, for high crimes and misdemeanors, having considered the same, report favorably thereon with an amendment and recommend that the resolution as amended be agreed to.

The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That Alcee L. Hastings, a judge of the United States District Court for the Southern District of Florida, be 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 Alcee L. Hastings, a judge of the United States District Court for the Southern District of Florida, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

From some time in the first half of 1981 and continuing through October 9, 1981, Judge Hastings and William Borders, then a Washington, D.C. attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in United States v. Romano, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE II

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and con-

trary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings and William Borders, of Washington, D.C., never made any agreement to solicit a bribe from defendants in United States v. Romano, a case tried before Judge Hastings.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE III

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., to modify the sentences of defendants in United States v. Romano, a case tried before Judge Hastings, from a term in the Federal penitentiary to probation in return for a bribe from those defendants.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE IV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings never agreed with William Borders, of Washington, D.C., in connection with a payment on a bribe, to enter an order returning a substantial amount of property to the defendants in United States v. Romano, a case tried before Judge Hastings. Judge Hastings had previously ordered that property forfeited.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE V

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings' appearance at the Fontainebleau Hotel in Miami Beach, Florida, on September 16, 1981, was not part of a plan to demonstrate his participation in a bribery scheme with William Borders of Washington, D.C., concerning United States v. Romano, a case tried before Judge Hastings, and that Judge Hastings expected to meet Mr. Borders at that place and on that occasion.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE VI

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings did not expect William Borders, of Washington, D.C., to appear at Judge Hastings' room in the Sheraton Hotel in Washington, D.C., on September 12, 1981.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE VII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath, make a false statement which was intended to mislead the trier of fact.

The false statement concerned Judge Hastings' motive for instructing a law clerk, Jeffrey Miller, to prepare an order on October 5, 1981, in United States v. Romano, a case tried before Judge Hastings, returning a substantial portion of property previously ordered forfeited by Judge Hastings. Judge Hastings stated in substance that he so instructed Mr. Miller primarily because Judge Hastings was concerned that the order would not be completed before Mr. Miller's scheduled departure, when in fact the instruction on October 5, 1981, to prepare such order was in furtherance of a bribery scheme concerning that case.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE VIII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that Judge Hastings' October 5, 1981, telephone conversation with William Borders, of Washington, D.C., was in fact about writing letters to solicit assistance for Hemphill Pride of Columbia, South Carolina, when in fact it was a coded conversation in furtherance of a conspiracy with Mr. Borders to solicit a bribe from defendants in United States v. Romano, a case tried before Judge Hastings.

Wherefore, Judge Alcee L. Hastings, is guilty of an impeachable offense warranting removal from office.

ARTICLE IX

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to his oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that three documents that purported to be drafts of letters to assist Hemphill Pride, of Columbia, South Carolina, had been written by Judge Hastings on October 5, 1981, and were the letters referred to by Judge Hastings in his October 5, 1981, telephone conversation with William Borders, of Washington, D.C.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE X

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath, make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on May 5, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XI

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of

Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on August 2, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-782-9387 in Columbia, South Carolina.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on September 2, 1981, Judge Hastings talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XIII

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that 803-777-7716 was a telephone number at a place where Hemphill Pride could be contacted in July 1981.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XIV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact.

The false statement was, in substance, that on the afternoon of October 9, 1981, Judge Hastings called his mother and Patricia Williams from his hotel room at the L'Enfant Plaza Hotel in Washington, D.C.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XV

From January 18, 1983, until February 4, 1983, Judge Hastings was a defendant in a criminal case in the United States District Court for the Southern District of Florida. In the course of the trial of that case, Judge Hastings, while under oath to tell the truth, the whole truth, and nothing but the truth, did knowingly and contrary to that oath make a false statement which was intended to mislead the trier of fact concerning his motives for taking a plane on October 9, 1981, from Baltimore-Washington International Airport rather than from Washington National Airport.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XVI

From July 15, 1985, to September 15, 1985, Judge Hastings was the supervising judge of a wiretap instituted under chapter 119 of title 18, United States Code (added by title III of the Omnibus Crime Control and Safe Streets Act of 1968). The

wiretap was part of certain investigations then being conducted by law enforcement agents of the United States.

As supervising judge, Judge Hastings learned highly confidential information obtained through the wiretap. The documents disclosing this information, presented to Judge Hastings as the supervising judge, were Judge Hastings' sole source of the highly confidential information.

On September 6, 1985, Judge Hastings revealed highly confidential information that he learned as the supervising judge of the wiretap, as follows: On the morning of September 6, 1985, Judge Hastings told Stephen Clark, the Mayor of Dade County, Florida, to stay away from Kevin "Waxy" Gordon, who was "hot" and was using the Mayor's name in Hialeah, Florida.

As a result of this improper disclosure, certain investigations then being conducted by law enforcement agents of the United States were thwarted and ultimately terminated.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

ARTICLE XVII

Judge Hastings, who as a Federal judge is required to enforce and obey the Constitution and laws of the United States, to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of his office impartially, did, through—

(1) a corrupt relationship with William Borders of Washington, D.C.;

(2) repeated false testimony under oath at Judge Hastings' criminal trial;

(3) fabrication of false documents which were submitted as evidence at his criminal trial; and

(4) improper disclosure of confidential information acquired by him as supervisory judge of a wiretap;

undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts.

Wherefore, Judge Alcee L. Hastings is guilty of an impeachable offense warranting removal from office.

I. Introduction

The Committee on the Judiciary has conducted an extensive inquiry into the conduct of Alcee L. Hastings, United States District Judge for the Southern District of Florida. The inquiry focused on whether (1) he was involved in a bribery conspiracy, (2) he committed perjury at his criminal trial, and (3) he improperly disclosed confidential information that he learned in his official capacity as a United States District Judge.

The Committee finds, based upon a careful study of the evidence, that Judge Hastings was involved in a bribery conspiracy with William Borders of Washington, D.C.; that Judge Hastings perjured himself 14 times at his criminal trial; and that Judge Hastings improperly disclosed confidential information that he obtained while supervising a wiretap. The Committee therefore recommends the impeachment of Judge Hastings.

II. Brief History of Impeachment

The Constitution gives the Congress the ultimate, albeit rarely used, power to remove federal officials from office. The Framers of the Constitution adopted the remedy of impeachment as an essential component of the system of checks and balances underpinning our Government. Alexander Hamilton, in *The Federalist* No. 65, characterized impeachment "as a method of National Inquest into the conduct of public men." The Framers sought to protect the in-

stitutions of government by providing for the removal of persons who are unfit to hold positions of public trust.

The model for the impeachment process adopted by the Framers was English precedent. Hamilton in *The Federalist* No. 65 specifically referred to the practice in Great Britain as the model from which the institution of impeachment had been borrowed. Indeed, the notorious impeachment trial of Warren Hastings was in progress in England even as the Framers sought to put together a plan of government in Philadelphia.

The phrase "high Crimes and Misdemeanors," the constitutional standard, was imported by the Framers directly from English practice, having first been employed in England as early as 1386 in the impeachment of the Earl of Suffolk and appearing thereafter in impeachments instituted over the next 400 years. The rich body of precedent incorporated with the adoption of the phrase "high Crimes and Misdemeanors" makes clear that the phrase refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal misconduct. Indeed, the phrase itself had no roots in the ordinary criminal law, but was limited to parliamentary impeachments. In the United States ten of the impeachments voted by the House of Representatives have involved one or more charges that did not allege a violation of the criminal law.

The Framers, however, did not adopt the English model wholesale. A critical difference between the two systems is that impeachment in England was a criminal proceeding intended to punish individuals as well as remove them from office. Impeachment under our Constitution has never imposed criminal penalties such as imprisonment or a fine. The non-criminal nature of the American impeachment process is a watershed distinction from the English practice.

At the time the impeachment process was included in the Constitution, the Framers were concerned primarily with providing a check on the President. They intended impeachment to be one of the central elements of assuring the integrity of the Executive Branch. Federal judges were added to the impeachment provision at the end of the drafting process by making "all civil officers of the United States" subject to impeachment, in addition to the President and Vice President.

As with other aspects of the checks and balances of our system of government, the Framers deliberately rejected a system of pure efficiency in favor of a more complex one that would maximize the integrity and independence of the judiciary. In so doing, the Founding Fathers anticipated that impeachment would be a cumbersome affair, generating controversy and divisiveness and demanding much exertion by Members of Congress. Yet, they believed that no other branch of Government was as qualified to undertake this duty or would safeguard the process as scrupulously from vindictive or frivolous accusations. While the power of impeachment has been exercised infrequently, history attests to the care with which Congress has discharged its prescribed responsibility.

Since 1787, fourteen federal officers have been impeached by the House of Representatives: one President, one cabinet officer, one Senator and eleven federal judges. Twelve of the fourteen officers

were tried in the Senate; two resigned prior to Senate proceedings. Five of the fourteen impeachments resulted in conviction in the Senate and removal from office. Each of the five convictions was of a federal judge.

The most recent impeachment proceeding involved Judge Harry E. Claiborne, who was impeached by the House of Representatives in 1986 and convicted and removed from office by the Senate the same year. Perhaps the most noteworthy aspect of the Claiborne impeachment, other than the fact that it was the first impeachment trial in 50 years, was the third article exhibited by the House. That article alleged that Judge Claiborne had been convicted in a United States district court for filing fraudulent tax returns. The House sought to have the Senate recognize that the conviction in and of itself, without proof of the commission of the underlying offense, was an adequate basis for impeachment. Judge Claiborne was ultimately acquitted on this article by the Senate, although he was convicted on the remaining three articles.

Prior to Judge Claiborne, the most recent impeachment trial was in 1936 when Judge Halsted Ritter was found guilty by exactly the required two-thirds vote of the Senate. More recently, in 1974, this Committee investigated and ultimately recommended articles of impeachment against Richard M. Nixon. President Nixon, however, resigned from office prior to the consideration of the articles by the House.

The historical antecedents of the impeachment process are rooted in hundreds of years of English and American experience. Impeachment 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.

III. Background of Inquiry Into the Conduct of Judge Alcee L. Hastings

On March 17, 1987, Chief Justice Rehnquist, acting on behalf of the Judicial Conference of the United States, transmitted to the Speaker of the House of Representatives a certification that, in language taken from 28 U.S.C. 372(c), the Judicial Conference had determined that United States District Judge Alcee L. Hastings had "engaged in conduct which might constitute one or more grounds for impeachment." [1] The certification and the accompanying Report of the Investigating Committee to the Judicial Council of the Eleventh Circuit ["Investigating Committee Report"] were referred to this Committee. Subsequently, this Committee referred the inquiry into the conduct of Judge Hastings to the Subcommittee on Criminal Justice ["Subcommittee"].

On December 29, 1981, Grand Jury No. 81-1-GJ(MIA), sitting in the Southern District of Florida, returned indictments charging Judge Hastings and William A. Borders, Jr., then a Washington, D.C. attorney, with conspiracy and obstruction of justice.[1a] The in-

[1] A copy of the certification is reprinted in *In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L. Hastings: Hearings before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) ["Subcommittee Hearings"], Appendix V.

[1a] Mr. Borders was also charged with two counts of interstate travel to facilitate the conspiracy.

dictment alleged that Judge Hastings and William Borders had engaged in a plan to solicit a bribe from defendants who were tried before Judge Hastings. The judge and Mr. Borders were tried separately. On March 29, 1982, Mr. Borders was convicted by a jury on all counts. Judge Hastings was acquitted by a jury on February 4, 1983.

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the United States District Court for the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the United States District Court for the Southern District of Georgia, filed a verified written complaint with the United States Court of Appeals for the Eleventh Circuit alleging misconduct on the part of Judge Hastings. The complaint was initiated under 28 U.S.C. 372(c), which was enacted as part of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. The Chief Judge of the Eleventh Circuit appointed an Investigating Committee consisting of five judges, which spent approximately three years investigating the allegations. The Investigating Committee hired John Doar of New York as its counsel. In the course of its inquiry, the Investigating Committee heard the testimony of over 100 witnesses and gathered approximately 2,800 exhibits.

The Investigating Committee unanimously adopted a report setting forth its findings and conclusions. At the heart of the Investigating Committee Report: are 2 findings.

> I. The evidence, considered in its totality, clearly and convincingly establishes that Judge Hastings was engaged in a plan designed to obtain a payment of money from defendants facing jail sentences in his Court by promising that with the payment they would receive lenient non-jail sentences.[2]
>
> II. There is clear and convincing evidence that Judge Hastings sought to conceal his participation in the bribery scheme and to explain away evidence connecting him with the sale of justice and he pursued these objectives through concocting and presenting fabricated documents and false testimony in a United States District Court. Judge Hastings' conduct was premeditated, deliberate and contrived.[3]

The Judicial Council of the Eleventh Circuit accepted and approved the Investigating Committee Report and concluded that Judge Hastings had engaged in conduct which might constitute grounds for impeachment. On September 2, 1986, a certification to that effect was made to the Judicial Conference of the United States. The Judicial Conference, in turn, concurred that consideration of impeachment of Judge Hastings "may be warranted." The Judicial Conference's determination was followed by the certification by the Chief Justice to the Speaker of the House.[4]

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[2] The Investigating Report is reprinted in Appendix I of the Subcommittee Hearings at 341

[3] *Id.* at 355–356

[4] Judge Hastings declined the opportunity to participate in the proceedings before the Investigating Committee. He also declined an opportunity extended to him by the Eleventh Circuit Judicial Council to respond to the Investigating Committee Report. The Judicial Conference of the United States afforded Judge Hastings another opportunity to respond, and he did so by filing a

Continued

IV. Committee Consideration

A. Scope of Investigation

It is a fundamental principle of the Constitution that impeachment proceedings have two separate and distinct parts. Article I, Section 2 states that the House of Representatives "shall have the sole Power of Impeachment," while Article I, Section 3 provides that "The Senate shall have the sole Power to try all Impeachments." The House of Representatives, therefore, inquires into whether an officer of the United States should be impeached, while the Senate conducts the trial if the House adopts articles of impeachment.

Within this framework, the Committee's role was to conduct an independent investigation into the alleged misconduct by Judge Alcee L. Hastings in order to determine whether to recommend the adoption of articles of impeachment. The Committee undertook an extensive investigation, which sought to assess independently the accuracy and reliability of the facts found by the Eleventh Circuit Investigating Committee, to analyze the record in Judge Hastings' trial which resulted in his acquittal, to pursue new leads and lines of inquiry with respect to the Investigating Committee's findings, and to investigate any new allegations of misconduct unrelated to the alleged bribery conspiracy.

In assessing the facts found by the Investigating Committee, the extensive record of the Investigating Committee proceedings, the thousands of pages constituting the records of the criminal trials of Judge Hastings and William Borders, and the entire record of the proceedings in *United States* v. *Romano*, the case involving the defendants whose sentences were the subject of the alleged bribery conspiracy were all reviewed. In addition, the Provisional Report submitted by Judge Hastings to the Judicial Conference, the records of Grand Jury 81-1, the FBI files pertaining to the bribery conspiracy case, and the working files of the Investigating Committee's counsel, John Doar, were reviewed.

Several forensic experts were consulted. Questioned documents were submitted to forensic experts for examination to determine whether they could be dated. The transcript of a conversation between Judge Hastings and William Borders was submitted to a linguistics expert to determine if it was a coded conversation as contended by the prosecution in Judge Hastings' criminal case and by the Investigating Committee.

During the course of its investigation into the conduct of Judge Hastings, the Committee learned of a wholly independent allegation that, in 1985, Judge Hastings had improperly disclosed confidential information he had received in his role as supervisory judge of a wiretap instituted under 18 U.S.C. 2516, generally referred to as Title III.[5] The records of the United States district court's au-

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document entitled "A Provisional and Preliminary Report on the Proceedings Against United States District Judge Alcee L. Hastings" ["Provisional Report"], which is reprinted in Appendix III of the Subcommittee Hearings.

[5] 18 U.S.C. 2516 was enacted by Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

thorization and supervision of the wiretap, the FBI investigation of the alleged disclosure, and the grand jury proceedings concerning the disclosure were all reviewed.[6]

Over sixty witnesses were interviewed or deposed.

B. LITIGATION

The Committee requested from the United States District Court for the Southern District of Florida the records of the grand jury proceedings in the bribery conspiracy case, and the applications, orders, progress reports and other documents which were under seal in the Title III matter, as well as certain grand jury testimony involving the Title III disclosure.[7] Judge Hastings opposed the Committee's requests and litigation ensued.

The Committee's request for access to the grand jury materials involving the bribery conspiracy was granted by Judge John Butzner, a Senior Judge of the Fourth Circuit, sitting by designation as District Judge in the Southern District of Florida. That decision was affirmed by the Eleventh Circuit Court of Appeals.[8]

Judge Butzner also granted the Committee's request for the grand jury and other materials relevant to the Title III inquiry. Judge Hastings again appealed, and again the Eleventh Circuit affirmed Judge Butzner's ruling.[9] Judge Hastings applied to the United States Supreme Court to continue the stay of the mandate of the Eleventh Circuit. The Court denied his application.[10]

C. COMMITTEE AND SUBCOMMITTEE CONSIDERATION

The Subcommittee held 7 days of hearings, during which 12 witnesses testified.[11] The majority of the witnesses testified to the facts surrounding Judge Hastings' alleged participation with William Borders in the bribery conspiracy, Judge Hastings' alleged false testimony at his criminal trial, and the alleged disclosure by Judge Hastings of confidential wiretap information. The Subcommittee also heard the testimony of a linguistics expert with respect to a recorded conversation between Judge Hastings and William Borders. The United States district judges who filed the complaint which gave rise to the appointment of the Eleventh Circuit Investigating Committee also testified.

The Subcommittee allowed Judge Hastings to give a 10 minute opening statement under oath. Judge Hastings' counsel was given the opportunity to question all witnesses called by the Subcommittee, following the conclusion of the Subcommittee's questioning.

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[6] The disclosure of confidential wiretap information by Judge Hastings was the subject of an investigation by a second Eleventh Circuit Investigating Committee. That second Investigating Committee is referred to herein as the "1987 Investigating Committee."

[7] The Committee could have subpoenaed these materials, but as a matter of comity the Committee proceeded by way of letter requests from Committee Chairman Peter W. Rodino to the United States District Court for the Southern District of Florida. The letters are reprinted in Appendix V of the Subcommittee Hearings.

[8] *In re Request for Access to Grand Jury Materials*, 669 F. Supp. 1072 (S.D. Fla.), *aff'd*, 833 F.2d 1438 (11th Cir. 1987) (special panel). *See* Appendix V of the Subcommittee Hearings.

[9] *In re Grand Jury 86-3 (Miami)*, 673 F. Supp. 1569 (S.D. Fla. 1987), *aff'd*, 841 F.2d 1048 (11th Cir. 1988) (special panel). *See* Appendix V of the Subcommittee Hearings.

[10] *Alcee L. Hastings, Judge, USDC S.D. Florida* v. *Committee on the Judiciary of the United States House of Representatives, et al.*, No. A-788 (April 18, 1988). The decision is reprinted in Appendix V of the Subcommittee Hearings.

[11] May 18, 19, 24, 25 and 26, and June 1 and 9, 1988.

Judge Hastings' counsel questioned the witnesses for an initial 10 minutes and was granted additional 10 minute periods as needed. Judge Hastings' counsel was afforded the opportunity to submit names of potential witnesses accompanied by a proffer as to the necessity and significance of the witnesses' testimony.[12] The Subcommittee, after reviewing the proposed witness lists and proffer, called and took testimony from those witnesses who had knowledge of facts relevant to the subject of the inquiry. Finally, Judge Hastings' counsel was afforded the opportunity to give a closing statement at the conclusion of all the testimony.

Judge Hastings was invited to testify before the Subcommittee on his own behalf. On June 9, 1988, Judge Hastings stated on the record that he declined the invitation on the advice of counsel.[13]

The Subcommittee subpoenaed William Borders to testify at the hearings. When he appeared, Mr. Borders refused to testify and asserted various constitutional rights.[14] The Subcommittee ultimately determined not to take the extraordinary step of seeking immunity for several reasons, and the Committee reached the same determination.

First, Mr. Borders has a history of refusing to testify with respect to the alleged bribery conspiracy. Mr. Borders served more than 30 days in prison for contempt rather than testify before a grand jury investigating the bribery conspiracy matter.[15]

Second, the legal process available to the Subcommittee to compel Mr. Borders' testimony is fraught with delay. A decision to seek use immunity must first be approved by two-thirds of the Committee. The Committee then must apply to a federal district court for an order directing Mr. Borders to testify or provide the sought after information. At least ten days prior to applying for that order, the Committee must notify the Attorney General of its intent to seek the order, and the court will delay issuance of the order for as much as twenty additional days if the Attorney General so requests.[16]

If Mr. Borders were to continue to refuse to testify, despite being granted use immunity, the House of Representatives' only means of compelling his testimony (aside from the process available under its inherent contempt power, which has not been used in modern times) is to seek criminal prosecution. To do so, a contempt citation must be approved by the Subcommittee, the Committee and the House (or by the presiding officer if Congress is not in session). After a contempt citation has been certified by the Speaker of the House, it is the "duty" of the United States Attorney "to bring the

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[12] Judge Hastings' witness lists and proffer are reprinted in Appendix III of the Subcommittee Hearings.

[13] For Judge Hastings' written explanation of his decision, *see* Appendix III of the Subcommittee Hearings.

[14] Prior to the hearings, Mr. Borders had asserted, on two occasions, that the terms and conditions of his parole precluded him from testifying before the Subcommittee. Although the Parole Commission and the Subcommittee took issue with this interpretation, the Subcommittee delayed further appearances by Mr. Borders until after his parole had expired. At that time, Mr. Borders refused to testify based on rights asserted under the First, Fourth, Fifth and Eighth Amendments to the Constitution. The transcripts of the Borders depositions are reprinted in Appendix V of the Subcommittee Hearings

[15] Mr. Borders also did not testify at his trial or at Judge Hastings' criminal trial.

[16] 18 U.S.C. 6005

matter before the grand jury for its action." [17] These procedures are an additional likely source of delay.

Third, unlike civil contempt (which is available to the Senate and its committees by statute, but not to the House), criminal contempt is punitive rather than coercive, for generally the witness will not be able to purge himself of the contempt by testifying. Consequently, even if Mr. Borders were prosecuted for refusing to testify, he would lack incentive to cooperate with the Subcommittee.

The fourth reason why the Committee and the Subcommittee decided not to seek immunity for Mr. Borders is that since Mr. Borders was convicted of serious felonies, going to the heart of his integrity and credibility, the Subcommittee had serious doubts as to whether his testimony, if finally presented, would be reliable.

The Committee and the Subcommittee recognize that important interests—particularly that of deterrence of others from engaging in contumacious conduct—would be served by pursuing Mr. Borders' testimony. The Committee and the Subcommittee reject Mr. Borders' position that he has satisfied his obligations by having been found guilty and imprisoned for the bribery conspiracy. However, given the history of Mr. Borders' recalcitrance, the significant delay which would likely result from pursuing his testimony, and the question of Mr. Borders' own credibility, the Committee determined not to take the unusual step of seeking immunity for Mr. Borders' testimony.

D. COMMITTEE AND SUBCOMMITTEE ACTION

On July 7, 1988, the Subcommittee unanimously adopted, on the motion of Subcommittee Chairman John Conyers, Jr., 17 articles of impeachment. Those articles were introduced as H. Res. 499. Article I alleges that Judge Hastings engaged in a corrupt conspiracy with William Borders to obtain $150,000 from defendants in a criminal cased tried before Judge Hastings. Articles II through XV allege that Judge Hastings testified falsely at his criminal trial. Article XVI alleges that Judge Hastings improperly disclosed confidential information which he had learned in his capacity as supervisory judge of a Title III wiretap. Article XVII alleges that the pattern of conduct described in Articles I through XVI undermines confidence in the integrity and impartiality of the federal judiciary and betrays the trust of the people of the United States, thereby bringing disrepute on the federal courts and the administration of justice by the federal courts.

On July 26, 1988, this Committee took up H. Res. 499. Representative Fish offered a technical and clarifying amendment which was adopted by voice vote. The Chair then divided the question, and separate votes were taken on Articles I and XVI. Article I was adopted by voice vote. Mr. Smith later announced that he had voted no on Article I. Mr. Crockett later announced that he had voted aye on Article I. Article XVI was adopted by voice vote. Mr. Crockett later announced that he voted no on Article XVI. With a reporting quorum being present, the Committee adopted the re-

[17] 2 U.S.C. 194.

mainder of H. Res. 499, as amended, excluding Articles I and XVI. It was adopted by a roll call vote of 32–1.

V. Statement of Facts

The Committee, based on its independent inquiry into the conduct of Judge Hastings, finds the following facts.

A. BRIBERY CONSPIRACY

1. Background

On October 22, 1979, Alcee L. Hastings was sworn in as a United States District judge for the Southern District of Florida. Both William A. Borders, Jr., then a Washington, D.C. attorney, and Hemphill Pride, a mutual friend of Mr. Borders and Judge Hastings, attended Judge Hastings' investiture ceremony. At the time of the swearing in, Mr. Borders and Judge Hastings had known each other for approximately 16 years. They were political allies and social friends. Hemphill Pride was a friend of both men, but he was particularly close to Judge Hastings. Mr. Pride had known Judge Hastings since the early 1960s when they were in law school together in Florida. After graduation, Mr. Pride had returned to South Carolina to practice law.

In 1977, Mr. Pride was convicted in South Carolina of misusing funds in a federally subsidized housing project. As a result of his conviction, Mr. Pride was suspended from the practice of law. His conviction was upheld on appeal in December 1979, not long after Judge Hastings became a federal district judge. During the time Mr. Pride's case was on appeal, Mr. Borders permitted Mr. Pride to live rent-free in an apartment in Washington, D.C. In March 1980, Mr. Pride began serving his sentence at the federal correctional facility at Maxwell Field in Montgomery, Alabama.

On October 16, 1980, Mr. Pride's mother wrote to Judge Hastings and asked his help in arranging an early release for her son. There is no evidence of a reply from Judge Hastings. Mr. Pride testified that while he was in prison he asked Judge Hastings to raise money for him to hire counsel to pursue certain post-conviction relief. According to Mr. Pride, Judge Hastings refused on the grounds that his position as a judge precluded him from doing so.

Mr. Pride was paroled on March 15, 1981 and he immediately began to work at two jobs in Columbia, South Carolina. He could not be employed as a lawyer, however, because he was indefinitely suspended from the practice of law by the Supreme Court of South Carolina. Under South Carolina rules he could not apply for readmission for two years, until May 1983. He also had to take and pass the South Carolina bar examination.

2. The Romano Case

Thomas and Frank Romano were indicted in November 1978 on 21 counts of racketeering, mail and wire fraud, embezzlement and false tax filings. The indictment alleged violations of the Racketeer Influenced Corrupt Organization statute ["RICO"] which, under certain circumstances, could result in the forfeiture of property connected with illegal racketeering activity. The case was assigned to Judge Hastings within the first week he was on the bench.

In December 1980 the Romano brothers were tried before a jury. The prosecution charged that they had looted a construction project of over a million dollars through various fraudulent means. During the trial, the prosecution made a proffer to Judge Hastings, out of the presence of the jury, that the Romanos had a history of making payoffs.

On December 23, 1980, the jury found the Romanos guilty on all counts. The parties agreed to try the forfeiture issues before Judge Hastings without a jury. Under applicable procedural rules, the court was required to make findings of fact and return a special verdict as to the extent of the property to be forfeited. Judge Hastings heard part of the prosecution's proof on the forfeiture issues on December 30, 1980. He then continued the matter until February 20, 1981 for an evidentiary hearing. He announced that he would proceed to final disposition of the case during the week following the evidentiary hearing.

On December 30, 1980, Marshall Curran, Jr., the lawyer who had represented the Romanos at trial, filed an appeal on their behalf. The Romanos retained a new attorney, Neal Sonnett, to handle their sentencing and appeal.

On February 20, 1981, Judge Hastings concluded the evidentiary hearing on the forfeiture matter. The judge reserved ruling and asked the parties to submit memoranda. Judge Hastings stated that sentencing would not be scheduled in light of the fact that there were to be additional submissions by the parties and the court had not yet received the presentence reports.

On March 13, 1981, the prosecution filed its proposed findings of fact and conclusions of law on the forfeiture issue. On April 6, 1981, the Romanos filed their memorandum of fact and law in opposition to forfeiture. On April 7, 1981, the Romanos filed objections to the Government's proposed findings of fact. The next day, April 8, 1981, the Government filed a lengthy memorandum in support of the forfeiture which sought forfeiture of property totaling $1,162,016 in value consisting of four components: (a) the net cash proceeds of certain checks ($305,939); (b) total cash proceeds of certain other checks ($540,000); (c) an investment in the Sea Inn restaurant ($234,061); and (d) a part of the gain realized upon the sale of the restaurant ($82,016).

On April 23, 1981, Judge Hastings' law clerk advised the parties that sentencing in *Romano* would take place on May 11, 1981. The official Notice of Sentencing was filed on April 28, 1981, setting the sentencing for May 11 at 1:00 p.m.

On May 4, 1981, Judge Hastings entered an order forfeiting property owned by the Romanos worth $1,162,016.

3. William Dredge and Further Events in Romano

William Dredge operated an antique store in north Miami, Florida. He was also a fence, a burglar, and a drug dealer. Mr. Dredge was a friend of Joseph Nesline, a Washington, D.C. gambler, who apparently introduced Mr. Dredge to Mr. Borders in late March or early April of 1981. In March 1981, Mr. Dredge was the subject of a narcotics investigation in Maryland. He was in touch with Mr. Borders in connection with this problem.

Mr. Dredge testified before the Eleventh Circuit Investigating Committee that around the end of March or in early April 1981, Mr. Borders asked Mr. Dredge if he knew the Romano brothers since Mr. Dredge was from the south Florida area. When Mr. Dredge responded that he did not know them, Mr. Borders asked him to check them out. Mr. Dredge made some inquiries and reported to Mr. Borders that the Romanos were "good stand up people," which in underworld parlance meant they would live up to their commitments and not disclose matters to the authorities. Mr. Borders then asked Mr. Dredge to contact the Romanos and tell them Mr. Borders might be able to help them in their criminal case. Mr. Dredge passed word to the Romanos that he knew an attorney in Washington, D.C. who could help them with their case.

Hotel and telephone records establish that the Romanos were in California on April 7, 1981 and during their stay they learned through an intermediary of Mr. Dredge's message about a Washington lawyer who could help them. In response, the Romanos contacted their counsel, Neal Sonnett, who documented the call in a memorandum dated April 16, 1981. The Romanos decided to ignore Mr. Dredge's offer.

Mr. Dredge reported to Mr. Borders about his attempted contact with the Romanos. Mr. Dredge testified before the Eleventh Circuit Investigating Committee that Mr. Borders said the judge handling the Romanos' case was a good friend of his and, for $150,000, he could deliver the judge. Mr. Dredge testified he did not really believe Mr. Borders could control a federal judge.

Over the next few months Mr. Borders repeatedly asked Mr. Dredge about the situation and Mr. Dredge reported that he had talked to the Romanos, but they did not have any money. According to Mr. Dredge, he was simply stringing Mr. Borders along. Mr. Dredge never had any contact with the Romanos or their intermediary after meeting with the intermediary in early April. Mr. Borders continued to importune Mr. Dredge about the Romanos and Mr. Dredge kept telling Mr. Borders that the Romanos did not have the money. According to Mr. Dredge, Mr. Borders said the judge could not believe the Romanos could not come up with money to keep them out of jail.

Mr. Dredge testified that when he suggested to Mr. Borders that the Romanos were trying to get to Judge Hastings through another contact, Mr. Borders challenged anyone else to produce the judge at a given time and place. Mr. Borders said he would produce Judge Hastings at a given time and place to prove that he controlled him.

On April 29, 1981, a sealed indictment was returned in Baltimore, Maryland charging William Dredge with narcotics offenses. Mr. Dredge was arrested in Florida on May 10, 1981, and Mr. Borders arranged for Jesse McCrary, a Miami lawyer, to represent Mr. Dredge at his bail hearing on May 11, 1981. Also, on May 11, 1981, the Romanos were scheduled to be sentenced by Judge Hastings.

Mr. Dredge testified before the Investigating Committee that he had a conversation with William Borders the day before the Romanos were supposed to be sentenced, in which Mr. Borders told him the sentencing would be continued by Judge Hastings in order

to give the Romanos a chance to come up with the money, because the judge could not believe they would not do so.

At the May 11, 1981 sentencing hearing, the Romanos' attorney, Neal Sonnett, requested a continuance in order to present additional arguments to the court regarding a pending motion for new trial that was scheduled to be heard that day. The Government opposed the continuance on the ground that everything had been thoroughly briefed and there had already been a delay of five months since the conviction. Judge Hastings granted the continuance and asked for briefs on RICO issues. He then set a briefing schedule and indicated that sentencing would not take place until late June 1981, but that the next time it was scheduled, sentencing would proceed.

Mr. Dredge testified before the Investigating Committee that Mr. Borders called him the day after the sentencing had been postponed to say that the hearing had been continued and the Romanos had better come up with the money. Mr. Dredge was convinced William Borders was serious about the bribe after the continuance of the hearing. It was Mr. Dredge's understanding, based on what Mr. Borders told him, that Judge Hastings had postponed the sentencing on his own motion. In fact, the May 11, 1981 sentencing was postponed on the basis of Mr. Sonnett's eleventh hour request. The fact that Mr. Borders knew in advance that the sentencing hearing would be continued, however, convinced Mr. Dredge that the bribery scheme was for real.

On Friday, June 19, 1981, a panel of the Fifth Circuit handed down a decision in *United States* v. *Martino.*[18] At issue in the case was an interpretation of the RICO statute's forfeiture provisions pertaining to the definition of an interest that was subject to forfeiture. The court held that the term "interest" did not include income, receipts or profits from racketeering activity. Government attorneys and defense counsel in *Romano* recognized that this opinion had important implications for the order previously entered by Judge Hastings on May 4, 1981, forfeiting property owned by the Romanos worth $1,160,000. Accordingly, all parties briefed the issue in papers filed with the court in advance of a hearing scheduled for July 8, 1981.

At the July 8, 1981 hearing, Judge Hastings was scheduled to sentence the Romanos and hear argument on all outstanding motions, including a motion for him to reconsider his May 4, 1981 order requiring forfeiture. At the hearing, after extensive argument concerning the impact of *Martino,* Judge Hastings stated to counsel he was familiar with *Martino* and had read the briefs. He had also received a memorandum on the issue from his law clerk shortly before going on the bench to conduct the hearing. At the conclusion of the argument, Judge Hastings reaffirmed his forfeiture order of May 4, 1981. He stated that he would file a brief written order explaining the basis for his decision.

Judge Hastings then sentenced each of the Romanos to a prison term of three years. The prison terms were consistent with the recommendation of the probation office.

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[18] 648 F.2d 367 (5th Cir. 1981).

4. The Undercover Investigation

On June 3, 1981, the case of *United States* v. *Accardo* was brought in the Southern District of Florida. This was a multi-defendant racketeering case in which Santo Trafficante, reputed to be the organized crime boss of southern Florida, was named as a defendant. The case was assigned to Judge Hastings. A month later, William Dredge flew to Washington, D.C. and stayed with Joseph Nesline from July 7–9, 1981. Mr. Dredge told the Investigating Committee that during his stay, Mr. Nesline had another guest at the apartment—Santo Trafficante. While at the apartment, Mr. Dredge observed Mr. Trafficante trying to contact Mr. Borders and heard bits and pieces of conversation which led him to believe that Mr. Borders and Judge Hastings were involved in a bribery scheme to obtain money from Mr. Trafficante.

On July 20, 1981, Mr. Dredge advised the United States Attorney's Office in Miami that he had information concerning a bribery scheme involving Judge Hastings, Santo Trafficante and a Washington, D.C. lawyer who was coming to Miami the next day to meet with Mr. Trafficante. In return for his information, Mr. Dredge wanted the drug charges pending against him in Maryland dismissed. In the course of ensuing discussions with Government prosecutors, Mr. Dredge also revealed the proposal to solicit a bribe from the Romanos—the essence of which was that for $150,000 their sentences would be reduced to probation.

Mr. Dredge did not initially identify Mr. Borders as the Washington lawyer who was arriving the next day to meet with Mr. Trafficante. However, a strike force attorney who had worked in Washington recognized Mr. Borders' name on a passenger list and visually identified Mr. Borders at the airport. The FBI followed Mr. Borders, who took a cab to Mr. Dredge's house and was later driven by Mr. Dredge to a shopping center. From there Mr. Borders took a cab to the Fontainebleau Hotel, where the FBI observed him meeting with Santo Trafficante for 5 to 10 minutes in a secluded area. Thereafter, Mr. Trafficante drove Mr. Borders to the airport.

Mr. Dredge continued to be debriefed by the Government concerning his knowledge of any bribery schemes. On August 18, 1981, Mr. Dredge told law enforcement agents that Mr. Borders was coming to Miami again to meet with Mr. Trafficante to iron out their bribery deal. FBI surveillance teams observed that on August 21, 1981, Mr. Borders flew to Miami, took a taxi to the Fontainebleau Hotel, got out of the cab, and got into a car driven by Mr. Trafficante, who thereupon drove him back to the airport. They spoke for four minutes at the terminal and Mr. Trafficante left.

Having twice corroborated Mr. Dredge's statements, the Government attempted to enlist Mr. Dredge's cooperation. Mr. Dredge refused to testify or wear a recording device because he feared for his life. He was willing, however, to introduce an undercover agent to Mr. Borders as one of the Romano brothers. Mr. Dredge advised the FBI that Mr. Borders was anxious to do the Romano deal, but that he would only deal with one or both of the Romanos.

On August 27, 1981, the Fifth Circuit handed down the case of *United States* v. *Peacock*,[19] which grudgingly followed the *Martino* rationale, while noting that a petition for rehearing en banc was pending in *Martino*. Jeffrey Miller, one of Judge Hastings' law clerks, testified that he brought this case to Judge Hastings' attention in early September, in all likelihood before September 10, 1981. According to Mr. Miller, Judge Hastings then told him to "give the money back" to the Romanos.

On September 10, 1981, Mr. Dredge, in the presence of an FBI agent, telephoned Mr. Borders and advised him that the Romanos were "ready to deal." Arrangements were made for Mr. Dredge to meet Mr. Borders at the Miami airport on Saturday, September 12 at 8:00 a.m. and introduce him to "Frank Romano," who was to be impersonated by retired FBI agent, H. Paul Rico.

On Friday, September 11, 1981, Judge Hastings was scheduled to fly from Miami to Washington, D.C. Judge Hastings was scheduled to leave Miami at 3:48 p.m., but his flight was delayed. He called Mr. Borders' office twice to advise him of the delay. He did not arrive at Washington National Airport ["National"] until about 8:00 p.m., two hours after his original scheduled arrival time.

On the same day, Mr. Borders was scheduled to leave National for Miami at 7:30 p.m. in order to make his meeting at 8:00 a.m. the next morning with Mr. Dredge and "Frank Romano." However, he changed his flight to leave at 9:25 p.m., thereby arriving in Miami at 1:30 a.m. on September 12. This schedule change created a clear opportunity—a period of over an hour—when Judge Hastings and Mr. Borders could have met at National, although no one actually observed such a meeting. Judge Hastings did not check into the Sheraton Hotel until 10:14 p.m., over two hours after he arrived in Washington, D.C.

The next morning, September 12, 1981, Mr. Borders met Mr. Dredge and the man who he thought was Frank Romano at the Miami airport. The undercover agent, Mr. Rico, was wearing a body recorder and recorded the conversation with Mr. Borders. At the meeting, Mr. Borders stated that he understood that the Romanos had "lost some property." He advised Mr. Rico that 10 days after receiving a payment of $150,000, an order would be signed returning a "substantial amount" of the property and thereafter, they were to withdraw their appeal and something would be done about their jail sentences. When Mr. Rico raised the issue of "how do I know," Mr. Borders responded, "checks and balances." Mr. Borders said, "I don't get nothin, until the first part is done . . . that will be a signal showing you that I'm, I know what I'm talking about, right?"

Mr. Borders proposed that the money be placed in escrow with Mr. Dredge and that Mr. Borders would only receive the money after the order came down. Mr. Rico said he preferred not to use Mr. Dredge and, aware that previously Mr. Borders had suggested to Mr. Dredge that Mr. Borders could prove his influence with Judge Hastings by having him show up at a given time and place, Mr. Rico proposed verification in that manner. Mr. Rico asked if

[19] 654 F.2d 339 (5th Cir. 1981).

Mr. Borders wanted to get back to him with the time and place. Mr. Borders said that was unnecessary and immediately selected Wednesday, September 16, 1981, as the date for Judge Hastings' appearance. Mr. Rico selected the main dining room in the Fontainebleau Hotel in Miami Beach at 8:00 p.m.

Mr. Borders and Mr. Rico agreed to meet the following Saturday, September 19, 1981, at the Miami airport at which time Mr. Rico would make an "upfront" payment on the bribery deal. At the conclusion of their meeting Mr. Borders assured Mr. Rico, saying "that's 100 percent, 100 percent, 100 percent."

At the time of his conversation with Mr. Rico about the status of the *Romano* case, Mr. Borders had no official connection with the case. He was a Washington, D.C. lawyer, and was not a member of the Florida bar. According to Judge Hastings' trial testimony, he never spoke to Mr. Borders about the facts, proceedings, or issues in the case.

When Mr. Borders finished his meeting with the undercover agent, he flew from Miami to West Palm Beach and drove to a long-planned family reunion. He stayed there only briefly, however, and made a complex series of reservations and cancellations of airplane flights back to Washington, D.C. Ultimately, Mr. Borders flew from Orlando, Florida to Baltimore-Washington International Airport ["BWI"], arriving at 8:58 p.m.[20]

Judge Hastings was spending that weekend of September 11–13, 1981 in Washington, D.C. at the Sheraton Hotel. Jesse McCrary, a mutual friend of Judge Hastings and Mr. Borders, registered at the Sheraton Hotel on the 12th in the room next to Judge Hastings.

Around 9:00 p.m. on Saturday, September 12, 1981, Mr. Borders landed at BWI. From there he immediately went to the Sheraton Hotel in Washington, arriving at Judge Hastings' room at 10:00 p.m. When Mr. Borders arrived, Judge Hastings, Jesse McCrary, and three women—two sisters, Pearl and Margaret Dabreau, and Donna Myrill—were in the judge's room. The group had not yet had dinner. According to Mr. McCrary, it was Judge Hastings' idea to delay dinner. Ms. Pearl Dabreau testified before the Investigating Committee that the group was "waiting for someone." Ms. Myrill testified before the Investigating Committee that they were specifically waiting for Mr. Borders. After Mr. Borders arrived, they all went to dinner. At trial, Judge Hastings testified under oath that Mr. Borders' appearance at the Sheraton Hotel that night was a surprise and not prearranged.

There is no evidence in the record to explain how Mr. Borders knew Judge Hastings would be in his room at the Sheraton Hotel at 10:00 p.m. on a Saturday night, although Mr. Borders clearly went to great lengths to get there from Florida, including foregoing his family reunion.

On Tuesday, September 15, 1981, Mr. Borders and a friend, Madeline Petty, flew from Washington, D.C. to Las Vegas, Nevada to attend the Sugar Ray Leonard-Tommy Hearns championship fight scheduled for Wednesday, September 16. This trip had been planned as a birthday present for Ms. Petty; the plane tickets had

[20] The day before setting up his initial meeting with Mr. Rico, Mr. Borders told both Judge Hastings and their friend Jesse McCrary that he intended to be in Florida for the weekend.

been purchased two weeks earlier on September 1, 1981. According to Dudley Williams, a close friend and former law partner of Mr. Borders, Mr. Borders' friends knew that he never missed an important championship fight.

September 16, 1981 was also the date Mr. Borders and Mr. Rico had agreed that Judge Hastings would appear at the main dining room of the Fontainebleau Hotel at 8:00 p.m. in order to prove that the judge was in on the bribery scheme FBI agents had the hotel under surveillance. Shortly before 8:00 p.m., Judge Hastings and a woman named Essie Thompson were observed entering the Fontainebleau Hotel and walking into the dining room.

Judge Hastings had invited Ms. Thompson to dinner the day before. He did not mention Mr. Borders to her nor did he indicate that they were meeting anyone. The maitre d' seated them at a table for four and removed two place settings. Judge Hastings did not protest. After about 15 minutes, Judge Hastings left the table and returned a few minutes later. At Judge Hastings' trial in January 1983, Ms. Thompson testified that when Judge Hastings returned to the table he said he was "looking for some friends from D.C." According to the FBI interview report dated October 10, 1981, however, Ms. Thompson told FBI agents that when Judge Hastings returned to the table he said he was "looking for someone, but did not see them." Judge Hastings acknowledged at trial that he did not have Mr. Borders paged. At trial, he testified that Mr. Borders had promised to meet him at the Fontainebleau that night but had not shown up.

Mr. Borders was in Las Vegas at the championship fight. He and Ms. Petty returned to Washington, D.C. two days later, on Friday, September 18, 1981, between 8:00 and 9:00 p.m. At the airport, Mr. Borders and Ms. Petty parted company. Mr. Borders took a 9:20 p.m. flight to Miami, in order to make his arranged meeting with Mr. Rico the next morning for the "upfront" payment.

Mr. Rico had not told Mr. Borders that Judge Hastings had appeared at the Fontainebleau Hotel on September 16th as promised. Mr. Borders nevertheless proceeded directly from National to Miami for his rendezvous with Mr. Rico as if he knew that the signal confirming Judge Hastings' involvement had been given.

On Saturday morning, September 19, 1981, at 10:00 a.m., Mr. Borders and Mr. Rico again met at the Miami airport. Mr. Rico was wearing a body recorder. After an exchange about the Leonard-Hearns fight, the undercover agent said: "You did what you said you'd do." Mr. Borders acknowledged this and Mr. Rico continued. "Your man arrived and in fact, he arrived a little early and, ah, you said you could do that, and that's ah, your end of the situation." Mr. Borders then asked, "What is it in?" and Mr. Rico replied that it was just in an envelope. Mr. Rico said he would put it inside a newspaper and give it to Mr. Borders. The undercover agent then said "[B]efore we go any further, the last time we talked my understanding was that, ah, some property was going to be released." Mr. Borders said the property would be released within 10 days. He told Mr. Rico, "Once you do that then file a motion for mitigation of sentence." Mr. Borders said, "Just tell him [the attorney] you're tired of the appeal, just see if the man will reduce the sentence."

The two men then separated and Mr. Rico went to get $25,000 in cash which had been placed in a locker. The undercover agent returned and placed the newspaper containing the envelope with the money on the arm of a sofa. Mr. Borders picked up the newspaper. There was further conversation, and Mr. Borders told Mr. Rico that the money would cover a reduction in sentence for both Romanos. They then discussed when the balance of the bribe would be paid. Mr. Borders suggested it be paid as soon as the order was entered returning the forfeited money. Mr. Rico proposed another installment payment, then full payment "on the culmination," i.e., when the sentences were reduced. Mr. Borders objected that this was not the deal. He again proposed that the money be put in escrow with Mr. Dredge. Mr. Rico rejected that idea. They finally agreed that on October 3, 1981 after Judge Hastings issued the order, the remaining $125,000 would be paid.

There was no further contact between Mr. Borders and the undercover agent between September 19 and October 2, 1981. The order returning a portion of the forfeited property was not issued within 10 days of September 19 as Mr. Borders had promised.

On October 1, 1981, a lawfully authorized wiretap was placed on Mr. Borders' business phone, and on October 2, 1981, a similar tap was placed on his residential phone. Mr. Rico placed four calls on Friday, October 2, to Mr. Borders' office. Mr. Borders was out, but he arranged to have a call patched through to him. At 3:11 p.m. Mr. Rico spoke to Mr. Borders and told him nothing had happened regarding the order. Mr. Borders replied "I think it has . I'll check into it," and then suggested they cancel the scheduled October 3, 1981 meeting for the final payment. Mr. Borders said he was not sure he would be able to call Mr. Rico back Friday night; he explained he did not know if he could find out "because of the time." They agreed that Mr. Rico would call Mr. Borders at home two days later, Sunday, October 4, 1981.

By 4:50 that Friday afternoon, Mr. Borders was back in his office. In a call recorded by the FBI, Mr. Border's secretary called Judge Hastings' chambers and was told that Judge Hastings had left for the day.

On Sunday morning, October 4, Mr. Rico called Mr. Borders as agreed to find out the status of the order. Mr. Borders explained "I have not, ah, gotten an answer, cause I haven't been able to talk to anybody." Judge Hastings testified at trial that William Borders called him the afternoon of October 4 and left a message for him to return the call.

On Monday morning October 5, 1981, Judge Hastings told his law clerk, Jeffrey Miller, to do the order returning a substantial amount of the Romanos' property that day. This was an "unusual" request according to Mr. Miller, although he also observed it was unusual for an order to sit around that length of time. Another law clerk, Daniel Simons, stated that Judge Hastings seemed disturbed that Mr. Miller had not finished the order.

At 4:22 p.m. on October 5, 1981, Mr. Rico again called William Borders. He said he was anxious. Mr. Borders said he understood, that he had checked on the matter, that the order had not gone out yet, but "that's been taken care of." Mr. Borders said it probably

went out that day, the 5th, or would go out first thing in the morning, on the 6th.

Less than one hour later, at 5:12 p.m., Judge Hastings called Mr. Borders and the following conversation occurred:

> MR. BORDERS: Yes, my brother.
> JUDGE HASTINGS: Yeh, my man.
> MR. BORDERS: Um hum.
> JUDGE HASTINGS: I've drafted all those, ah, ah, letters, ah, for Hemp .
> MR. BORDERS: Um hum.
> JUDGE HASTINGS: . and everything's okay. The only thing I was concerned with was, did you hear if, ah, you hear from him after we talked?
> MR. BORDERS: Yea.
> JUDGE HASTINGS: Oh. Okay.
> MR. BORDERS: Uh huh.
> JUDGE HASTINGS: Alright, then.
> MR. BORDERS: See, I had, I talked to him and he, he wrote some things down for me.
> JUDGE HASTINGS: I understand.
> MR. BORDERS: And then I was supposed to go back and get some more things.
> JUDGE HASTINGS: Alright. I understand. Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning.
> MR. BORDERS: Okay.
> JUDGE HASTINGS: Okay.
> MR. BORDERS: Right.
> JUDGE HASTINGS: Bye bye.
> MR. BORDERS: Bye.

The Government argued at Judge Hastings' trial that this was a coded conversation intended to convey information concerning the bribery scheme. Judge Hastings testified at trial that it was not a coded conversation, but rather a discussion about some letters he was drafting to help Hemphill Pride. The Subcommittee submitted the tape recording and the transcript of this conversation to a recognized expert in the field of linguistics, Professor Roger Shuy of Georgetown University, who analyzed the conversation and concluded that Judge Hastings and Mr. Borders were engaging in a coded conversation.

On October 6, Judge Hastings issued an order which vacated judgments against the Romanos for over $845,000 of the total original forfeiture of $1,200,000. This order reversed in large measure Judge Hastings' prior order of May 4, 1981 and was inconsistent with his oral ruling on July 8, 1981. There had been no further filings or proceedings before Judge Hastings since the hearing on July 8, 1981.

Mr. Rico called Mr. Borders at mid-day on October 7 inquiring again about the status of the order. This time Mr. Borders said "it went out yesterday morning." This assertion corresponds to Mr. Borders' October 5 conversation with Judge Hastings in which the judge said he would send out "the letters in the morning." In fact,

the order had gone out by special delivery the evening of October 6. Mr. Rico called Mr. Borders the night of the 7th to tell him he had received word that the order had been issued. They discussed arrangements for the final payoff. Mr. Rico offered to travel to Washington, D.C. on Thursday or Friday, October 8 or 9. Mr. Borders agreed and told Mr. Rico to call him when he got to town.

The National Bar Association had scheduled a testimonial dinner in honor of Mr. Borders, a past president of the organization, for October 9, 1981, in Washington, D.C. Judge Hastings was one of the sponsors of the dinner. On the morning of October 8, 1981, Mr. Borders received a call from Judge Hastings who stated that he would be arriving in Washington the next day at 10:40 a.m. Judge Hastings told Mr. Borders he was staying at the Washington Hilton, although he would prefer to be at the L'Enfant Plaza Hotel. Mr. Borders said he could always get Judge Hastings in there.

Mr. Borders picked up Judge Hastings at National on the morning of October 9. They drove from the airport to the L'Enfant Plaza where a suite and an adjoining room were assigned to them. They stopped briefly to see Hemphill Pride, who was also staying at the L'Enfant Plaza Hotel for the National Bar Association event. Judge Hastings and Mr. Borders then left the hotel and after a couple of intermediate stops arrived at Mr. Borders' office where Mr. Borders had a message to call "Frank" [Mr. Rico] at the Twin Bridges Marriott Hotel. Mr. Borders called and Mr. Rico told Mr. Borders he had "brought all the necessary papers." Mr. Rico and Mr. Borders agreed to meet at the Marriott in about an hour.

When Mr. Borders arrived at the Marriott, he told Mr. Rico, who was wearing a recording device, to "get it" because he wanted to take a ride. Mr. Borders and the undercover agent got into Mr. Borders' car, with a bag containing $125,000 in 100 dollar bills on the floor between them. As they started to leave the parking lot, the FBI pulled them over and arrested Mr. Borders.[21]

Mr. Borders was arrested just before 1:00 p.m. on October 9, 1981. At 1:18 p.m. Mr. Borders requested and received permission to telephone his attorney, John Shorter. Mr. Shorter arrived at the Marriott at 1:31 p.m. according to FBI logs. At 1:55 p.m., Special Agents Bird, Skiles and Murphy left for Mr. Borders' law office to locate and interview Judge Hastings. They entered the office at 2:40 p.m. and presented subpoenas for certain of Mr. Borders' records to Mr. Border's secretary, who was uncertain how to deal with the situation. She contacted Mr. Shorter and Agent Murphy explained to Mr. Shorter that they had subpoenas for records. Mr. Shorter told the secretary to accept the subpoenas.

In addition, Agent Murphy told Mr. Shorter that they were trying to locate Judge Hastings in order to interview him, and asked Mr. Shorter to give the judge Mr. Murphy's name, Mr. Bird's name and the number of the FBI Washington field office if he located the judge.

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[21] The FBI's decision to arrest Mr. Borders immediately rather than let the money go was based in part on a belief that the money would not go directly to Judge Hastings, but instead would first be "laundered." The $25,000 that was paid to Mr. Borders on September 12, 1981 was never found. The Government eventually recovered $25,000 from Mr. Borders in a civil suit.

After leaving Mr. Borders' office and making a few stops, Judge Hastings returned to his room at the L'Enfant Plaza Hotel and ordered lunch from room service around 1:00 p.m. Shortly thereafter, Mr. Pride dropped by and joined him for lunch. Afterwards, they went downstairs for drinks in the hotel's cocktail lounge.

When Mr. Pride returned to his room, he immediately received a phone call from John Shorter who told him that Mr. Borders had been arrested on charges involving bribery that had taken place in Judge Hastings' court. Mr. Shorter also told Mr. Pride that the FBI was looking for Judge Hastings to interview him. Mr. Shorter gave Mr. Pride the names of two FBI agents and the FBI telephone number. He asked Mr. Pride to give the message to Judge Hastings and to tell him to contact the agents. Mr. Shorter thought that Judge Hastings should have a lawyer present and suggested the name of a Washington attorney. Mr. Pride immediately called Judge Hastings and told him he had an important message and that he should come to Mr. Pride's room.

Mr. Pride took his two-year-old son and met Judge Hastings outside the elevator on Mr. Pride's floor of the hotel. Mr. Pride related Mr. Shorter's information. Mr. Pride testified at Mr. Borders' trial that Judge Hastings' reaction was one of shock, as if "he didn't know which way to move or what to do." Judge Hastings repeatedly asked where Mr. Borders was. Mr. Pride told the judge he knew nothing more than what he had learned from the phone call. The judge asked for Mr. Shorter's number, but Mr. Pride stated that Mr. Shorter was with Mr. Borders.

Mr. Pride testified that he and Judge Hastings then left Mr. Pride's child at Mr. Pride's room and went together to Judge Hastings' room. Mr. Pride testified at Judge Hastings' criminal trial that he suggested to Judge Hastings that if he had a problem he could best handle this matter in Florida, rather than in Washington and that he should get Florida counsel. Mr. Pride watched while Judge Hastings packed his clothes. When Mr. Pride offered to give Judge Hastings a ride to the airport, Judge Hastings declined, saying that Mr. Pride should not get involved because Mr. Pride was still on parole and that he would take a cab. They then went downstairs to the lobby where Judge Hastings and Mr. Pride parted. Mr. Pride testified that Judge Hastings made no phone calls in his presence.

At his trial, Judge Hastings testified that before leaving the L'Enfant Plaza Hotel, he gave Mr. Pride a 100 dollar bill and asked him to pay the room service charge and to pick up a suit Judge Hastings had left with the valet service. Mr. Pride, in his testimony, denied that Judge Hastings gave him any money or asked him to take care of the charges or the suit. The room service charge was not paid and the suit was left behind.

Judge Hastings also testified at trial that after speaking with Mr. Pride outside the elevators, he returned alone to his room and telephoned his mother and his fiancee, Patricia Williams, in Florida, while Mr. Pride went to his own room. According to Judge Hastings, when he called his mother long distance from his hotel room, she said she had learned about William Borders' arrest and that reporters were at her apartment complex. She allegedly was hysterical and told him to "come home." Judge Hastings also testi-

fied that he called Ms. Williams who told him that she had been interviewed by the FBI and that she had called his chambers and learned the FBI was interviewing his staff. According to Judge Hastings, Mr. Pride joined him after these calls.

The computer-generated record of all calls charged to rooms at the L'Enfant Plaza Hotel on October 9, 1981 does not reflect the calls Judge Hastings claims he made to his mother and Ms. Williams. The Chesapeake and Potomac Telephone Company routinely maintains a computer record of all telephone calls from the guest rooms at the L'Enfant Plaza Hotel. The computer runs for October 9 and 10, 1981, reflect only one call made from the hotel to area code 305—the area code for south Florida. That call was made at "22:00" (10:00 p.m.), long after Judge Hastings had left for Florida. Moreover, that call was placed from a room other than the one assigned to Judge Hastings. The records show no long distance calls made from Judge Hastings' room until the morning of October 10, 1981 at 1:56 a.m., again long after the judge had departed the hotel and the District of Columbia. That call was made to New York City.

On the afternoon of October 9, 1981, the FBI office in Washington, D.C. advised FBI personnel in Miami to begin interviews at Judge Hastings' chambers. The agents arrived at about 2:50 p.m. and were there until approximately 5:15 p.m. The Miami office of the FBI also received instructions to interview Ms. Williams, Judge Hastings' fiancee. FBI agents arrived at her office at about 2:50 p.m. and began the interview at approximately 3:00 p.m. Ms. Williams was interviewed by FBI agents for approximately 45 minutes. She was interrupted once by a phone call during the interview and stated to the agents upon her return that the call was from a client.

On Friday, October 9, 1981, at 2:50 p.m., FBI agents left Mr. Borders' office to go to the L'Enfant Plaza Hotel. They arrived at about 3:10 p.m., and were advised by the front desk that Judge Hastings had not checked out. Special Agent Murphy then called Judge Hastings' room and there was no answer. The agent called several times over the next few minutes and then went to the room and knocked. Each time there was no answer. At 3:30 p.m., Special Agent Murphy again called Judge Hastings' room. There was no answer.

The evidence indicates that Judge Hastings departed for the airport within 30 to 40 minutes of the time he first learned of Mr. Borders' arrest. By around 3:00 p.m., he was aware the FBI in Washington, D.C. wanted to interview him. Judge Hastings testified that he left the hotel at approximately 3:35 or 3:40 p.m. By 4:37 p.m., according to telephone records, he was at BWI calling his mother from a pay phone.

Airline records establish that Judge Hastings could have taken a direct flight that afternoon from Washington, D.C. to Miami, where his car was parked. There were 14 seats available on a flight, which left National at 4:35 p.m. However, instead of traveling to National, which is located four miles from the L'Enfant Plaza Hotel, Judge Hastings went by taxi—at a cost of $50—to BWI, which is 32 miles northeast of the hotel and approximately an hour away in Friday afternoon traffic.

At 4:37 p.m., Judge Hastings called his mother from a pay phone at BWI and spoke for four minutes, charging the call to his home telephone. This is the first documented contact between the judge and his mother that day. At 5:06 p.m., he called Ms. Williams from a BWI pay phone, also charging the call to his home telephone. This is the first documented call from Judge Hastings to Ms. Williams that day. He spoke to her for one minute and told her to call him back at a different pay phone. She called back at 5:07 from her home, and again at 5:22 p.m. from a pay phone. He then took her number, moved to a third pay phone and called her again. Judge Hastings admitted at his trial that he had engaged in this series of pay phone calls. He testified to several explanations for this conduct—a baby was crying; he suspected government surveillance near the pay phone; he was afraid Ms. Williams' phone had been tapped. He denied, however, that he went to BWI because he was trying to avoid any FBI agents who might be waiting for him at National.

Delta Airline records show that at 5:31 p.m. Judge Hastings made a reservation on flight 237 departing BWI at 6:30 p.m. for Miami with an intermediate stop in Fort Lauderdale. There is a handwritten notation on Judge Hastings' ticket crossing out Fort Lauderdale as his destination and substituting Miami. However, Judge Hastings got off the plane when it stopped in Fort Lauderdale. At the Fort Lauderdale airport, Judge Hastings rented a car because he had parked his car at the Miami airport when he had left Florida.

Judge Hastings testified at trial that upon arrival in Fort Lauderdale, he went to his mother's house and then proceeded to the home of Ms. Williams. In his FBI interview on October 9, 1981, however, he stated that he called his mother from the airport and drove directly to the home of Ms. Williams, without first seeing his mother. Judge Hastings testified that he arrived at Ms. Williams' home between 9:30 and 10:00 p.m. and told her to expect a visit from FBI agents. At about midnight, two FBI agents showed up and interviewed Judge Hastings for two hours. They testified that they had gone to Ms. Williams' home on the chance that Judge Hastings might be there.

FBI Agent John Simmons testified that when Mrs. Hastings was interviewed by the FBI on the night of October 9, at about 11:00 or 11:30 p.m., she stated that she had not heard from her son. Judge Hastings testified at trial that he had gone home and that if his mother had told the FBI that she had not heard from him, it was because she had had too much to drink. Both Judge Hastings and his mother denied that she had been instructed to tell the FBI that she had not heard from him. Mrs. Hastings testified at trial that Judge Hastings came to the apartment and she gave the FBI Mrs. Williams' telephone number when an agent called later that night.

When Judge Hastings was interviewed by the FBI at Ms. Williams' home, he denied any involvement with Mr. Borders in a bribery conspiracy. He stated that he did not believe he had ever discussed the *Romano* case with Mr. Borders. With respect to his abrupt departure from Washington, D.C., Judge Hastings said he went home because he believed he could better defend himself against allegations while on "his own turf." He later testified at

trial that he departed immediately because of the telephone calls he made from the hotel to his mother and Ms. Williams. When interviewed by the FBI on October 9, 1981, Judge Hastings did not mention any telephone calls.

On Monday, October 12, 1981, three days after Mr. Borders' arrest, at 6:38 a.m., a person placed a telephone call from Judge Hastings' home telephone number (305-731-8176) to William Borders' home telephone number (202-398-6321). The call lasted two minutes. No recording of the conversation was made because the wiretap was no longer in effect.

On October 14, 1981, Ms. Williams wrote to Judge Hastings and told him that she felt "pride and joy as well as horror" as a result of their telephone conversation on Friday, October 9th, when Judge Hastings called her "from Baltimore" and indicated that he wanted her legal assistance in confronting allegations of bribery which Judge Hastings had just learned were being directed against him.

5. Contacts Between Judge Hastings and William Borders

As the *Romano* case proceeded, there was a series of telephone calls between Judge Hastings and Mr. Borders, which are documented through toll records. Judge Hastings also testified to two additional calls from Mr. Borders. While the content of these calls is not always known, there is a synchronization of contacts between Mr. Borders and Judge Hastings relative to significant documented events in the *Romano* case. As the Eleventh Circuit Investigating Committee observed, the telephone contacts between Judge Hastings and Mr. Borders were often of brief duration, sometimes at odd hours and on at least one occasion from and to a pay phone.

Analysis of these contacts reveals that most of the known calls occurred on or close to days on which (a) Judge Hastings had motions in the *Romano* case under active consideration, (b) Judge Hastings held hearings relating to the Romanos' forfeiture or sentencing matters, or (c) William Borders was negotiating about the payment of a bribe. The available telephone records for Judge Hastings and Mr. Borders, and Mr. Borders' office message logs reflect only eight other telephone contacts from January through October 1981. Specifically:

1. On February 20, 1981, the day of the forfeiture hearing, Judge Hastings called Mr. Borders early in the morning. The call lasted three minutes.

2. On April 9, 1981, the day after the last memoranda relating to the forfeiture issue were filed, Judge Hastings called Mr. Borders' office. He left a message for Mr. Borders to call and said he would be "at his office between 12 and 1." At 12:15 p.m. a call was placed from a pay phone in the corridor of the third floor of the federal courthouse in Miami, Florida near Judge Hastings' chambers to a pay phone in the lobby of the federal courthouse in Washington, D.C. The call lasted one minute or less and was charged to Judge Hastings' residence. At about the same time, Mr. Borders' secretary made a reservation for Mr. Borders to fly to Miami the following weekend. This call was made within a day or two of when the intermediary relayed Mr. Dredge's message to the Romanos that there

was a Washington, D.C. lawyer who might be able to help them with their case.

3. Judge Hastings called William Borders three times within a few days of April 23, 1981, the date the parties were advised the Romano sentencing was scheduled for May 11, 1981.

4. On May 4, 1981, the day Judge Hastings entered his order compelling forfeiture, he called Mr. Borders during a morning recess and left a message that he would be awaiting Mr. Borders' call between 12:00 and 1:00 p.m.

5. Judge Hastings called Mr. Borders four times between the call on May 4 and the scheduled time of sentencing on May 11, 1981 at 1:00 p.m.: once after midnight on May 6 from Madison, New Jersey; once on May 7 at 4:30 p.m. when Judge Hastings left a message for Mr. Borders to call him at 7:00 a.m. the next morning; and twice before 7:00 a.m. on May 11. Two of the calls (on May 6 and May 11) were to the home of Mr. Borders' girlfriend. On May 11, Judge Hastings postponed sentencing. One of the three documented calls lasted less than two minutes; the two others less than one minute each.

6. Judge Hastings sentenced the Romanos on July 8, 1981. On July 5, 7 and 9, Judge Hastings called Mr. Borders. The July 5 and 7 calls each lasted less than one minute. On July 9, Judge Hastings left a message for Mr. Borders. The following weekend Mr. Borders met Judge Hastings in Miami.

7. On September 10, 1981, the same day that Mr. Borders arranged a September 12 meeting with Mr. Rico, there were calls back and forth between Judge Hastings and Mr. Borders. The calls occurred both before and after the Borders-Rico meeting had been arranged.

8. On September 11, 1981, the day before Mr. Borders was to meet Mr. Rico, Judge Hastings called Mr. Borders twice.

9. On September 20 or 21, 1981, Mr. Borders called Judge Hastings, which was during the 10 day period before the order was to issue.[22]

10. On October 2, 1981, after telling Mr. Rico that he would check on the promised order vacating the forfeiture order, Mr. Borders called Judge Hastings' chambers and asked to speak with Judge Hastings.

11. On October 4, 1981, Mr. Borders called Judge Hastings' residence and left a message for the judge to call.[23]

12. On October 5, 1981, Judge Hastings told his law clerk to get the *Romano* order out that day. At 5:12 p.m. that day, Judge Hastings called Mr. Borders.

13. On October 8, 1981, Judge Hastings called Mr. Borders and arranged to stay at the same hotel when he came to Washington, D.C. on October 9, 1981.[24]

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[22] This call is not documented by phone records; however, Judge Hastings testified to the call at trial

[23] This call is also not documented in the phone records; however , Judge Hastings testified to it at trial

[24] *See* Appendix I to the Subcommittee Hearings at p. 199 n. 47.

6. Pre-trial Proceedings

Following William Borders' arrest on October 9, 1981, a subpoena was served on the chambers of Judge Hastings, seeking appointment calendars, telephone logs, and other records. The requested documents were turned over to the FBI at the time of the service of the subpoena.

William Borders was released from jail on Saturday, October 10, 1981. The items subpoenaed from Mr. Borders' office on October 9, 1981, were turned over on October 13, 1981. At least two items from Mr. Borders' office were missing: a telephone message slip from September 9, 1981 and the secretary's desk calendar for September 1981.

On October 13, 1981, a grand jury began hearing evidence, a process it concluded on October 21, 1981. On December 29, 1981, an indictment was returned against Mr. Borders and Judge Hastings, charging both with conspiracy and obstruction of justice.[25]

On January 4, 1982, the case was assigned to Judge Edward T. Gignoux, then Chief Judge of the United States District Court for the District of Maine, sitting by designation. He ordered reciprocal discovery, which called for each of the parties to produce for the other side those documents it intended to rely upon at trial. The prosecution produced its documents on January 19, 1982, including the tapes of the intercepted telephone calls between Judge Hastings and Mr. Borders. The defense produced its materials on February 12, 1982. Judge Hastings did not at that time produce any letters or drafts of letters about or to "Hemp" as referred to in the critical October 5, 1981 conversation.

On February 1, 1982 Judge Hastings filed suit to enjoin his prosecution on the ground that a sitting federal judge had to be impeached before a prosecution could proceed. Although this position was eventually rejected,[26] his criminal case was stayed pending the outcome of the litigation, thereby prompting Judge Gignoux to sever Judge Hastings' trial from that of Mr. Borders.

Mr. Borders was tried in Atlanta, Georgia from March 22 until March 29, 1982. Neither Mr. Borders nor Judge Hastings testified. The theory of Mr. Borders' defense was that there was insufficient evidence of a conspiracy with Judge Hastings. Mr. Borders argued that although the evidence may have been compelling that he solicited and took a bribe on behalf of the judge, there was insufficient evidence that he had acted in concert with Judge Hastings.[27] The jury convicted Mr. Borders on all counts on March 30, 1982. Mr. Borders appealed contesting the introduction of certain evidence supporting a finding that there was a conspiracy, specifically the evidence tending to show that Judge Hastings had fled Washington, D.C. after he had learned of Mr. Borders' arrest. The United States Court of Appeals for the Eleventh Circuit concluded that the evidence of flight was sufficient to support a finding that Judge Hastings had conspired with William Borders and affirmed the conviction.[28]

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[25] Mr. Borders was also charged with two counts of interstate travel to carry out the bribery scheme.

[26] *United States* v. *Hastings*, 681 F.2d 706 (11th Cir. 1982).

[27] *United States* v. *Borders*, 693 F.2d 1318, 1319 (11th Cir. 1982).

[28] *Id*

Judge Hastings and his attorneys undertook to prepare his defense. In addition to having one of the defense attorneys attend Mr. Borders' trial as an observer, thereby enabling the judge to gain a preview of the Government's evidence against him, the defense team immediately reviewed the taped conversations.

On January 25, 1982, Hemphill Pride was interviewed by Judge Hastings in Columbia, South Carolina. Judge Hastings' principal attorney at that time, Joel Hirschhorn, was concerned about his client meeting alone with Mr. Pride and therefore arranged for a local attorney, Jack Swerling, to attend the session. When the conference concluded, however, Mr. Pride insisted on driving Judge Hastings to the airport. During that trip, Judge Hastings told Mr. Pride it was important for Mr. Pride to recall that the judge was trying to draft support letters for him. When Mr. Pride told the judge that he knew of no such attempts and, if he had, he would have stopped any such efforts, Judge Hastings replied that Mr. Pride would not have had to know about it. Mr. Pride refused to endorse Judge Hastings' suggestion and disavowed any connection with the letters.

Following the Court of Appeals' rejection of his challenge to the prosecution, Judge Hastings' case was set for trial. Approximately one month before trial, on December 13, 1982, Judge Hastings (now represented only by himself and Patricia Williams) for the first time disclosed to the prosecution the "Hemp letters," which consisted of three yellow legal pad sheets, comprising three handwritten letters, one addressed to Hemphill Pride, and the other two addressed generally to friends and supporters from whom Judge Hastings was requesting either financial assistance for Mr. Pride or letters of support to be sent to the South Carolina Supreme Court, to be used to assist Mr. Pride in gaining readmission to the South Carolina bar.

The prosecution submitted the letters to forensic experts in an attempt to date the creation of the letters. The Committee did so as well. None of the forensic experts, however, could date the papers. The paper and ink employed were such that it was impossible to conclude when the letters were written. Likewise, tests to reveal impressions on the paper other than the visible writing revealed nothing that could date the papers.

B. JUDGE HASTINGS' FALSE TESTIMONY AT TRIAL

Judge Hastings' criminal trial, conducted in Miami, Florida, began on January 19, 1983 and continued for 12 days. Judge Hastings took the stand as the final witness in his defense. During his testimony, Judge Hastings testified falsely in 14 different instances. Three instances of false statements pertain directly to Judge Hastings' testimony that he did not participate in a conspiracy with William Borders: (1) Judge Hastings' assertion that he and Mr. Borders did not agree to solicit a bribe from the Romanos; (2) Judge Hastings' assertion that he and Mr. Borders did not agree that Judge Hastings would modify the Romanos' sentences from a prison term to probation in exchange for the bribe; and (3) Judge Hastings' assertion that he and Mr. Borders had never agreed that

Judge Hastings would set aside the May 4, 1981 forfeiture order after a payment on the bribe.

The 11 other instances of false testimony pertain to Judge Hastings' attempt to explain away specific incriminating evidence. Judge Hastings knowingly testified that:

1. He expected to meet William Borders at the Fontainebleau Hotel on September 16, 1981.
2. He was surprised by Mr. Borders' arrival at his room at the Sheraton Hotel on September 12, 1981.
3. On October 5, 1981, he told his law clerk to prepare the order in the *Romano* case primarily because the law clerk would be leaving his employment shortly.
4. His October 5, 1981 telephone conversation with William Borders was about writing letters for Hemphill Pride rather than about the conspiracy to solicit a bribe in the *Romano* case.
5. The "Hemp letters" were written on October 5, 1981, when, in fact, they were fabricated by Judge Hastings after that date in an effort to conceal his participation in the bribery scheme.
6. On May 5, 1981 he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.
7. On August 2, 1981 he talked to Hemphill Pride by placing a telephone call to 803-782-9387 in Columbia, South Carolina.
8. On September 2, 1981 he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.
9. The telephone number 803-777-7716 was the number at a place where Hemphill Pride could be contacted in July 1981.
10. On the afternoon of October 9, 1981, he called his mother and Patricia Williams from his room at the L'Enfant Plaza Hotel.
11. He took a plane from BWI rather than National because he did not think there were direct flights to Miami from National at that time.

C. DISCLOSURE OF WIRETAP INFORMATION

In the fall of 1984, the Federal Bureau of Investigation began an investigation of Local 1922 of the International Longshoremen's Association ["ILA"] in Miami, Florida. In early 1985, the FBI decided to penetrate the local with an undercover person. At that point the Public Corruption Section of the United States Attorney's Office in Miami joined in the investigation of public and union corruption in connection with the Port of Miami. By July 1985, a confidential source,[29] Johnny Rivero, was in place and had reported a broad variety of illegal activities—including labor racketeering, extortion, narcotics offenses, and bribery—involving union officials, public employees, police officers, and organized crime figures. Efforts were made to get Mr. Rivero admitted to Local 1922. It was

[29] A confidential source is a private cooperating individual, under the supervision of the FBI, but not a special agent. Mr. Rivero, the confidential source, has authorized the disclosure of his name.

decided that a wiretap would be necessary to identify in advance the time and place for the payoff of corrupt union officials.

On July 15, 1985, the United States Attorney's Office in Miami applied for authorization to institute a wiretap under 18 U.S.C. 2516, generally referred to as Title III. Federal law requires that interceptions of wire communications be authorized by a federal judge and, in July of 1985, Judge Hastings was the judge assigned responsibility for reviewing such applications that month.

The expressed need for the wiretap was the failure of other investigative techniques. Local 1922 had been the subject of an earlier, very successful and well publicized investigation which had culminated in 1978 with the arrest and conviction of several union officials. As a result, the union was very suspicious of newcomers. Recorded conversations had revealed that Mr. Rivero had been patted down on more than one occasion by persons connected with the union who were searching for recording equipment. Similarly, Mr. Rivero was accused of being a "cop" by one union member and warned by another person that since he was coming from the west he would be treated as if he were an FBI agent.

These facts were set out in great detail in the Application and Affidavit in Support of Application for the wiretap submitted to Judge Hastings on or before July 15, 1985.[30] In stating the necessity for the interception, an FBI agent, Geoffrey Santini, emphasized the suspicions of the union officials and the potentially violent nature of some of the subjects of the investigation. The backgrounds of the persons listed as subjects of the wiretap supported Special Agent Santini's conclusions: one was identified as the son of a leading organized crime figure in Cleveland, Ohio and the union member controlling "bookmaking, shylocking and fencing" operations at the Port of Miami; a second was the secretary-treasurer of Local 1922 and son of the former office manager of Local 1922 who had been convicted of racketeering, racketeering conspiracy, extortion, and Taft-Hartley Act violations; another described himself as a member of "La Cosa Nostra;" and one was Kevin "Waxy" Gordon, zoning code enforcer for the City of Surfside, Florida, who had stated to Mr. Rivero that he had political connections that could exercise control over officers of the local.

The Application and Affidavit in Support of Application, and other supporting papers were presented to Judge Hastings by Assistant United States Attorneys Mark Schnapp and Roberto Martinez and Special Agent Geoffrey Santini. Judge Hastings expressed concern about the minimization of interceptions of communications at the Surfside City Hall, and Mr. Martinez assured him that all efforts would be made to insure proper minimization on these phones. Judge Hastings then signed the necessary orders, one of which placed under seal all of the pleadings filed in support of the wiretap, rendering the information contained in those pleadings confidential. In addition, each time Judge Hastings received subsequent documents concerning the wiretap, he signed an order placing under seal all the information set forth in the documents.

[30] The Affidavit and Application are reprinted in Appendix IV of the Subcommittee Hearings.

1. July 22–August 12, 1985

On July 22 and 29, and August 5 and 12, 1985, Judge Hastings was presented weekly progress reports describing information obtained by the wiretap and by other investigative techniques.[31] The judge quickly reviewed and signed each report. The First Progress Report was presented to Judge Hastings by Assistant United States Attorney Martinez on July 22, 1985. At that time Mr. Martinez pointed out that there were interceptions concerning other crimes (bribery and extortionate credit transactions),[32] but there was no further conversation between Mr. Martinez and the judge. The Second Progress Report was presented on July 29, 1985. Mr. Martinez again pointed out the interceptions, reflecting new criminal activity. On this occasion, however, Mr. Martinez pointed out the page that discussed those interceptions, and Judge Hastings turned back to the page and reviewed it. One of the other crimes described on that page was the possibility of obtaining zoning changes and licenses for an amusement operation which Mr. Rivero had raised with Kevin "Waxy" Gordon. During a discussion of favorable locations for such an operation, Mr. Gordon had mentioned the location of a particular novelty store. The report quotes Mr. Gordon as saying "We cheated a little to get him in there to begin with, he's a friend of the Mayor's."

In the first three progress reports there are continuing references by the subjects of the wiretap, including Mr. Gordon, that they do not trust the phones and are suspicious that certain persons are agents and that cars spotted near their homes belong to agents.

The Third, Fourth, and Fifth Progress Reports, as well as the application for an extension of the wiretap, were presented to Judge Hastings by Assistant United States Attorney Jon May. These reports reveal that Mr. Gordon was working through several sources (some of them targets of the investigation) to get Mr. Rivero into the union. He had also suggested various drug deals and methods of enlisting the aid of the North Bay Village Police to bring in drugs. Mr. Gordan was also attempting to find an appropriate location for the amusement operation.

In the Fourth Progress Report, presented to Judge Hastings on August 12, 1985, a conversation between Mr. Gordon and Johnny Rivero is reported in which Mr. Gordon stated that he had Mayor Stephen Clark of Dade County "in his pocket." Mr. Gordon explains that he had raised over $40,000 for the mayor during his last election campaign. Later in the same conversation Mr. Gordon stated that his buddy was the mayor's campaign manager. When Mr. Gordon first started working on the problem of getting Mr. Rivero onto the docks, he had placed a call in Mr. Rivero's presence to a person whom Mr. Gordon had identified as the campaign manager for the Mayor of Dade County. In that conversation, as reported in the affidavit in support of the July 15 application, Mr. Gordon stated to the campaign manager that Mr. Rivero had

[31] The progress reports are reprinted in Appendix IV of the Subcommittee Hearings.

[32] 18 USC 2517(5) requires judicial approval of the investigation of criminal activity discovered as a result of the wiretap if that criminal activity was not included in the original application.

"money to pay his way," that he just needed some inside help. At the conclusion of the conversation Mr. Gordon told Mr. Rivero not to worry because they were going to get him onto the docks.

2. August 15, 1985

On August 15, 1985, both the Fifth Progress Report and the application for a 30 day extension of the July 15 wiretap authorization were presented to Judge Hastings by Mr. May and FBI Agent. Santini.[33] The affidavit in support of the application repeated almost verbatim the events reported in the first four progress reports which had been submitted to Judge Hastings between July 22 and August 12, 1985, including all of the comments about Mayor Clark. Judge Hastings reviewed the application and then commented that when he had first begun reading the application he had thought that "Waxy" was the radio station.[34] According to Special Agent Santini, the judge went on to say that "Waxy is like the radio station. If he doesn't keep his mouth shut he will get everyone into trouble, including the Mayor." The rest of the conversation concerned the minimization of interceptions at the Surfside City Hall.

3. August 22–September 5, 1985

The First Progress Report after the extension of the wiretap was submitted by Mr. Martinez and signed by Judge Hastings on August 22, 1985. However, it was not picked up by Mr. Martinez until August 29, 1985, the date of the submission of the Second Progress Report. Both progress reports had references to Mayor Steve Clark.[35]

At this point in the investigation, Gino, an undercover FBI agent posing as a Houston-based entrepreneur who wanted to set up the amusement center, had been introduced to Kevin "Waxy" Gordon by Johnny Rivero. Mr. Gordon drove Gino around to look at possible sites and when Gino expressed an interest in the Hialeah area, Mr. Gordon stated the mayor of Hialeah was a friend of Mayor Clark's. Mr. Gordon went on to state that help from the mayor of Hialeah might cost as much as $10,000. This conversation is reported in the First Progress Report after the extension.

The Second Progress Report, dated August 29, 1985, describes a meeting between Mr. Gordon and Johnny Rivero at which Mr. Rivero is introduced to Mayor Clark, Peter Ferguson and several other people. The meeting occurred at the Miami Outboard Club a favorite meeting place of the participants. The report states that Mayor Clark walked in, went over to Mr. Gordon and hugged him. At that point Mr. Gordon introduced him to Mr. Rivero as "Steve Clark, the mayor." After some general conversation and a game of pool, Mr. Gordon said to Mr. Rivero that "Steve is going to take care of this Hialeah thing for us, since that's where Gino wants to be." Mayor Clark then stated, "If you have any problems with that thing in Hialeah get in touch with me." Mr. Gordon asked again for the name of the contact in Hialeah, and Mayor Clark gave him

[33] The progress report is reprinted in Appendix IV of the Subcommittee Hearings.
[34] WAXY are the call letters of a Miami radio station.
[35] The progress report is reprinted in Appendix IV of the Subcommittee Hearings.

the name of a Hialeah councilman and added, "If you have any problems with him, get back in touch with me."

Mr. Martinez presented this Second Progress Report to Judge Hastings in the courtroom. The judge reviewed it while on the bench and then asked Mr. Martinez to see him in chambers. Once in chambers, Judge Hastings remarked, "Pretty heavy stuff." Mr. Martinez asked if he was referring to Mayor Clark, and the judge responded "Uh hum." Mr. Martinez explained that Mayor Clark was not a target of the investigation. He explained the history of the Hialeah investigation and stated that Mayor Clark had simply walked into the picture when Kevin "Waxy" Gordon had introduced him to Johnny Rivero. Judge Hastings commented that "Clark better be careful because he could get in trouble hanging around Waxy."

A week later, on September 5, 1985, Mr. Martinez presented the Third Progress Report to Judge Hastings in his courtroom. Judge Hastings read the report while on the bench and then called Mr. Martinez to the bench. The judge asked if Mr. Martinez had anything to tell him, and Mr. Martinez replied that everything was in the report. Mr. Martinez added that the wiretap was expiring in ten days and that they would not apply to renew it.

Three times in this report Mr. Gordon is quoted as saying that the zoning matters in Hialeah will be handled by Mayor Clark's contact. First he tells Gino that he has made a connection with the Hialeah Zoning Commission through Mayor Clark. Then Mr. Gordon reports to Johnny Rivero that he has told Gino all about Hialeah and the mayor. Finally, when Mr. Gordon, Mr. Rivero and Gino meet to drive around and look at potential sites, Mr. Gordon is reported to have described a Hialeah councilman who was generally reputed as being corrupt as "Steve Clark's man in Hialeah."

Throughout these progress reports there are additional indications that the subjects of the wiretap are sensitive to the possibility of their phones being tapped and of the presence of undercover agents. In addition to questions about whether a person's "phone is good" and the pat downs, there were specific concerns expressed about both Mr. Rivero and Gino. After Mr. Gordon introduced Mr. Rivero to one of the union officials, the official called back and said he needed a "resumé" on Mr. Rivero—some background information—"where he comes from and who he knows." The official stated that before they talk to anybody "they got to know for damn sure who they talking about." After Mr. Rivero provided the information, the official stated that there were no positions available.

During the same time period, Mr. Gordon made contact with another union official to get Mr. Rivero on the docks. Mr. Gordon was told that the official had contacted someone in the ILA local in New Orleans, and he had never heard of Johnny Rivero. As a result, the Miami official said that Local 1922 was very suspicious of Mr. Rivero. Finally, the day after Mr. Gordon met with Gino and Mr. Rivero, Mr. Gordon called Gino and said that he had better go back to Houston. He explained that the Hialeah councilman would be out of town for a week and then added that he did not know how the councilman would feel about giving someone he does not know "guarantees about zoning matters, it usually isn't done that way It's an illegal act you know." These events were

reported in the progress reports submitted to Judge Hastings on August 22 and 29, and September 5, 1985.[36]

There are also clear indications in these progress reports that the undercover operations were dealing with dangerous people in a potentially violent situation. Both Kevin "Waxy" Gordon and another target of the investigation had talked to Mr. Rivero about enlisting the aid of corrupt police officers to bring in a shipment of cocaine. Mr. Rivero had introduced one of the targets to an undercover agent posing as a cocaine smuggler interested in obtaining police protection from the North Bay Police Department. The three of them had met and set the final terms ($3,000 to each officer, Mr. Rivero, and the target) and on the next day the target had introduced Mr. Rivero to one of the policemen. In addition, Mr. Gordon had introduced Mr. Rivero to a boat captain who was available to bring in the cocaine. One of the targets of the investigation had threatened to "blow away" a drug dealer who was later found dead on the beach. The person who had made that threat was staying at Mr. Rivero's apartment. This information was set out in the progress reports submitted to Judge Hastings on August 29 and September 5, 1985.

4. The Hastings/Clark Meeting

On September 6, 1985, Stephen Clark, mayor of Dade County, Florida attended a meeting of the Metro Miami Action Plan ["MMAP"], a community service organization which promotes black-white community relations in the Miami area. Judge Hastings was the guest speaker at the breakfast meeting. Some time that morning Judge Hastings disclosed confidential information learned while supervising the wiretap. He told Mayor Clark to "stay away from Kevin Gordon, he's hot, he's been using your name in Hialeah."

Mayor Clark called Mr. Ferguson and asked him to get in touch with Kevin "Waxy" Gordon. Mr. Ferguson was to tell Mr. Gordon that the mayor would be at the Miami Outboard Club at 11:30 a.m. that day and that he wanted to see Mr. Gordon there. At 8:58 a.m., the FBI monitored an incoming phone call to Mr. Gordon from Mr. Ferguson in which Mr. Ferguson said that Mayor Clark wanted to meet Mr. Gordon at "11:30 a.m today at the Miami Outboard." That morning Mr. Gordon told two persons, an attorney and Mr. Rivero, that he would be meeting the mayor that day. Although he did not know what the meeting was about, he told Mr. Rivero that it was not about the Hialeah zoning matter. Mr. Gordon and Mr. Rivero agreed that Mr. Rivero would also come to the Miami Outboard Club that day.

When Mr. Rivero arrived at the Miami Outboard Club, Mayor Clark and Mr. Gordon were talking. Mr. Rivero joined Mr. Ferguson at another part of the bar and they were eventually joined by Mayor Clark and Mr. Gordon. At that time Mr. Rivero overheard the mayor tell Mr. Gordon, "I need it done, and we're both going to come out OK." Mr. Gordon responded, "It's done and don't worry about it."

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[36] *See* Appendix IV of the Subcommittee Hearings.

At the Miami Outboard Club, Mayor Clark advised Mr. Gordon that he had learned from an authoritative source that Mr. Gordon was using his name in Hialeah. According to the mayor, Mr. Gordon denied that he was using the mayor's name and denied that he was doing anything wrong. Mr. Gordon then pressed Mayor Clark to identify his source, and the mayor eventually stated that the source was Judge Hastings.[37]

On September 9, 1985, the FBI became aware that confidential information had been leaked, when Mr. Gordon told an acquaintance about his meeting with Mayor Clark in a conversation that was monitored. Representatives of the FBI, the Public Integrity Section of the Criminal Division of the United States Department of Justice, and the United States Attorney's Office met to determine whether the undercover investigations could continue. It was decided that both the investigation into union corruption and the zoning investigation would have to be terminated because of Mr. Gordon's involvement. The union investigation had become too risky for the undercover source, Johnny Rivero. The zoning investigation was no longer viable because Mr. Gordon had immediately suspected Gino, and had asked Mr. Rivero to check out Gino. He also launched his own investigation of Gino. The cocaine deal involving corrupt police officers was considered to be sufficiently isolated from Mr. Gordon to be safe, and, in fact, that operation was successfully completed and resulted in arrests and convictions.

5. Investigation of the Disclosure

In an effort to determine whether Judge Hastings had in fact disclosed confidential information to Mayor Clark, the Department of Justice focused its investigation on Kevin "Waxy" Gordon. Mr. Gordon had on several occasions offered to obtain drugs for Mr. Rivero, an offer which Mr. Rivero had been instructed to avoid in the past in order to keep the investigation from being sidetracked. Now Mr. Rivero was instructed to accept Mr. Gordon's offer, and in October 1985 two undercover buys were arranged. Mr. Gordon was arrested and on November 20, 1985 he executed a plea agreement in which he agreed to cooperate with authorities.

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[37] There are numerous accounts of the conversation between Mayor Clark and Mr. Gordon on that day. On September 9, 1985, three days later, Mr. Gordon recounted the meeting to an attorney in a conversation that was monitored by the FBI. On September 10, 1985, Mr. Gordon met Mr. Rivero and told him about the meeting with Mayor Clark, and on September 11, 1985, Mr. Gordon and Mr. Rivero discussed it again in a monitored telephone conversation. Mayor Clark described the meeting in a conversation with Mr. Gordon on January 17, 1986, which was recorded without his knowledge in his statement to the FBI on March 13, 1986 and in his testimony before the grand jury on March 20, 1986. All of the accounts are generally consistent.

On several occasions, Mr. Gordon stated that Mayor Clark said that the judge had warned the mayor that Mr. Gordon was using both Mayor Clark's name and Mr. Ferguson's name while putting together a deal with a councilman in Hialeah. Mayor Clark does not say that the judge mentioned either Mr. Ferguson or a councilman from Hialeah.

When Mr. Gordon recounted the meeting to Mr. Rivero, he stated that Mayor Clark had told him that Judge Hastings said the phones at the Surfside City Hall and at Mr. Gordon's home were wired and there was an investigation going on in Hialeah. In that account the judge is reported to have said, "If Kevin is a friend of yours, tell him not to do anything in Hialeah."

Mayor Clark denied that Judge Hastings had said anything specifically about the wiretap or about the FBI investigation. According to Special Agent Santini, when Mr. Gordon was arrested and debriefed he stated that Mayor Clark did not say anything about the wiretap or the FBI investigation. Similarly, in a September 1985 conversation with Mr. Rivero, Mr. Gordon stated that it was Mayor Clark, not the judge, who had said that if Mr. Gordon was doing anything in Hialeah, he should "back off."

A plan was developed whereby Mr. Gordon would wear a body recorder and attempt to engage Mayor Clark in a conversation in which Judge Hastings' disclosure would be discussed. Mr. Gordon was successful in obtaining body recordings of two of the participants in the September 6, 1985 conversation at the Miami Out-[illegible] Club. On December 18, 1985 he recorded a conversation with M[illegible] Ferguson in which Mr. Ferguson suggested that Johnny Rivero was an undercover narcotics agent. On January 17, 1986, Mr. Gordon spoke with Mayor Clark, who again recounted Judge Hastings' statement to him at the MMAP annual meeting.

Mr. Gordon died in February 1986. The FBI then approached Mayor Clark directly. The mayor admitted that Judge Hastings had spoken to him at the MMAP meeting and had warned him to stay away from Mr. Gordon because Mr. Gordon was "hot" and was using the mayor's name in Hialeah. Mayor Clark passed a polygraph test in which he was asked whether Judge Hastings had disclosed the information.[38]

In March 1986, both Mayor Clark and Special Agent Christopher Mazzella[39] testified before the grand jury about Judge Hastings' disclosure. Shortly after their testimony, a Miami Herald reporter learned of the fact of the testimony and the subject of the inquiry. The reporter confronted Mayor Clark and Judge Hastings, both of whom initially said that they had no comment. Judge Hastings called the reporter back the following day and stated that he had "searched his mind" the night before and his only recollection of seeing Mayor Clark was at occasional speaking engagements and that he was sure that he had not revealed any confidential information to the mayor. Judge Hastings did not contact either the FBI or the United States Attorney's Office about the leak.

In May of 1986, the Department of Justice decided to attempt to interview Judge Hastings. Special Agent Mazzella spoke with Judge Hastings on May 19, 1986. After obtaining Agent Mazzella's permission to have a court reporter make a record of their conversations, Judge Hastings did not think it was appropriate for him to discuss a Title III wiretap with Agent Mazzella. Judge Hastings stated that he would be willing to talk with representatives of the Public Integrity Section of the Department of Justice. On May 20, 1986, Eric Holder of the Public Integrity Section spoke with Judge Hastings. At that time the judge declined to be interviewed, stating that Mr. Holder would have to do whatever he planned to do without Judge Hastings' assistance and that he knew how the Department of Justice worked. Judge Hastings also asked Mr. Holder if he knew who Judge Hastings was.

Ultimately the Department of Justice decided not to prosecute Judge Hastings, in spite of its conclusion that Judge Hastings had disclosed the confidential information and had violated the law in

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[38] The Committee is aware of the controversy surrounding the use of polygraphs and recognizes their limited utility. The Committee is not suggesting that it condones their use as a substitute for traditional investigative techniques particularly in wide ranging, unfocused investigations. They have been shown to have some utility in answering specific questions once an investigation is already underway and clearly focused. In this case, the evidence as a whole is sufficiently persuasive that the Committee is confident in the conclusion it has reached.

[39] Mr. Mazzella was the FBI supervisor of the investigation of the disclosure of confidential information.

doing so. According to a Department of Justice memorandum, the ultimate decision not to prosecute "was not easy to reach" and was reached only after changing their minds "numerous times." [40] The Department of Justice perceived certain factual weaknesses in the case as a criminal prosecution, primarily because the encounter with Mayor Clark was one-on-one, albeit bolstered by circumstantial evidence corroborating Mayor Clark. Another difficulty was the lack of an obvious motive for Judge Hastings' disclosure to Mayor Clark. A significant factor in the decision not to pursue the matter as a criminal prosecution was the fact that any such prosecution in light of the acquittal of Judge Hastings on the bribery conspiracy charge would be "vastly complicated by charges of a prosecution motivated by race, politics and institutional vindictiveness." [41] The Department of Justice chose instead to initiate a complaint with the Eleventh Circuit under 28 U.S.C. 372(c).

Two additional issues which the Committee investigated, were the precise timing of the disclosure and the possibility of an alternative source of the information to Mayor Clark. Mayor Clark testified before the grand jury (and subsequently before the 1987 Investigating Committee and the Subcommittee) that at the MMAP meeting on September 6, 1985, at the conclusion of his speech, Judge Hastings approached him. While shaking his hand, Judge Hastings took him aside and before Mayor Clark could even say "Good morning," the judge warned him to stay away from Kevin "Waxy" Gordon. Mayor Clark testified that he then left the meeting, returned to his office and called Mr. Ferguson to arrange a meeting with Mr. Gordon. The FBI monitored a call from Mr. Ferguson to Mr. Gordon at 8:58 a.m. that day which set up such a meeting. Judge Hastings, however, was not scheduled to speak until 9:05 a.m. By all accounts the program was running late and the speech was not concluded until after 10:00 a.m. Therefore, Judge Hastings could not have made the disclosure to Mayor Clark after the speech.

The Subcommittee heard evidence, however, that before the speech Judge Hastings spoke with Mayor Clark in the company of a third person, Monsignor Bryan Walsh. Testifying before the 1987 Investigating Committee Judge Hastings admitted such a meeting but denied that he had had a private conversation with the mayor before the program began or that he had made any improper disclosure. Monsignor Walsh testified before the Subcommittee that he, Mayor Clark, and Judge Hastings had exchanged greetings on the morning of September 6, 1985 before the speeches, but he did not know whether Mayor Clark and Judge Hastings had had a private conversation after the three of them separated. There are no witnesses to such a private conversation, and Mayor Clark testified that he had no recollection of meeting Judge Hastings and the monsignor before the speech.

A second issue investigated by the Committee was the possibility of an alternative source for Mayor Clark's information. This issue arose because of a telephone conversation on July 23, 1985 between

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[40] The Department of Justice memorandum is reprinted in Appendix IV of the Subcommittee Hearings.

[41] *Id.*

FBI Special Agent Tom Dowd of Miami and Glen Whittle, an aide of Mayor Clark. Mr. Whittle asked Special Agent Dowd to verify that the FBI had an investigation into the activities of "the man who married you" and Mr. Ferguson. Mr. Whittle said he had gotten this information from Special Agent Dowd's wife's boss. The man who married Special Agent Dowd was Mayor Clark, and his wife's boss was H. Paul Rico, the retired FBI agent who had posed as Frank Romano in the bribery conspiracy investigation. In addition, Special Agent Dowd was a friend of both Mr. Ferguson and Mr. Whittle.

Special Agent Dowd checked with his supervisors and was told to return the call and state that the requested information was confidential and that he "took exception" with the fact that Mr. Whittle would ask him for such information. Special Agent Dowd then called Mr. Whittle back, at which time Mr. Whittle said, "your wife's boss is a great kidder." Mr. Whittle was advised that he could interpret the call however he wanted but the call was not to be construed as a confirmation or denial of his suspicions.

In addition to whatever contacts Mayor Clark had with the FBI through Mr. Rico and Special Agent Dowd, the mayor also testified before the Subcommittee that he played golf with two FBI agents, Anthony Amoroso (who had been involved in the bribery conspiracy investigation) and Jerry Forrester.

The FBI and the United States Attorney's Office concluded that the inquiry by Mr. Whittle was of no significance because it did not affect the actions of the various participants in the ILA or the zoning schemes. Mr. Whittle called Special Agent Dowd approximately one week after the wiretap was instituted. At that date, there was no basis for concluding that Mayor Clark had anything to do with the investigation. Moreover, there were no conversations intercepted thereafter in which concerns about an FBI investigation were expressed. In fact, both Mr. Ferguson and Mayor Clark talked to Kevin "Waxy" Gordon about ILA and zoning matters subsequent to the July 23, 1985, inquiry by Mr. Whittle.

In comparison, the disclosure by Judge Hastings resulted in a dramatic change in conduct by Mr. Gordon after September 6, 1985. He immediately started questioning numerous friends about who might be the source of the "leaked" information. He devoted time to investigating Gino for himself—including visiting the office address Gino had given to him, asking someone at AT&T to find out if the telephone number for Gino's office actually rang at the office address, giving Gino's card to a banker friend to check, and reassessing the economics of Gino's business proposition to try to determine if it was an FBI operation.

The Committee concludes that no plausible basis exists for finding that someone other than Judge Hastings tipped off Mayor Clark.

6. Impact of the Disclosure

In early September 1985, the investigation into Local 1922 was stalled because various members of the ILA local were suspicious of the informant, Mr. Rivero. Prior to Judge Hastings' disclosure, however, representatives of the FBI and United States Attorney's Office had taken steps to enlist the aid of an ILA official who was

coming to Miami to vouch for Mr. Rivero. Assistant United States Attorney Martinez and Special Agent Santini believed that person to be of such stature that his word would be sufficient to persuade Local 1922 to admit Mr. Rivero. When Mr. Martinez and Special Agent Santini learned about the disclosure, they immediately called off the official for fear of compromising him. At the time of the disclosure, the FBI and United States Attorney's Office believed they were very close to actually getting Mr. Rivero on the docks.

When Judge Hastings' disclosure was confirmed, two of three very important undercover operations had to be terminated. The waterfront investigation of Local 1922 was terminated because Kevin "Waxy" Gordon was in the center of the attempts to get Mr. Rivero into the union. Because Mr. Gordon had connections with a number of the union officials, as well as with Mr. Ferguson, who was not only Mayor Clark's campaign manager but also the marketing director for Fiscal Operations at the Port of Miami. This operation was now too risky to pursue. The investigation of the waterfront was approximately a year old, and it had to be abandoned before sufficient information was obtained to make any arrests.

The Hialeah zoning operation was also terminated. Mr. Gordon had immediately suspected Gino, the undercover agent who was posing as the businessman who wanted to set up the amusement center. Although that investigation had only begun in July 1985, the FBI had the cooperation of an amusement company to set up an amusement franchise, and extensive resources and personnel had been invested in the operation. In the opinion of law enforcement officials, the undercover operation was very promising until the leak. To the extent that any further operations dependent on Mr. Gordon were contemplated, they also had to be abandoned.

Because the United States Attorney's Office and law enforcement agencies feel they can no longer trust Judge Hastings, authorization for wiretaps is not sought during the months when he is the duty judge.

VI. Analysis of Articles of Impeachment

Article I

The Committee determined, based on an independent and thorough review of the evidence, that Judge Hastings participated in the 1981 bribery conspiracy with William Borders. Judge Hastings put the administration of justice up for sale, thereby undermining the integrity of the federal judiciary and the public's faith in the federal courts. For this reason alone, impeachment is warranted.

There is abundant evidence supporting the Committee's conclusion. As a threshold matter, the chronology of events (set forth in Part A of the Statement of Facts) presents in detail the correlation of events in the *Romano* case with the implementation of the bribery conspiracy. The chronology reveals a pattern of contact between Judge Hastings and William Borders that strongly suggests Judge Hastings' involvement. The evidence is circumstantial; however, one event after another points to Judge Hastings' participation in the bribery scheme.

1. As detailed in the Statement of Facts,[42] between January and October 1981, the vast majority of documented phone contacts between Judge Hastings and William Borders occur around significant events in the *Romano* case. There are very few documented contacts on other occasions. The contacts between the two men demonstrate Judge Hastings' participation in the bribery conspiracy.

At trial, Judge Hastings did not specifically recall the phone contacts. In his submissions to the Subcommittee, however, Judge Hastings provided a list of independent events that occurred during the relevant time period. For example, in February and July of 1981, there were meetings of the National Bar Association, in which both Mr. Borders and Judge Hastings were active participants. Similarly, Mr. Borders was engaged in a lawsuit against President Reagan in the late spring of 1981 which was decided on July 7, 1981. Although these events are within the general time frame of the 1981 telephone contacts, they do not explain the phone calls with nearly the same degree of persuasiveness and specificity as do key events in the *Romano* case. Indeed, the telephone contacts between Judge Hastings and Mr. Borders are often on the very day Judge Hastings held a hearing or issued an order in *Romano*.

2. Mr. Borders' detailed knowledge of the *Romano* case when he met Mr. Rico for the first time on September 12, 1981 points to Judge Hastings' participation.[43] William Borders was not a member of the Florida bar, he did not practice in Miami, and the *Romano* case was not publicized in the Washington, D.C. area. Nonetheless, when he met Mr. Rico to set up the bribery scheme, Mr. Borders knew that Judge Hastings had forfeited a significant amount of the Romanos' property; that an order would issue returning a "substantial amount" of that property; that the Romanos had received jail sentences; and that they had filed an appeal. This information could have been gleaned from the *Romano* pleadings, which were public records. The public file, however, was kept in Judge Hastings' chambers throughout the relevant time period. Moreover, there is no evidence to suggest that Mr. Borders had access to this file personally or that he was in contact with anyone who could inform him of the file's contents, other than Judge Hastings.

In addition, during his first meeting with Mr. Rico, Mr. Borders immediately selected a date for Judge Hastings' dinner at the Fontainebleau Hotel without consulting the judge, despite Judge Hast-

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[42] Section A-5.

[43] On June 10, 1988, the Supreme Court of Rhode Island issued a decision in *Lerner v. Moran*, reversing an 18 year old murder conviction on the ground that an FBI agent named Paul Rico had suborned perjury and had testified falsely himself at the defendant's trial. The FBI has confirmed that the Paul Rico named in that case is the same person who played the role of Frank Romano in the bribery conspiracy case.

In reviewing the evidence the Committee determined that all known interactions and conversations between Mr. Rico and Mr. Borders were recorded, and therefore do not depend on the credibility of Mr. Rico. No one has ever questioned the accuracy or genuineness of the tape recordings. The Committee has no basis for believing that there were any unrecorded contacts between Mr. Rico and Mr. Borders. The Committee relies upon Mr. Rico for the fact that Mr. Borders did not verify in advance of his trip to Miami on September 18, 1981 that Judge Hastings had appeared at the Fontainebleau Hotel as promised. That fact alone, however, is hardly determinative of Judge Hastings' participation in the bribery scheme. Therefore the Committee concludes that the issue of Mr. Rico's credibility is of marginal relevance.

ings' busy travel schedule. This is further evidence of Judge Hastings' direct participation in the bribery scheme.

3. The decision in *United States* v. *Martino*, which was controlling Fifth Circuit law, required Judge Hastings to reverse the *Romano* forfeiture order in June 1981 and return a substantial amount of the forfeited property. Judge Hastings, however, failed to reverse the order in July, August, or September 1981. In fact, in early July he specifically affirmed his earlier order, despite his knowledge of *Martino*. Judge Hastings did not issue the order returning a substantial amount of the Romanos' property until (a) William Borders' scheme with Mr. Rico had commenced, (b) a $25,000 down payment had been made, (c) Mr. Rico had repeatedly questioned Mr. Borders about the fact that the order had not yet been issued, (d) Mr. Borders had attempted to contact Judge Hastings and, (e) on October 5, 1981, the coded conversation between Judge Hastings and Mr. Borders had occurred. While there is evidence that Judge Hastings told his law clerk to prepare the reversal order in early September before Mr. Borders was told the Romanos were "ready to deal," the judge took no steps until October 5, 1981 to see that the order was completed.

4. Mr. Borders and Judge Hastings had an opportunity on the day before William Borders' meeting with Mr. Rico (on September 12, 1981) to meet and discuss the bribery scheme. Indeed, Mr. Borders and Judge Hastings took steps to coordinate their schedules to bring about that opportunity. Judge Hastings was scheduled to fly to Washington, D.C. on September 11th. When his flight from Miami to National was delayed, he repeatedly notified Mr. Borders. Judge Hastings testified that he notified Mr. Borders of the delay because Mr. Borders was supposed to pick him up at National. That testimony is incredible, however, because Mr. Borders was to leave from National one and one half hours after Judge Hastings' originally scheduled arrival time. After Judge Hastings' flight was delayed, Mr. Borders—who was scheduled to fly from National to Miami in order to meet Mr. Rico the next morning—delayed his departure. Ultimately there was a one and one half hour period when both Judge Hastings and William Borders were in Washington, D.C., and could have conveniently met at the airport.[44]

5. Mr. Borders went to great lengths to see Judge Hastings in Washington, D.C. on September 12, 1981, presumably to discuss with him the meeting with Mr. Rico which had taken place that morning, and to tell Judge Hastings to "show" at the Fontainebleau Hotel at 8:00 p.m. four days later. Immediately after setting up the bribery deal in Miami, Mr. Borders flew to West Palm Beach and drove to his family reunion in Fort Pierce, Florida. Shortly after arriving he made reservations to leave West Palm Beach that afternoon at 4:12 p.m. At 3:30 p.m. Mr. Borders canceled that reservation and made one leaving from Melbourne, Flor-

[44] Judge Hastings did not check into the Sheraton Hotel, where he was staying in Washington, D.C., until two and a quarter hours after he arrived at National, a delay which Judge Hastings attributed at trial to a lengthy wait for his luggage and a cab ride to pick up his date in upper Northwest Washington in which the driver had a great deal of difficulty locating the street. At trial, Judge Hastings denied meeting Mr. Borders at the airport. Meanwhile Mr. Borders took a flight through Atlanta and did not arrive in Miami until 1:30 a.m. on September 12, 1981.

ida, at 4:35 p.m. He drove to Melbourne and missed his flight. Immediately thereafter he drove to Orlando, Florida where he caught a flight to BWI scheduled to arrive at 8:35 p.m. Two days earlier, Mr. Borders had told Jesse McCrary (who was with Judge Hastings in Washington) that he would be in Florida for the weekend. Mr. Borders' complicated effort to return to Washington is specifically documented in the record.

The evidence also establishes that Judge Hastings was waiting for William Borders on the evening of September 12, 1981, bolstering the already strong inference that they had planned to meet. At 10:00 p.m. on that Saturday evening, Judge Hastings, Mr. McCrary, and three women were in the judge's room at the Sheraton Hotel. They had not yet had dinner. One of the women testified before the Investigating Committee that they were waiting for William Borders, while another testified they were waiting for someone. Jesse McCrary testified that it was Judge Hastings' idea to delay dinner. Only when William Borders arrived did the group go to dinner.

6. As agreed by Mr. Borders and Mr. Rico, on September 16, 1981, Judge Hastings dined at 8:00 p.m. at the Fontainebleau Hotel. As discussed in detail below in support of Article V, Judge Hastings did not intend to meet William Borders for an innocent social encounter. Rather, as a participant in the bribery conspiracy, he dined at the Fontainebleau Hotel on the specified day and at the assigned time as a sign of his involvement in the scheme.

7. A series of lawfully intercepted phone calls, between October 2-7, 1981, convincingly demonstrates Judge Hastings' participation in the bribery conspiracy. Mr. Rico called William Borders on October 2, 1981 inquiring after the order, which had not yet been issued. Mr. Borders replied "I'll check into it." Less than two hours later, Mr. Borders attempted to call Judge Hastings. When he was unable to reach the judge, Mr. Borders reported to Mr. Rico on the morning of October 4th "I haven't been able to talk to anybody." Mr. Borders called Judge Hastings' residence on the afternoon of October 4th and left a message for the judge to call him. On the morning of October 5, 1981, Judge Hastings instructed his law clerk to complete the order in *Romano* that day. Also, on October 5, 1981, Mr. Borders told Mr. Rico that everything was taken care of and the order would go out either that day or "first thing in the morning." Forty minutes later, Mr. Borders had the coded conversation with Judge Hastings, in which the judge said "I'll send the stuff off to Columbia in the morning." Finally, two days later, October 7, 1981, Mr. Borders told Mr. Rico that the order "went out yesterday morning."

Although the failure to issue the order within the promised time period arguably suggests that Judge Hastings was not a knowing participant in the bribery conspiracy, the Committee finds that the series of phone calls immediately before and after the issuance of the order, between Mr. Borders, Mr. Rico and Judge Hastings, is compelling evidence of Judge Hastings' complicity.

8. The coded conversation of October 5, 1981 itself demonstrates Judge Hastings' knowing participation in the scheme. Judge Hastings contends that the conversation was about letters for Hemphill Pride rather than the conspiracy. The taped conversation, however, undermines Judge Hastings' claim. On its face, the conversation

does not make sense. Moreover, Mr. Pride testified convincingly that he never "wrote some things down" for William Borders as stated in the conversation. In addition, a linguistic expert concluded after detailed analysis of the conversation that the conversation was coded.

Further, Hemphill Pride has repeatedly testified that he did not know of any letters of support, nor desire any. Mr. Pride, in fact, was not even eligible for reinstatement to the South Carolina bar until 18 months after the letters were allegedly written. He testified before the Subcommittee that he refused to endorse Judge Hastings' explanation of the letters, when suggested by the judge after the indictment issued.

9. Judge Hastings' guilty flight from Washington, D.C. after learning of William Borders' arrest belies Judge Hastings' innocence. First, Judge Hastings did not contact the FBI after Mr. Pride gave him the names of the agents and the telephone number to call but instead immediately left for Florida. Second, there is no documentary evidence of the phone calls which allegedly motivated Judge Hastings to return to Florida. The documentary evidence of the timing of the FBI interviews in Florida and testimony about the entries in the visitor logs of Mrs. Hastings' apartment complex establish that the events allegedly discussed in the phone conversations had not yet occurred.

Third, Judge Hastings refused a ride from Mr. Pride to the airport, stating Mr. Pride should not get involved because he was on parole. Instead, Judge Hastings took a $50 cab ride to BWI, even though he knew that National was only a ten minute ride away. Fourth, as recently as July 1981, Judge Hastings had taken a 5:30 p.m. nonstop flight from National to Miami and, therefore, contrary to his trial testimony, he knew that direct flights were available from that airport.[45] Fifth, when at BWI, Judge Hastings engaged in a series of pay phone calls from different booths with Patricia Williams. He admitted making the calls at trial and offered several inconsistent explanations for his conduct. Sixth, Judge Hastings flew to Ft. Lauderdale and rented a car, despite the fact that the plane went on to Miami, where his car was parked. Finally, Judge Hastings' account of his actions once he arrived in Ft. Lauderdale is contradictory at best.[46]

It is clear that Judge Hastings' purpose in leaving Washington was to avoid immediate interrogation by the FBI. The Committee concludes that the fact that Judge Hastings consented to being interviewed when he was later located by the FBI in Fort Lauderdale, and that he may have been more comfortable facing the FBI on "his own turf" are insufficient to outweigh the inference that Judge Hastings' initial avoidance of the agents and his false testimony offered to explain his decision was evidence of his consciousness of guilt.

10. Phone records reflect an early morning phone call, on October 12, 1981, three days after William Borders' arrest, from Judge Hastings' residence to Mr. Borders' residence. By this time, Judge

[45] In fact, on October 9, 1981, at 4:35 p.m. there was an Eastern flight departing National for Miami with seats available.

[46] See Statement of Facts at A-4.

Hastings had already asserted that he was an innocent victim of Mr. Borders' corrupt bribery scheme.

The totality of the evidence clearly and convincingly establishes Judge Hastings' knowing and willing participation in the bribery conspiracy with William Borders. In contrast to this abundant evidence of Judge Hastings' involvement, there is very little exculpatory evidence.

At both the criminal trial and the Subcommittee hearings, Judge Hastings offered evidence of his good reputation and standing in the community.[47] The Committee has taken that evidence into account; however, it is not sufficient to counter the extensive evidence of Judge Hastings' participation in the bribery scheme. Likewise the Committee took into account evidence that Judge Hastings was not facing financial pressure. For example, at his trial, witnesses testified to the relatively modest life style of the judge and his history of pro bono work. Yet Judge Hastings did not appear to have a comfortable financial cushion and he also testified to his desire to put together a downpayment for a house.

In addition, at his criminal trial, Judge Hastings presented the defense that Mr. Borders had been acting alone—that he had been "rainmaking", that is, saying that he could influence the judge's decisions when he had no such power. In support of this argument Judge Hastings proffered, at his criminal trial, testimony by members of the legal community describing rainmaking schemes. He also pointed to the statements of William Dredge that Mr. Borders had claimed to be able to influence other judges.

The Committee rejects this defense for several reasons. First, there was no evidence in the record that Mr. Borders engaged in "rainmaking." Second, Mr. Borders exhibited a confidence in his ability to produce the promised favors which would be foolhardy if he were merely "rainmaking." On two occasions Mr. Borders offered to have Mr. Dredge hold the entire $150,000 payment in escrow, until Judge Hastings had signed the order returning the Romanos' property. Moreover, the reputation of Mr. Trafficante suggests that Mr. Borders' life may well have been in danger had he not produced on his promises. Finally, the Committee rejected the "rainmaking" defense because the evidence establishes that Mr. Borders was not acting alone.

The Committee concludes that, when viewed in its totality the evidence of Judge Hastings' involvement in the corrupt bribery scheme is overwhelming. Judge Hastings schemed to sell the trust placed in him as a federal judge. His conduct warrants impeachment.

Articles II, III and IV

Articles II, III and IV charge Judge Hastings with knowingly making false statements under oath at his criminal trial. These three articles address Judge Hastings' general denials that he participated in the bribery conspiracy. Specifically, Judge Hastings testified under oath as follows:

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[47] At the Subcommittee's request, Judge Hastings submitted letters regarding his reputation and good standing rather than presenting live testimony at the hearings. The letters are reprinted in Appendix III of the Subcommittee Hearings.

Question: Did you agree with and conspire with William Borders to influence, in any way, the performance of your judicial duties?

Answer: No, I did not.

Question: Did you agree with Bill Borders and intend knowingly and voluntarily to participate in any kind of illegal undertaking?

Answer: None whatsoever. I did not do that, nor would I have done so, nor would I now.[48]

* * * * * * *

Question: Let me say it this way: Is not the gist of what Mr. Borders said to the man he thought was Romano was that he could eliminate their jail sentences for $125,000.[49] As a show of proof, A, he'd produce you at any restaurant they wanted, and B, a substantial portion of property would be returned to them?

Answer: I believe that is the gist of the conversation.

Question: Of course, you had no idea that was going on?

Answer: No, I didn't.[50]

The evidence in support of Articles II, III and IV is set forth in the analysis of Article I. Judge Hastings knowingly participated in the bribery conspiracy and violated his oath to tell the truth by denying that involvement. Judge Hastings' false testimony at his criminal trial warrants impeachment.

Article V

Article V charges Judge Hastings with falsely testifying at his criminal trial with respect to his reason for appearing at the Fontainebleau Hotel on September 16, 1981 at 8:00 p.m. Judge Hastings testified under oath as follows:

Question: Judge, would you tell the jury why you went to the Fontainebleau Hotel on September 16th?

Answer: As I indicated, William Borders had indicated to me that he would be at the Fontainebleau Hotel during the dinner hour and for purely social purposes he and I were going to meet expressly for the purpose of socializing . I know for a fact that . William Borders indicated to me that he would be in Miami at the Fontainebleau Hotel September 16th.

And that is the primary reason I went there.[51]

* * * * * * *

Question: Judge did you dine at the Fontainebleau Hotel on September 16, 1981, to show your participation in a bribery scheme?

Answer: Absolutely not.[52]

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[48] Transcript of *United States* v. *Hastings* at 2058.

[49] The prosecutor apparently misspoke here, for the bribery scheme actually involved a payment of $150,000.

[50] Transcript of *United States* v. *Hastings* at 2107-2108.

[51] *Id.* at 2009.

[52] *Id.* at 2057.

For several reasons, this testimony is false. There is no question that Judge Hastings appeared at the time and place set by Mr. Borders and Mr. Rico to establish the judge's participation in the scheme. Judge Hastings invited a date for dinner and only made reservations for two. The judge neither told his date they were meeting William Borders, nor objected when the waiter removed two place settings after they were seated at a table for four. Furthermore, 15 minutes after being seated in the dining room, Judge Hastings got up from the table and walked through the hotel lounge allegedly to look for Mr. Borders. That walk, however, enabled him to be seen by any interested observers.

There was no way William Borders could have met Judge Hastings for dinner, nor is there any indication that Mr. Borders even intended to do so. Mr. Borders was in Las Vegas, Nevada at the Leonard-Hearns championship fight on September 16, 1981. He had planned the trip well before promising Mr. Rico that the judge would appear at the Fontainebleau Hotel. When Mr. Rico suggested a meeting with Mr. Borders on September 17, 1981, Mr. Borders declined because he would be at the fight. Moreover, William Borders was well known as an avid boxing fan who never missed an important championship fight.

In addition, upon returning from Las Vegas on September 18, 1981, Mr. Borders immediately changed planes at National in order to fly to Miami to make his scheduled meeting the next morning with Mr. Rico. At that meeting, Mr. Borders received the $25,000 down payment based on Judge Hastings' appearance at the Fontainebleau Hotel. There is no evidence that Mr. Borders verified that Judge Hastings had appeared as agreed. He was certain the judge had dined as planned because Judge Hastings was a knowing participant in the bribery conspiracy.

Article VI

Article VI charges Judge Hastings with testifying falsely at his criminal trial that he was surprised by William Borders' appearance at his Sheraton Hotel room at 10 p.m. on September 12, 1981. Specifically, Judge Hastings testified under oath that:

> *Answer:* He [Mr. Borders] knocked on the door. I answered it . and I said words to the effect, "Some kind of surprise," without trying to remember exactly what I said, but I was surprised to see Bill .[53]
>
> * * * * * * *
>
> *Question:* And you weren't waiting for Mr. Borders?
> *Answer:* Oh, absolutely not.[54]

Judge Hastings violated his oath to tell the truth by testifying that he was surprised to see Mr. Borders. His testimony flatly contradicts the testimony of other people in the room. Moreover, Mr. Borders' complicated and purposeful maneuvers to reach Washington, D.C. undermine Judge Hastings' testimony. For a more detailed discussion of the facts establishing Judge Hastings' false tes-

[53] *Id.* at 1841.
[54] *Id.* at 2111.

timony in this regard, *see* Statement of Facts, part A-5, and paragraph 5 in support of Article I.

Article VII

Article VII charges Judge Hastings with lying under oath at his criminal trial with respect to why, on October 5, 1981, he told his law clerk, Jeffrey Miller, to prepare the order returning a substantial amount of the Romanos' property. Judge Hastings testified under oath that:

> *Answer:* . . But the most pressing consideration was the complexity of the forfeiture aspect and his leaving the possibility of his not being there when I returned from the long trip with the exception of one day that I was going to come back to try a juvenile that was in jail.
>
> And it is for that reason that I made the statement to him that I wanted the order done.[55]
>
> * * * * * * *
>
> *Question:* What was the urgency to issuing the order on October the 6th?
>
> *Answer:* Because Jeffrey was going to be leaving and I was going to be away for the month of October.[56]

While it is true that Mr. Miller was scheduled to leave Judge Hastings' chambers at the end of October, the real reason that Judge Hastings told his law clerk to get out the *Romano* order that day was to implement a part of the bribery conspiracy.

The governing law required Judge Hastings to reverse the *Romano* forfeiture order much earlier than October 1981, and Judge Hastings was well aware of the law.[57] Nonetheless, the judge did not effectively follow through on his instruction to reverse his earlier order until the bribery scheme was in place, the down payment had been made, and the series of phone calls between Mr. Rico, Mr. Borders and Judge Hastings had occurred. In addition, Mr. Miller testified before the Investigating Committee that Judge Hastings' instruction to get out the order "that day" was unusual. The totality of the evidence establishes that Judge Hastings' explanation under oath as to why he wanted the order out on October 5, 1981 was knowingly false and stated with the intention of misleading the trier of fact.

Articles VIII and IX

Article VIII charges Judge Hastings with knowingly testifying falsely at his criminal trial with respect to the meaning and purpose of his October 5, 1981 conversation with William Borders. Article IX charges Judge Hastings with violating his oath by testifying that three documents were drafts of the "Hemp letters," which were referred to in the October 5th conversation and were allegedly written by the judge on October 5, 1981.

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[55] *Id.* at 1969.
[56] *Id.* at 2139.
[57] See paragraph 2 in support of Article I

Judge Hastings testified extensively about the meaning and purpose of the October 5th conversation and the draft letters for "Hemp." Specifically, he testified under oath as follows:

> *Question:* At about 5:00 in the afternoon, you called Bill Borders on October 5th?
>
> *Answer:* Yes, I——
>
> *Question:* Why did you call him?
>
> *Answer:* I called him, then, because on October 4th, at some time in the afternoon, evidently he left a message for me with my mother . something about Hemphill.
>
> And again it had to do with matters that he and I had been in rather ongoing discussions about . . trying to raise money for him.[58]
>
> * * * * * * *
>
> *Question:* Now when you used the word "letters," were you in fact referring to letters?
>
> *Answer:* I certainly was.[59]
>
> * * * * * * *
>
> *Question:* Mr. Borders goes, "Ah-hah" and then what do you say?
>
> *Answer:* I say "And everything's okay. The only thing I was concerned about was, did you hear if, ah, hear from him after we talked?"
>
> *Question:* And what are you talking about there?
>
> *Answer:* I am referring specifically to the call that I received from Mr. Borders either on September 20th or 21st wherein he indicated to me he expected to see Hemphill again, and he was asking him specifically about his exact financial condition.[60]
>
> * * * * * * *
>
> *Question:* And Mr. Borders, "See I talked to him and he wrote some things down for me." What did you take Mr. Borders to mean there?
>
> *Answer:* The best I can think I took that he meant had to do with Hemphill's financial condition.[61]
>
> * * * * * * *
>
> *Question:* Just so I am perfectly clear on your answer, you thought he was going to get some more information about Mr. Pride?
>
> *Answer:* That is all I could have possibly had in my mind at that time, sir.[62]
>
> * * * * * * *
>
> *Question:* Now, are these the letters to which you refer in your October 5th conversation?

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[58] Transcript of *United States v. Hastings* at 1846.
[59] *Id.* at 1848.
[60] *Id.* at 2180.
[61] *Id.* at 2182.
[62] *Id.* at 2185.

Answer: Certainly.[63]

* * * * * * *

Question: Judge Hastings, you said you wrote these letters on the Bench. On what date did you write these letters?

Answer: October 5th.[64]

* * * * * * *

Question: All right. So we are 100 percent clear on this, you wrote these letters, Government or Defense Exhibit 29, from the Bench during the Santorelli trial on October 5?

Answer: 100 percent clear.[65]

By this testimony Judge Hastings attempted to explain the incriminating October 5, 1981 taped conversation. Judge Hastings, however, lied under oath and fabricated the letters. A close reading of the October 5 conversation reveals that it corresponds to details of the bribery scheme.[66] The conversation on its face does not make sense, its base and based on expert linguistic analysis, it contains the signifying characteristics of a code.[67] Hemphill Pride testified that he never wrote anything down for Mr. Borders, contrary to Mr. Borders' assertion in the October 5th conversation. It is uncontroverted that Hemphill Pride did not know of the letters, would never have agreed to them, and was not even eligible for reinstatement to the South Carolina bar until May 1983. All of these facts establish the falsity of Judge Hastings' testimony.

Finally, Judge Hastings failed to produce the draft "Hemp letters" until approximately one month before trial. He was under an obligation to turn over the letters as early as February 1981, ten months earlier. However, he did not do so until December 1982. Although there is a reference to such letters in an early memorandum prepared by Judge Hastings' counsel, the judge never actually showed any letters to that lawyer.[68] Moreover, William Borders'

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[63] *Id.* at 1849–1850.

[64] *Id.* at 1854.

[65] *Id.* at 2187–2188.

[66] The Committee analyzed the conversation and concludes that Judge Hasings initiated the October 5 call in order to confirm that the bribery deal with the Romanos was still on. The Committee believes that Judge Hastings and Mr. Borders spoke on the previous day, at which time Mr. Borders indicated that Frank Romano (Mr. Rico) had repeatedly called to inquire about the order which was supposed to have been issued on September 29, 1981. At 4:22 p.m. on October 5, Mr. Rico again called Mr. Borders. During the conversation Mr. Borders assured him that the order had "been taken care of." Mr. Rico then indicated that once the order was issued, the bribe would be paid.

Approximately fifty minutes later, Judge Hastings called Mr. Borders and they had the coded conversation. Judge Hastings began the call by informing Mr. Borders that he had drafted the order, "those, ah, ah, letters, ah, for Hemp." He then asked whether Mr. Borders had heard from "him" (Mr. Rico) after Judge Hastings and Mr. Borders had talked. Mr. Borders responded "Yea" and went on to confirm the bribery scheme by repeating its terms, "See, I had, I talked to him and he, he wrote some things down for me . . . and then I was supposed to go back and get some more things." Judge Hastings responded "I understand." The judge then confirmed that he would issue the order by stating, "Well then, there's no great big problem at all. I'll, I'll see to it that, ah I communicate with him. I'll send the stuff off to Columbia in the morning." The order issued at the end of the next day, October 6, 1981. *See* Statement of Facts, section A–5 for the transcript of the entire conversation.

[67] *See* the oral and written testimony of Dr. Roger Shuy in the Hearing Record.

[68] Judge Hastings testified that he did not give the letters to his lawyer because he did not trust him and he did not produce the drafts because the case was dormant during his pre-trial appeal.

attorney, John Shorter, refused even to look at the letters, despite the fact that they were potential exculpatory evidence for his client.[69] All of this evidence, in its totality, establishes that the letter writing campaign and the testimony at trial was fabricated in an effort to hide the bribery conspiracy. Judge Hastings lied under oath in this respect.

Articles X, XI, XII and XIII

Articles X through XIII charge Judge Hastings with four additional instances of false testimony. At trial, Judge Hastings testified to three phone calls he made to Hemphill Pride in 1981, identifying the numbers on phone records. He also identified a phone number at which Mr. Pride could allegedly be reached in July 1981. Judge Hastings offered this testimony in support of his assertion that he (and Mr. Borders) frequently spoke to Mr. Pride about his financial condition and desire for reinstatement, which in turn supported Judge Hastings' explanation of the October 5, 1981 conversation.

At the conclusion of his direct examination, Judge Hastings testified as follows:

> *Question:* Judge, would you tell us about the first call that I indicated with a little check on the front page, there?
>
> *Answer:* The first call would be Item 2 under the second full itemization column, and it is a call . . . to Columbia, South Carolina. And the call is a five-minute call, and it is placed on September 2nd, at 11 something in the morning.
>
> *Question:* And to whom was that call placed?
>
> *Answer:* I know for a fact that this particular call was placed to Hemphill Pride.
>
> *Question:* Did you speak with Hemphill Pride?
>
> *Answer:* I certainly did.
>
> *Question:* On that day?
>
> *Answer:* I certainly did.
>
> *Question:* All right. Now, would you seek out the second call that I have indicated on those toll records with a little check?
>
> *Answer:* May 5th.
>
> *Question:* May 5th?
>
> *Answer:* '81. I spoke with Mr. Pride.[70]
>
> * * * * * * *
>
> *Question:* Judge, I direct your attention to the August 2nd call.
>
> *Answer:* Yes.
>
> *Question:* The one for eighteen minutes' duration?
>
> *Answer:* Yes.
>
> *Question:* Would you tell us what time that call was placed?

[69] Mr. Borders' attorney testified before The Investigating Committee such letters were useless to him because he believed Judge Hastings would not testify and therefore would not be available to authenticate them

[70] Transcript of *United States* v. *Hastings* at 2048–2049.

Answer: 9:20 in the morning, to Columbia, South Carolina, to a place that I know is the number of Hemphill Pride, and it was a eighteen-minute call.

Question: And did you, in fact, speak with Hemphill Pride for eighteen minutes on August 2nd?

Answer: Yes, I did; . . .[71]

* * * * * * *

Question: Judge, I would like to direct your attention to Item No. 11. Is there a phone call dated 7/24?

Answer: The second column, Item No. 11, dated July the 24th, is a phone call to a number in Columbia, South Carolina, being Area Code 803-777-7716, and that call was for five minutes.

Question: Do you recognize that number?

Answer: The number is a number where Hemphill Pride may have been working. I am not certain if he was working there or not, but I have called that number myself.

Question: All right. And that call was made by Bill Borders, to Hemphill Pride on July 24th?

Answer: On July 24th, correct.[72]

Only one of the four phone numbers identified by Judge Hastings belonged to Mr. Pride. The other three numbers belonged respectively to a business contact of William Borders, a social acquaintance of Judge Hastings (who was called twice) and Patricia Williams' ex-mother-in-law. The call to Ms. Williams' ex-mother-in-law was, in fact, made from Patricia Williams' home phone and lasted 18 minutes.[73] The actual subscribers to the identified numbers testified before the Investigating Committee either that they did not know Mr. Pride or it was not possible that Mr. Pride had received a call on their phone. Finally, Hemphill Pride testified before the Subcommittee that, although he spoke to Judge Hastings in the summer of 1981, he has never received a call at any of the three numbers falsely identified by Judge Hastings in his trial testimony. There is no evidence relating to whether Judge Hastings called any of these numbers in the year immediately preceding trial. He testified at trial, however, without reservation, that each of the four calls was to Hemphill Pride.

Article XIV

Article XIV charges Judge Hastings with testifying falsely, with the intention of misleading the trier of fact, about two phone calls he claimed at trial to have made from the L'Enfant Plaza Hotel on October 9, 1981 after learning of Mr. Borders' arrest. The evidence before the Committee establishes that Judge Hastings' testimony was knowingly false and given with intent to mislead. While under oath, Judge Hastings testified as follows:

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[71] *Id.* at 2051-2052.

[72] *Id.* at 2033.

[73] As defense counsel, Ms. Williams asked Judge Hastings whether the identified phone numbers were calls to Hemphill Pride, including the call to her ex-mother-in-law with whom she was in contact.

Question: . . . What did you do when you got down to your room?

Answer: The very first thing I did, walked straight into the room and picked up the telephone and called my mother.

Question: And when you called your mother, what did you learn?

Answer: When I called my mother, she was—I do not wish to exaggerate—I have never known her to be as hysterical as she was. It is just that simple. And I couldn't calm her down. . .

Question: Did you make any other calls?

Answer: Yes, I did.

Question: Had Hemphill arrived at your room by this time?

Answer: No he had not.

Question: Who did you call?

Answer: I called you [Patricia Williams].

Question: All right. And what happened there?

Answer: I called you at your office at the Economic Opportunities Commission here at the Dupont Plaza Hotel and I learned you had been interviewed by the FBI and the particulars, at least in part, as to what had transpired in your interview with the FBI.

And in addition to that I learned that you had called my office and had learned that the FBI was there for the express purpose, among other things, of interviewing my staff.[74]

* * * * * * *

Question: You are certain that sitting in the hotel room after Mr. Pride gave you the news, that you made two long distance calls to Florida and you charged them to your room?

Answer: Right.[75]

The evidence establishes that not only could Judge Hastings not have learned the specific information he testified to at the time he alleged, but also that no phone calls were made. There is no documentary evidence whatsoever of the phone calls. The hotel phone records contain no record of any calls made to Florida from the L'Enfant Plaza Hotel (let alone from Judge Hastings' room) during the relevant time period. No such calls appear on Judge Hastings' home or business phone records. While it is true that the computer records do not reflect any calls charged to the guest rooms between 2:54 pm and 4:10 pm on the afternoon of October 9, 1981, the Committee does not find that fact to be persuasive evidence that the system was "down". For, although it may be unlikely that there would be no long distance calls by guests during that time, the computer system does not record *all* calls by guests—it records only those calls moreover, witnesses who were thoroughly familiar

[74] Transcript of *United States* v. *Hastings* at 1914-1916.

[75] *Id.* at 2216.

with the operator of the computer record system and who reviewed the relevant hotel phone records did not suggest there was any problem with the system's operation charged to the room, not the calls charged to another number or to a credit card.

Hemphill Pride unequivocally testified before the Subcommittee he was with Judge Hastings from the time the judge learned of Mr. Borders' arrest until the time the judge was in the hotel lobby ready to depart. According to Mr. Pride, during that time, Judge Hastings did not make any phone calls.

FBI agents testified before the Investigating Committee that on October 9, 1981 both Ms. Williams and Judge Hastings' staff were being interviewed by the FBI at the time of Judge Hastings' alleged calls. Thus, contrary to his testimony, Judge Hastings could not have learned from a call to Ms. Williams that she had already been interviewed by the FBI.

An FBI agent testified that the logs for Mrs. Hastings' apartment indicated that no reporters had arrived at the complex at the time of Judge Hastings' alleged call to his mother. Again, Judge Hastings could not have learned from his mother the information to which he testified. The only documented call between Judge Hastings and his mother on October 9 is from BWI.

Finally, in a letter dated October 14, 1981, confirming Judge Hastings' request that she assist in his legal representation, Ms. Williams stated that she was horrified, yet pleased to assist him, as the judge had asked when calling "from Baltimore." The only documented phone calls from Judge Hastings to Ms. Williams on the afternoon of October 9, 1981 are from BWI.

No telephone calls were made by Judge Hastings from the L'Enfant Plaza Hotel to his mother and Ms. Williams. He testified falsely in this regard, intending to mislead the trier of fact, by offering an innocent explanation for his hasty and incriminating flight from Washington, D.C.

Article XV

Article XV charges Judge Hastings with testifying falsely at his trial as to why, on October 9, 1981, he flew from BWI rather than National in an attempt to return to Florida immediately. The evidence before the Committee establishes that Judge Hastings' testimony was knowingly false and given with intent to mislead the trier of fact.

The prosecution argued at trial that Judge Hastings' hasty departure from the L'Enfant Plaza Hotel and return to Florida from BWI was flight and evidence of the judge's guilt. To counter that argument, Judge Hastings testified that he went to BWI because he did not think he could obtain a direct flight from National and denied going to BWI in order to avoid law enforcement officers.

At trial, Judge Hastings testified under oath as follows:

> *Question:* Why did you not go to the airport, the nearer airport?
>
> *Answer:* There was never any question in my mind but that at that time in the evening I thought that all flights that left Washington, D.C. at that particular point in time,

either went through Atlanta en route to Miami, but I was absolutely certain that there were none until 10:00 p.m.[76]

* * * * * * *

Question: Did you consider that there might be FBI agents looking for you at the National Airport?

Answer: It was of no concern to me had there been FBI agents at the National Airport, Dallas [Dulles] or at Baltimore Airport . I had no desire or design to not cooperate with any authorities.[77]

* * * * * * *

Question: And your thinking was there would be no flights from National Airport that would fly you non-stop from Washington National Airport——

Question: That was my thinking.

Answer: ——to Miami?

Even though two months ago you had taken one?

Question: Yes, sir. That was my thinking at that particular time. I have traveled that way an awful lot, an awful lot.[78]

All the evidence in the record with respect to Judge Hastings' actions after he learned of Mr. Borders' arrest establishes that the judge was, in fact, attempting to avoid law enforcement officers when he took a $50 cab ride to BWI during rush hour on Friday, October 9, 1981.[79]

Moreover, Judge Hastings knew that he could obtain a direct flight from National, for in July 1981 he took a 5:30 p.m. nonstop Eastern flight from National to Miami.[80] Judge Hastings lied under oath with the intention of misleading the trier of fact in explaining his decision to fly out of BWI.

Article XVI

Article XVI charges that on September 6, 1985, Judge Hastings disclosed to Stephen Clark, the Mayor of Dade County, confidential information Judge Hastings learned in his capacity as supervising judge of a wiretap pursuant to 18 U.S.C. 2516. The evidence before the Committee establishes that on that day Judge Hastings told Mayor Clark to "stay away from Kevin 'Waxy' Gordon" because Mr. Gordon was "hot" and had been using Mayor Clark's name in Hialeah, Florida.

Six witnesses testified before the Subcommittee about this matter: (1) Roberto Martinez, the Assistant United States Attorney in charge of the underlying investigation for which the wiretap was sought; (2) Mayor Clark, to whom the confidential information was disclosed; (3) Geoffrey Santini, the FBI case agent for the underlying investigation; (4) Christopher Mazzella, the FBI special agent assigned to the underlying investigation and the subsequent investigation of the "leak"; (5) Monsignor Bryan Walsh, who was

[76] *Id.* at 1922-1923
[77] *Id.* at 1923-1924
[78] *Id.* at 2224.
[79] *See* paragraph 9 in support of Article I.
[80] *Id.*

present at the MMAP meeting where the disclosure took place; and (6) Florreyn Joyette Royals, a staff employee of MMAP. The Committee reviewed the applications for authorization to institute and renew the wiretap, the progress reports and affidavits submitted to Judge Hastings, and the orders signed by Judge Hastings in his capacity as supervising judge of the wiretap investigation. The Committee also reviewed the FBI materials from the investigation of the "leak", the testimony and investigative reports developed by the 1987 Investigating Committee, and materials submitted by Judge Hastings.

Mayor Clark testified before the Subcommittee that on September 6, 1985, he attended the annual meeting of the MMAP at the Hyatt Regency Hotel in downtown Miami. Mayor Clark was receiving an award and Judge Hastings was the featured speaker. The mayor testified that at the conclusion of Judge Hastings' speech, the judge approached him, shook his hand, took him aside and said "Stay away from Kevin Gordon. He is hot. He is using your name in the Hialeah area," and then went out the door. Mayor Clark testified that he left the meeting soon thereafter, went back to his office and called Peter Ferguson, his campaign manager. He asked Mr. Ferguson to get in touch with Kevin "Waxy" Gordon and tell Mr. Gordon that the mayor wanted to see him that day at the Miami Outboard Club. He saw Mr. Gordon that day at the Miami Outboard Club and told him that Judge Hastings had said that Mr. Gordon was using the mayor's name in the Hialeah area.

The Subcommittee also heard testimony that Judge Hastings could not have had such a conversation after the speech. Ms. Royals testified that Judge Hastings was staying at the hotel and that on the morning of the speech she had called his room when it was time for him to come down to speak. She met Judge Hastings at the elevator and guided him through the catering areas to an entrance to the meeting room that was immediately behind the dias. Judge Hastings asked Ms. Royals to have his car waiting for him and to make sure that he finished by 10:15 a.m. so that he could be back in court by 10:30 a.m. Ms. Royals testified that she returned through the rear door, a little before 10:15 a.m., and tugged on the judge's coattail to let him know that it was time for him to finish. According to Ms. Royals, Judge Hastings could not have stepped off the dias to shake hands with any members of the audience because she was holding on to his coat.

In addition, the FBI monitored a call from Mr. Ferguson to Mr. Gordon at 8:58 a.m. informing Mr. Gordon that Mayor Clark wanted to see him that day at the Miami Outboard Club. By all accounts, Judge Hastings could not have finished his speech in time for Mayor Clark to have called Mr. Ferguson before 9:00 a.m. The program was scheduled to begin at 8:30 a.m. The awards presentation was to begin at 8:55 a.m. and Judge Hastings' speech at 9:05 a.m. No one suggests that the program was running early. To the contrary, the program was in all likelihood behind schedule. Therefore, Judge Hastings could not have disclosed the confidential information to Mayor Clark at the time and in the manner that the mayor described in his testimony.

The threshhold issue for the Committee was whether Judge Hastings did in fact make the alleged disclosure to Mayor Clark on

the morning of September 6, 1985. The Committee concludes that he did.

Several factors led the Committee to this conclusion. First, Mayor Clark has repeatedly and consistently stated, both under oath and in conversation, that Judge Hastings disclosed the information. In a January 17, 1985 conversation, which was taped by Mr. Gordon without the mayor's knowledge, the mayor confirmed that Judge Hastings had given him the information. Mayor Clark subsequently told the FBI that Judge Hastings was the source of his information that Mr. Gordon was using the mayor's name in Hialeah, and Mayor Clark so testified at the grand jury, before the 1987 Investigating Committee, and before the Subcommittee. In addition, Mayor Clark passed a polygraph examination administered by the FBI on the question of whether Judge Hastings was the person who had warned him about Mr. Gordon.

Second, Judge Hastings on several occasions prior to September 6, 1985, after reviewing wiretap progress reports, expressed concern to Special Agent Santini and Assistant United States Attorney Martinez that Mr. Gordon was going to get Mayor Clark in trouble. In his testimony before the 1987 Investigating Committee, Judge Hastings admitted to having made such statements. It is therefore undisputed that Judge Hastings was aware of Mayor Clark's potential implication in a corrupt zoning scheme.

Third, although it is unlikely that Judge Hastings talked to Mayor Clark after Judge Hastings' speech, there is undisputed evidence that Judge Hastings saw the mayor *before* the program began. Monsignor Bryan Walsh, who attended the MMAP meeting on September 6, 1985, testified that he arrived at the meeting around 8:15 a.m. and spoke with Judge Hastings and Mayor Clark sometime shortly thereafter. According to the Monsignor, one of the two came up to him and the other joined them a few moments later. He did not remember whether Judge Hastings or Mayor Clark came up first, but he did remember that they did not arrive together and that they seemed to be greeting each other for the first time that morning in his presence. After a brief exchange, the three separated. The Monsignor did not specifically recall the details of their parting, and testified that the mayor and Judge Hastings could have parted together. Although Mayor Clark testified that he had no recollection of seeing Monsignor Walsh and Judge Hastings that morning before the program began, Judge Hastings in his testimony before the 1987 Investigating Committee confirmed that on the morning of September 6 he talked with Mayor Clark and Monsignor Walsh before the speech.[81]

Judge Hastings had the opportunity to make the disclosure to Mayor Clark well before the speech began. Although a disclosure before the speech is inconsistent with some of the details of Mayor Clark's testimony, the Committee believes that Mayor Clark accurately remembered the actual disclosure. He was not inter-

[81] According to Judge Hastings, he left the two others and went to get the continental breakfast which was being provided for the conferees. Ms. Royals testified that she called Judge Hastings in his room a few minutes after 9:00 a.m. and met him at the elevator soon thereafter. Her testimony is consistent with that of Judge Hastings and Monsignor Walsh concerning a pre-speech meeting, if Judge Hastings returned to his room after getting the continental breakfast to await the beginning of the meeting.

viewed about the details surrounding the disclosure until late February 1986, almost six months after the event.[82]

Fourth, Mayor Clark made arrangements to see Kevin "Waxy" Gordon on the same day that he attended the MMAP meeting. Mr. Ferguson called Mr. Gordon and told him that the mayor wanted to see him at the Miami Outboard Club at 11:30 a.m. In subsequent conversations monitored by the FBI that morning, Mr. Gordon told two different people that the mayor wanted to see him that day. One of them was the confidential informant, Mr. Rivero, and it was agreed that Mr. Rivero would also come to the Miami Outboard Club that morning. When Mr. Rivero arrived at 11:45 a.m., the mayor and Mr. Gordon were already talking. Mr. Gordon later reported, in monitored telephone conversations and to Mr. Rivero, that the mayor had told him that Judge Hastings had told Mayor Clark, that Mr. Gordon was involved in some deal in Hialeah. Within a few hours of seeing Judge Hastings, Mayor Clark had conveyed to Mr. Gordon information he had learned from Judge Hastings.

Fifth, Mr. Gordon immediately acted on the information he received from Mayor Clark. He conferred with friends about where the judge could have learned what Mr. Gordon was doing. He became suspicious of Gino, the undercover FBI agent who was posing as a Houston-based entrepreneur interested in setting up an amusement center. Mr. Gordon began his own investigation into Gino's background.

Judge Hastings testified before the 1987 Investigating Committee that he had not disclosed any confidential information to Mayor Clark. His counsel suggested that perhaps Mayor Clark had learned of the investigation from an alternative source in the FBI.

The Committee rejects that contention for two reasons. First, there is no evidence of an alternative source. Mayor Clark testified that he had friends in the FBI, however, there is no evidence that he received any information from those persons.[83] Second, the timing of Mayor Clark's statement to Mr. Gordon and Mr. Gordon's subsequent actions coincided exactly with the day on which Mayor Clark saw Judge Hastings. By the testimony of both the mayor and Judge Hastings, the two of them rarely saw each other, even at public functions. Therefore, if Judge Hastings was not the source of the information, the timing would have had to have been the result either of a coincidence or of a sophisticated plan on the part of Mayor Clark to protect an alternative source. The Committee rejects both of those possibilities as unfounded.

The evidence before the Committee did not establish any obvious motive for Judge Hastings to warn Mayor Clark. Regardless of

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[82] Some of the details of Mayor Clark's testimony are consistent with a disclosure before the meeting, others are not: (a) a disclosure before the speech cannot be reconciled with Judge Hastings stepping off the podium and approaching Mayor Clark; (b) if Judge Hastings and Mayor Clark talked after leaving Monsignor Walsh, the disclosure could have been made as they were shaking hands in parting; (c) the statement that there was no conversation before or after the disclosure is inconsistent with the disclosure being made after they had conversed with each other and with Monsignor Walsh; and (d) Mayor Clark's statement that he immediately went to his office and called Mr. Ferguson is inconsistent with a disclosure before the meeting because it is unlikely that Mayor Clark could have left the meeting, gone to his office, and returned to the meeting in time to receive his award at 8:55 a.m. or sometime shortly thereafter; obviously he could have left the meeting and called Ferguson from a telephone at the hotel.

[83] *See* Statement of Facts at C-5.

Judge Hastings' motive, however, the Committee concludes that the judge knew that the information he disclosed was confidential and very sensitive. Indeed, in answer to a question about the *Romano* order at his criminal trial, Judge Hastings commented on the "super-sensitivity" of Title III wiretap information:

> But if it had been a sensitive order, or let me give you an example of that, on a wire tap, for example, would be something under Title III that would be super-sensitive, and the judge that issues such an order is legally bound, not only ethically bound but legally bound, not to reveal the substance and contents of that matter [84]

Finally the Committee concludes that Judge Hastings should have known that to reveal the name of a target of an undercover investigation to an acquaintance of the target could compromise that investigation and endanger the lives of law enforcement officers. The Committee recognizes Judge Hastings did not mention the wiretap as such, may have disclosed the information spontaneously, and perhaps lacked a corrupt motive. Nonetheless he intentionally made the disclosure, thereby violating his own sealing order and compromising important undercover investigations. Judge Hastings' conduct warrants impeachment.

Article XVII

Article XVII charges that through a corrupt relationship with William Borders, repeated false testimony under oath at his criminal trial, fabrication of false documents submitted as evidence at his criminal trial, and improper disclosure of confidential information acquired as supervisory judge of a lawful wiretap, Judge Hastings undermined confidence in the integrity and impartiality of the federal judiciary and betrayed the public trust, thereby bringing disrepute on the federal courts and the administration of justice in the federal courts. The events described in Articles I through XVI reveal a pattern of misconduct, spanning five years, that is incompatible with the proper function and purpose of the federal judiciary.

Judge Hastings was sworn in as a federal judge on October 22, 1979 and he was assigned the *Romano* case less than a week later. By the end of March 1981, less than a year and a half after Judge Hastings became a federal judge, William Dredge was making inquiries at the behest of William Borders to find out if the Romano brothers were likely candidates from whom to solicit a bribe. The bribery scheme played out over the course of six months in 1981.

Judge Hastings was tried in January and February of 1983. Articles II through XV allege that during the course of that trial Judge Hastings lied under oath about 14 substantive matters. In addition at some point between October 9, 1981 and December 1982 he prepared false documents which he then submitted as evidence at his criminal trial.

Finally, in September of 1985, while the subject of an inquiry by the Eleventh Circuit Investigating Committee concerning the brib-

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[84] *U.S. v. Hastings*, *supra* at p. 1976.

ery conspiracy, perjury, and submission of fabricated evidence, Judge Hastings improperly disclosed confidential information about the target of a wiretap investigation to an acquaintance of the target. His disclosure terminated two undercover investigations and significantly limited a third.

Such conduct seriously undermines public confidence and brings the federal court system into disrepute. The Judicial Branch is an essential institution of our Government. In order to perform its critical functions, it relies in large part upon the trust and confidence of the public. Conduct which substantially undermines that confidence threatens the functioning of the Judicial Branch, which in turn is grounds for impeachment.

VII. Double Jeopardy

There is no constitutional or legal barrier to the impeachment of Judge Hastings for his participation in the bribery conspiracy. Judge Hastings' acquittal by a jury does not bar the House of Representatives from exercising its constitutional authority to adopt articles of impeachment. Indeed, the House of Representatives has a duty to insure the impartiality and integrity of the federal judiciary and the fair administration of justice. Neither the constitutional principle of double jeopardy nor the legal doctrines of res judicata or collateral estoppel bar the House from acting on the entire record of Judge Hastings' misconduct.

A. THE CONSTITUTION PROVIDES TWO SEPARATE AND COMPLEMENTARY PROCESSES: IMPEACHMENT AND INDICTMENT

The express language of the Constitution provides two separate and complementary processes, impeachment and indictment. Article I, Section 2, cl. 7, known as the "impeachment judgment clause," evinces the Framers' intention that a federal official accused of serious misconduct is subject to *both* criminal prosecution and impeachment for the same offense. That clause 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."

The Framers designed the impeachment judgment clause "to make clear that criminal prosecutions subsequent to removal from office would not constitute double jeopardy of the sort explicitly prohibited by the Fifth Amendment." [85] That clause does more than specify a time sequence. It refers to the criminal process as a distinct proceeding to which an impeached official shall also be liable and reinforces the proposition that impeachment is separate and distinct from a criminal prosecution.

For this reason, Judge Hastings' impeachment is wholly independent of his criminal trial and acquittal. Moreover, there are sound justifications for subjecting Judge Hastings and all federal officers to two independent types of scrutiny.

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[85] L. Tribe, *American Constitutional Law* 223 (1978).

First, the criminal process must be complemented by impeachment where misconduct, although not punishable by the criminal law, is sufficiently serious to warrant a judge's removal from office for the protection of the Nation. In fact, 10 of the 14 impeachments voted by the House of Representatives involved one or more charges that did not allege a violation of the criminal law.

Second, as Justice Story pointed out in his commentaries,[86] the Framers intended that both impeachment and criminal prosecution should be available lest the "extraordinary influence" of "high and potent offenders" enable federal officers to escape punishment in "ordinary tribunals." Alexander Hamilton explained that the Senate was chosen to try impeachments because it was likely to be "unawed and uninfluenced." [87] A local jury, for example, responding to purely local concerns, might render a verdict of acquittal. Such a "local" decision cannot be permitted to take from the Congress the power to remove from office, in the national interest, an official who has committed a high crime or misdemeanor.

Finally the double jeopardy clause of the Constitution does not bar an impeachment following a criminal proceeding of Judge Hastings. Under the Constitution, once jeopardy attaches a defendant may not generally be tried for the "same offense." The Supreme Court, however, has consistently held that the prohibition against double jeopardy does not bar the Government from exacting both criminal and civil penalties from an individual for the same acts or omissions.[88] Because impeachment is not a criminal proceeding, the double jeopardy clause does not prohibit Judge Hastings' impeachment.

The nature of the sanction imposed by a proceeding is determinative of whether double jeopardy applies. As stated by the Supreme Court, an "acquittal on a criminal charge is not a bar to a civil action by the Government, *remedial in its nature*, arising out of the same facts on which the criminal proceeding was based . . ." [89] Therefore, the determination of whether the prohibition against double jeopardy affects impeachment depends on whether impeachment is "a civil action remedial in its nature."

There is overwhelming authority that impeachment is properly viewed as remedial or prophylactic, rather than criminal or punitive. Justice Story, for example, wrote that impeachment is:

> [A] proceeding purely of a 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

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[86] Story, *Commentaries on the Constitution of the United States*, Section 688 at 497 (4th ed. 1973).

[87] *The Federalist* No. 65 at 398 (Mentor ed. 1961).

[88] See e.g., *United States* v. *One Assortment of Firearms*, 465 U.S. 354 (1984) (criminal acquittal of gun owner does not prohibit later forfeiture proceeding against firearms involved in criminal case); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam) (although defendant was acquitted of criminal charge of smuggling the government may still seek forfeiture of the items that the defendant allegedly smuggled out of the country); *Helvering* v. *Mitchell*, 303 U.S. 391 (1938) (Brandeis, J.) (acquittal in tax evasion trial did not bar subsequent civil assessment suit; court noted difference in the standards of proof required in criminal and civil cases); *Lewis* v. *Frick*, 233 U.S. 291 (1914) (acquittal in criminal proceedings of unlawfully importing a woman for prostitution did not bar subsequent civil deportation proceedings for same act).

[89] *Helvering* v. *Mitchell*, 303 U.S. at 397 (emphasis added).

person nor his property, but simply divests him of his political capacity.[90]

A 1974 Staff Report of this Committee correctly described the non-criminal nature of impeachment:

> Impeachment and the criminal law serve fundamentally different purposes. *Impeachment is the first step in a remedial process*—removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment; its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since its [sic] specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing.[91]

The conclusion that impeachment is remedial, not punitive, is reinforced by the fact that noncriminal activities may constitute impeachable offenses.[92] In such a case, the purpose of impeachment is to provide "a prospective remedy for the benefit of the people, not a retributive sanction against the offending officer." [93]

For the foregoing reasons, Congress' power to impeach Judge Hastings on the basis of the bribery conspiracy is simply not affected by his prior acquittal.

B. THE LEGAL DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY

The legal doctrines of *res judicata* and collateral estoppel do not affect the impeachment of Judge Hastings for his participation in the bribery conspiracy. The doctrine of *res judicata* bars the relitigation, by the same parties, of a "claim" or "cause of action," including all the issues relevant to that claim or cause of action, whether or not raised at trial. Collateral estoppel, on the other hand, bars the relitigation of an issue actually adjudicated and essential to a judgment.[94] Neither of these doctrines affect the impeachment of Judge Hastings for his corrupt involvement in the bribery conspiracy.

Application of these judicially created doctrines to the Congress would impermissibly violate the doctrine of separation of powers. As one commentator has observed:

> [C]ertain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers would not be served if Congress delegated its responsibility. Con-

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[90] Story, *Supra*, at section 803.

[91] The Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment" (February 22, 1974) at 24 (footnotes omitted; emphasis added). *See also* Brown, "The Impeachment of the Federal Judiciary," 26 Harv. L. Rev. 684, 692, n. 12 (1913) quoting 1 Curtis, "Constitutional History of the United States," 481–482.

[92] *Id. See* also Report of the Committee on Federal Legislation, Association of the Bar of the City of New York, *The Law of Presidential Impeachment*, 29 *The Record* 154 (January 21, 1974); Tribe *supra*, at 220.

[93] J. Labowitz, *Presidential Impeachment* 199 (1978)

[94] For a more detailed explanation of the legal doctrines, *see Casper Wireworks, Inc. v. Leco Engr'g & Mch., Inc.*, 575 F.2d 530, 535–36 (5th Cir. 1978).

> gress could not set up a Federal Court of Impeachment to try all impeachments: according to article I, section 3, "The Senate shall have the sole Power to try all Impeachments." [95]

Application of *res judicata* or collateral estoppel to the Congress would be an impermissible de facto delegation to the judiciary of the House of Representatives' "sole power to impeach."

Moreover, even if judicial preclusion of impeachment proceedings were not constitutionally prohibited by separation of powers considerations, "[i]t should be remembered also that issue preclusion is appropriate only in certain circumstances and is subject to important exceptions to prevent unfairness." [96] One such exception is when the two actions involve different standards of proof, which is an important distinction between Judge Hastings' criminal trial and the present impeachment proceedings.

Because impeachment does not impose criminal punishment, the criminal standard of proof, "beyond a reasonable doubt", does not apply.[97]

In the impeachment trial of former Judge Harry E. Claiborne, the respondent filed a motion in the Senate to designate, "beyond a reasonable doubt," the criminal standard of proof, as the standard of proof for conviction by the Senate. The Managers on behalf of the House opposed the motion and urged that a "preponderance of the evidence" was the appropriate standard. Manager Kastenmeier stated in opposition to the respondent's motion, "A preponderance of the evidence is all that is necessary for removal from office. You are not sending the Respondent to prison. You are not taking his life." [98] The Senate rejected the Judge Claiborne's motion by a vote of 75 to 17. Senator Mathias stated, "It is the Chair's determination that the question of standard of evidence is for each Senator to decide individually when voting on Articles of Impeachment."[99]

The standard of proof used by the House of Representatives in adopting articles of impeachment is also lower than "beyond a reasonable doubt." Historically, the view that the House, acting analogously to a grand jury, "need only ascertain probable cause to warrant sending the case to trial at the bar of the Senate has generally been followed without debate." [100] In the case of former President Nixon, however, there was general agreement that the appropriate standard of proof in the House was "clear and convincing" evidence.[101] Several commentators have noted that the standard of proof may involve a "sliding scale," depending on the subject of the impeachment and the gravity of the offense.[102]

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[95] Tribe *supra* at 285.

[96] *Otherson* v. *Department of Justice, I. & N.S.*, 711 F 2d, 267, 262 (D.C. Cir. 1983).

[97] *See also* Labowitz, supra at 199 ("If removal of the [officer] was intended to be a remedial step . . . there is little justification for contending that absolute certainty of guilt, or proof beyond a reasonable doubt, should be required to bring it into play. Rather, the test must be whether there is sufficient evidence of past wrongdoing meeting the constitutional criteria for grounds for impeachment to demonstrate the unfitness of the . . . officer to remain in office ")

[98] S. Doc. No. 48, 99th Cong., 2d Sess. 108.

[99] *Id.* at 148.

[100] Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 Duke L. J. at 1042.

[101] Labowitz *supra* at 192.

[102] *See generally* Labowitz *supra* at 191-200.

C. SUBSTANTIAL EVIDENCE WAS NEVER PRESENTED TO THE JURY

Finally there is substantial evidence before the Committee that was never presented to the jury. The three-year investigation by the Eleventh Circuit Investigating Committee and the Committee's own independent investigation into Judge Hastings' participation in the bribery conspiracy and his false testimony at trial produced abundant new evidence of Judge Hastings' corrupt conduct.

The following items of evidence were not presented to the jury at Judge Hastings' criminal trial:

1. The correlation of the documented telephone contacts between Judge Hastings and William Borders with significant events in the *Romano* case.

2. The evidence of events prior to September 10, 1981 revealing (a) the relationship between William Dredge and William Borders, (b) William Borders' insistence that he could deliver Judge Hastings, and (c) the correlation of events in the *Romano* case with early events in the bribery scheme.

3. William Borders' statement to Jesse McCrary prior to setting up his first meeting with the undercover agent, H. Paul Rico, that he did not expect to return to Washington, D.C. during the weekend of September 11–13, 1981 due to a long-planned family reunion.

4. William Borders' decision to delay his flight from National on September 11, 1981, following Judge Hastings' messages that his flight from Miami to National was delayed, which in turn provided the opportunity for Mr. Borders and the Judge Hastings to meet prior to Mr. Borders' first meeting with Mr. Rico.

5. The testimony of two of the women who were in Judge Hastings' Sheraton Hotel room at 10 p.m. on September 12, 1981, indicating that they were waiting for William Borders or at least for "someone" when Mr. Borders arrived.

6. Dudley Williams' statement that William Borders never missed a championship fight and this fact was well known to Mr. Borders' friends.

7. The determination that the phone records of the L'Enfant Plaza Hotel are sequentially numbered and none are missing for the relevant time period on October 9, 1981.

8. Evidence that four of the five phone calls Judge Hastings testified to at trial, allegedly made to Hemphill Pride to discuss his financial condition and desire for reinstatement, were not made to Mr. Pride, nor to any phone to which Mr. Pride had access.

9. Hemphill Pride's testimony that Judge Hastings asked him to go along with his explanation of the "Hemp letters" when the judge came to Columbia, South Carolina to interview Mr. Pride.

10. The testimony of William Borders' attorney, John Shorter, that prior to Mr. Borders' trial he declined to look at the alleged draft "Hemp letters" because he did not believe Judge Hastings would authenticate them.

11. The conclusions of forensic experts that the alleged drafts of the "Hemp letters" could not be dated.

12. The detailed testimony of a linguistics expert that the October 5, 1981 taped conversation between Judge Hastings and William Borders was a coded conversation.

13. Evidence of events prior to September 10, 1981 suggesting a bribery scheme involving William Borders, Judge Hastings, and Santo Trafficante.

VIII. Conclusion

Impeachment protects our society by insuring that those in the highest positions of public trust are held accountable. This is especially true with respect to members of the federal judiciary who, barring impeachment, enjoy life tenure in office. The appointment of federal judges for life, as required by Article III of the Constitution, serves the very important purpose of insulating the federal judiciary from political pressure. The Constitution, however, does not tolerate abuse of office.

The evidence in the record before the Committee establishes Judge Hastings' misconduct in the three areas addressed in detail above. His corrupt conduct rises to the level of impeachable offenses.

The Committee's role is not to punish Judge Hastings. It is to determine whether articles of impeachment should be brought whereby he may be removed from office. That is a unique constitutional responsibility committed exclusively to the House of Representatives. The American people look to the Congress to protect them from persons who are unfit to hold public office by virtue of serious misconduct constituting a violation of the public trust. Where, as here, the evidence establishes the commission of impeachable offenses by a federal judge, our duty under the Constitution is clear and requires that articles of impeachment be brought.

IX. Oversight Findings

No oversight findings were made by the Committee.

X. Committee Vote

On July 26, 1988, the Committee took up H. Res. 499. Mr. Fish offered a technical and clarifying amendment which was adopted by voice vote. The Chair then divided the question, and separate votes were taken on Articles I and XVI. Article I was adopted by voice vote. Mr. Smith later announced that he had voted no on Article I. Mr. Crockett later announced that he had voted aye on Article I. Article XVI was adopted by voice vote. Mr. Crockett later announced that he voted no on Article XVI. With a reporting quorum being present, the Committee adopted the remainder of H. Res. 499, as amended, excluding Articles I and XVI. It was adopted by a roll call vote of 32–1.

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99TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPORT 99-688

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

JULY 16, 1986.—Referred to the House Calendar and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 461]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 461) impeaching Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of high crimes and misdemeanors, having considered the same, report favorably thereon with an amendment and recommend that the resolution as amended do pass.

The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, be impeached for misbehavior, and for high crimes and misdemeanors; that the evidence heretofore taken by a subcommittee of the Committee on the Judiciary of the House of Representatives sustains articles of impeachment, which are hereinafter set out; and that the articles be adopted by the House of Representatives and 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 Judge Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, in maintenance and support of its impeachment against him for misbehavior and for high crimes and misdemeanors.

ARTICLE I

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1980, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1979, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the

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amount of $80,227.04 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

ARTICLE II

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1981, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1980, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $54,251 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

ARTICLE III

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes in office in a manner and form as follows:

On August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of title 26, United States Code.

Thereafter, a judgment of conviction was entered against Judge Harry E. Claiborne for each of the violations of section 7206(1) of title 26, United States Code, and a sentence of two years imprisonment for each violation was imposed, to be served concurrently, together with a fine of $5000 for each violation.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of high crimes.

ARTICLE IV

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

Judge Harry E. Claiborne took the oath for the office of judge of the United States and is required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States.

Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

Judge Harry E. Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office.

COMMITTEE CONSIDERATION

The Constitution provides in Article I, Section 2, Clause 5, that "the House of Representatives shall have the sole Power of Impeachment." Article II, Section 4 provides, "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." Federal judges are civil officers of the United States and are therefore subject to impeachment.

A resolution to impeach Judge Harry E. Claiborne was introduced by eight House Members [1] on June 3, 1986. Judge Claiborne, a federal district judge for the District of Nevada, was convicted of two felony counts of making and filing false statements on his 1979 and 1980 federal tax returns. All of his direct appeals have been exhausted and he is currently serving a two year sentence in a federal penitentiary. The resolution—H. Res. 461—was referred to the Committee. On June 5, 1986, the Committee referred H. Res. 461 to the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

H. Res. 461, as introduced, provides: "*Resolved,* that Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, is impeached of high crimes and misdemeanors."

Prior to any formal meeting of the subcommittee, each Member was provided with a copy of a report entitled "Constitutional Grounds for Presidential Impeachment" prepared by the Impeachment Inquiry staff of the House Judiciary Committee in February, 1974 (Committee Print). That report concluded as follows:

> Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense that word was used in English impeachments.[2]

On June 19, 1986, the subcommittee held an investigatory hearing for the purpose of examining the conduct of Judge Harry E.

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[1] Mr. Rodino (for himself, Mr. Fish, Mr. Brooks, Mr. Kastenmeier, Mr. Edwards of California, Mr. Glickman, Mr. Moorhead and Mr. Hyde).

[2] Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, House Committee on the Judiciary, 93rd Cong., 2d Sess. (Committee Print 1974) at 26.

Claiborne.[3] After opening statements were made by the subcommittee Chairman (Mr. Kastenmeier), ranking minority Member (Mr. Moorhead), and ranking minority Member of the full Committee (Mr. Fish), a nondebatable motion was offered by Mr. Moorhead to go into executive session to receive testimony. The motion passed by voice vote, and the hearing room was cleared of all persons except subcommittee Members, designated staff, and invited witnesses, including Judge Claiborne's attorneys (Oscar Goodman, Esq. and Howard Cannon, Esq.).

Invitational letters to all witnesses and Chairman Kastenmeier's opening remarks specified that the subcommittee's inquiry was to be limited to the conduct of Judge Claiborne which resulted in the jury verdict, conviction and incarceration. Chairman Kastenmeier explained:

> As we previously wrote the witnesses, our inquiry will be restricted to an examination of the two counts of making and filing false statements in Judge Claiborne's tax returns for the two years 1979 and 1980 for which he was convicted. The inquiry will also assess whether Judge Claiborne's conviction and incarceration constitute behavior incompatible with the duties and responsibilities of a federal judicial officer. The subcommittee has prepared materials only within these parameters.[4]

During the subcommittee's executive session, testimony was received from the United States Department of Justice (William C. Hendricks III, Esq., Deputy Chief, Public Integrity Section, Criminal Division); The Honorable Charles E. Wiggins (Circuit Judge, Ninth Circuit Court of Appeals); and Oscar Goodman, Esq. (attorney for Judge Claiborne, Las Vegas, Nevada).

All witnesses were sworn to tell the truth. The witnesses were allowed to make their own statements. Questions were put to them by Members of the subcommittee, two Members of the full Committee (Mr. Fish and Mr. Sensenbrenner), and special counsel (Richard Cates, Esq.).

Judge Claiborne, who had been offered the opportunity to appear on his own behalf, elected to travel to Washington, D.C., in the custody of the U.S. Marshals Service. After sitting through part of the morning's session, he chose to return to his site of incarceration (Maxwell Air Force Base, Montgomery, Alabama) without being sworn or without making any formal statement to the subcommittee. His decision not to testify was made that day after full and fair opportunity to discuss the matter with legal counsel. The Judge, through his counsel, formally waived his opportunity to testify before the subcommittee.[5]

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[3] Hearing on the Conduct of Harry E. Claiborne, United States District Judge, District of Nevada, Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 99th Cong., 2d Sess. (1986) [hereinafter referred to as House Hearing].

[4] *Id* at 3.

[5] The following exchange occurred on the record:

Mr. KASTENMEIER. . . . Mr. Goodman, do I understand that the respondent does not choose to appear this afternoon in person?

Mr. GOODMAN. Mr. Chairman, that is correct. Judge Claiborne was afforded an invitation to these proceedings, and he accepted the same, and he was transported from the facility from

Continued

William Hendricks, who had been part of the prosecution team in Judge Claiborne's second trial (the first trial resulted in a hung jury), testified about the two counts of falsifying income tax returns for which Judge Claiborne was convicted by a jury of twelve citizens. He reiterated the evidence that appears in the transcript of Judge Claiborne's second trial and answered questions about Judge Claiborne's direct appeals arising from the indictment and trial.

Judge Wiggins, as a former member of the Committee and as a sitting judge, set forth a conceptual approach about the impeachment of convicted judges. He testified that it is unnecessary for the subcommittee to engage in an independent finding of the facts, the facts having already been found under a judicial procedure which afforded the respondent full due process rights. The facts, in his opinion, were found beyond a reasonable doubt by a jury of twelve citizens without dissent. Judge Wiggins also set forth the proposition to the subcommittee that a lifetime-tenured federal judge who is convicted of a felony is, by definition, guilty of misbehavior.

Oscar Goodman—Judge Claiborne's attorney—indicated to the subcommittee that he would not present a defense unless he was allowed to make statements concerning matters outside the scope of the inquiry previously defined in the letter of invitation sent to the witness. The subcommittee agreed to allow Mr. Goodman to present arguments outside the scope.

Mr. Goodman ultimately discussed the entire chain of events that preceded Judge Claiborne's first trial. He used some of his time to explain Judge Claiborne's conduct which resulted in the jury rendering a verdict of guilty on two counts. Mr. Goodman also apprised the subcommittee of a recently filed motion to vacate the judgment and sentence of Judge Claiborne based upon the argument that his conviction was obtained in violation of the Constitution.

On June 24, 1986, the subcommittee conducted general debate and mark-up of H. Res. 461 in open session. The entire proceeding was open to electronic media, making television coverage possible.

At the outset, a motion was offered (by Mr. Kindness) to release the testimony and evidence received during the executive session of June 19 to the public. That motion passed by voice vote, no objection having been heard.

In addition, pursuant to the unanimous consent request agreed to by the subcommittee on June 19, 1986, certain other materials were included in the subcommittee hearing record. A copy of the list of additional materials appears as Appendix A.

Before the reading of the resolution, and before considering amendments to the resolution in the form of specific articles of impeachment, each subcommittee Member was recognized for an opening statement.

Maxwell Field, AL to Washington, DC, leaving Maxwell Field apparently as late as 3:30 last night and the rigors of the travel are such that he believes that it is in his best interest to return to the facility. He has been addressed by your staff and has been told very explicitly that he has the opportunity to be present during the remainder of these proceedings.

Mr. KASTENMEIER. Then does he, in fact, waive the right to appear?

Mr. GOODMAN. Yes, sir.

Id. at 48.

After the opening statements, an amendment was offered to the resolving clause. The amendment, of a clarifying nature, was adopted. Thereafter, four articles of impeachment, having been prepared by staff (on behalf of Chairman Kastenmeier) and having been distributed in advance to subcommittee Members, were considered separately and voted upon individually.

Articles I and II set forth the facts behind Judge Claiborne's trial on two counts of falsifying his income tax returns—Article I for 1979 and Article II for 1980. An amendment to both articles was offered by Mr. Morrison and accepted by the subcommittee. The Morrison amendment clarified that the facts set forth in 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. The amendment to both Articles passed by voice vote. Articles I and II, as amended, were then adopted unanimously by voice vote.

Article III rests on the proposition that when a federal judge is convicted of a felony, the judge is guilty of misbehavior and was and is guilty of high crimes in the constitutional sense. Congressman Mazzoli initially offered a substitute for Article III but withdrew it.[6] After debate, Article III ultimately was adopted by the subcommittee unanimously by voice vote.

Article IV stands for the proposition that the conduct of a convicted federal judge does more than tarnish a personal reputation; this conduct brings disrepute upon the federal courts and the administration of justice by the courts. This misbehavior is a misdemeanor in the constitutional sense, warranting impeachment and removal from office. Congressman DeWine offered an amendment to strike both the reference to the oath of office taken by Judge Claiborne and the inclusion of the violation of the oath as an element of the impeachable offense. The DeWine amendment was defeated by a 7 to 7 recorded vote. Congressman Swindall offered an amendment and then later withdrew it.[7] Article IV, unamended, ultimately was adopted by a recorded vote of 9 to 5.

With a reporting quorum present, and a recorded vote of 15 to 0 in favor, the subcommittee then ordered the resolution favorably reported to the full Committee as amended by the four Articles of impeachment.[8]

On June 26, 1986, the full Committee on the Judiciary met to consider H. Res. 461, as amended by the subcommittee. The Committee agreed to permit the meeting to be covered by television broadcast, radio broadcast and still photography.

Following opening remarks and an explanation of the four articles of impeachment approved by the subcommittee, the Committee—by unanimous consent—agreed to proceed with one hour of general debate on the resolution, equally divided between the Chairman (Mr. Kastenmeier), and ranking minority Member of the

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[6] The Mazzoli substitute amendment would have added language to the effect that Judge Claiborne was indicted, convicted, exhausted his direct appeals, benefited from experienced and competent counsel during trial, and presently is serving a two year sentence in a federal penitentiary.

[7] The Swindall amendment would have deleted reference to the commission of misdemeanors in office, leaving Article IV to stand on misbehavior alone.

[8] Also, on June 24, 1986, Congressman Sensenbrenner introduced H. Res. 487, with 60 cosponsors, to impeach Harry E. Claiborne of a high crime and misdemeanor.

subcommittee (Mr. Moorhead), and debate each article for a time-period not to exceed 30 minutes, equally divided between the Chairman and ranking minority Member of the subcommittee.

After unanimous approval of the amendment to the "resolving" clause, the Committee considered each of the four articles of impeachment separately.

After debate, Article I was approved by a recorded vote of 34 to 0. No amendment were offered.

After debate, Article II was approved by a recorded vote of 34 to 0.

After debate, Article III was approved by a recorded vote of 35 to 0.

Article IV was subjected to more extensive debate than the previous three articles. Several Members argued that the language of Article IV would broaden the scope of a Senate trial, and opposed it on strategic grounds. They believe that the Senate trial should be limited to the facts which resulted in the findings of the jury and the conviction and incarceration of Judge Claiborne.

Congressman DeWine offered an amendment to delete reference to violation of the oath of office and to further charge that Judge Claiborne has betrayed the trust of the people of the United States. The amendment was agreed to by voice vote.

Article IV, as amended, was then adopted by a recorded vote of 28 to 7. The vote not only signified support for Article IV, as amended, but also the belief and intention of the Committee that its phraseology would not broaden the scope of the prospective Senate trial beyond facts within the scope of the inquiry.

Three minor technical amendments were offered by Congressman Moorhead and adopted by unanimous consent.

Finally, the resolution, as amended, was ordered favorably reported to the House by a recorded vote of 35 to 0, all Members having voted. By unanimous consent, the resolution was reported as a single amendment in the nature of a substitute incorporating all amendments. Thirty-two Members of the full Committee, along with eleven other House Members, decided to cosponsor H. Res. 461, as amended.[9]

The Committee on the Judiciary based its decision to recommend that the House of Representatives exercise its constitutional power to impeach Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, on evidence presented to the Subcommittee on Courts, Civil Liberties and the Administration of Justice, evidence which is summarized in this report and evidence which was found beyond a reasonable doubt by a unanimous jury of twelve citizens.[10]

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[9] H. Res. 461, as amended, is sponsored by the following Members: Mr. Rodino, for himself, Mr. Fish, Mr. Brooks, Mr. Kastenmeier, Mr. Edwards of California, Mr. Glickman, Mr. Moorhead, Mr. Hyde, Mr. Coble, Mr. Robinson, Mrs. Vucanovich, Mr. Barnes, Mr. Fazio, Mr. de Lugo, Mr. Bliley, Mr. Pepper, Mr. Martinez, Mr. Fields, Mr. Pickle, Mr. Seiberling, Mr. Mazzoli, Mr. Hughes, Mr. Synar, Mrs. Schroeder, Mr. Frank, Mr. Crockett, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Feighan, Mr. Berman, Mr. Boucher, Mr. Staggers, Mr. Smith of Florida, Mr. Kindness, Mr. Lungren, Mr. Sensenbrenner, Mr. McCollum, Mr. Shaw, Mr. Gekas, Mr. DeWine, Mr. Dannemeyer, Mr. Brown of Colorado, Mr. Swindall, and Mr. Torricelli.

[10] On June 30, 1986, the Judicial Conference of the United States—acting to concur in a determination of the Judicial Council of the Ninth Circuit made on June 18, 1986—communicated

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Constitutional Provisions

The Constitution deals with the subject of impeachment and conviction at six places. The scope of the power is set forth in Article II, Section 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.

Other provisions deal with procedures and consequences. Article I, Section 2 states:

> The House of Representatives * * * shall have the sole Power of Impeachment.

Similarly, Article I, Section 3, describes the Senate's role:

> 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.

The same section limits the consequences of judgment in cases of impeachment:

> 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.

Of lesser significance, although mentioning the subject, are: Article II, Section 2:

> The President * * * shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Article III, Section 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

The Constitution further creates the judiciary as an independent and coordinate branch of government. Article III, section 1, states:

> The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

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with the House of Representatives that ". . . a violation of section 7206(1) of the Internal Revenue Code might constitute one or more grounds for impeachment and that Judge Claiborne has engaged in conduct which might constitute grounds for impeachment under Article I of the Constitution. The Judicial Conference considers no additional investigation appropriate." The Judicial Conference's recommendation was signed by the Honorable Warren E. Burger, Chief Justice of the United States, and is in conformity with 28 U.S.C. § 372(c)(8).

Statement of Information

The Committee on the Judiciary, having considered and examined the evidence at the second trial[11] of Judge Harry E. Claiborne, and also the information and arguments of witnesses before the Subcommittee on Courts, Civil Liberties and the Administration of Justice,[12] makes the following statement of information. Discussion is divided into three separate parts: (1) a statement of facts; (2) an analysis of issues before the jury; and (3) procedure.

I. Statement of Facts

Judge Harry E. Claiborne was found guilty of willfully falsifying his income tax returns for 1979 and 1980 with respect to the amount of income he had received in those two years. The evidence showed that he did not report income of $18,740.06 in 1979, or $87,911.83 in 1980. The question tried to the jury was whether Judge Claiborne knew that his tax returns were false at the time he signed and filed the returns.

The evidence at this second trial established the following facts.

Judge Harry E. Claiborne opened a law office in Las Vegas, Nevada in the late 1940's (Tr. 820–821).[13] By the mid-1970's, Judge Claiborne established a highly successful law practice, earning gross income of $375,752.21 in 1977 and $240,876.23 in the first eight months of 1978 (Tr. 926–927). On September 1, 1978, he became a federal district judge, earning an annual gross salary of approximately $54,000 (Tr. 18, 846, 929). By his own admission, his income level dropped "[d]rastically" when he assumed the bench, while many of his expenses, such as alimony payments of $21,000 annually, remained constant (Tr. 929). He found himself, in his own words, "in a financial bind" (Tr. 930). Indeed, in mid-August, 1980, he wrote a letter to an attorney requesting immediate payment of a $37,500.00 legal fee due him because "[f]or the first time in my life, I am desperately in need of money" (Tr. 72, 993; GX 10).[14]

During 1979 and 1980, pursuant to fee-splitting agreements with two other attorneys in his former office, Judge Claiborne received shares of fees for work he had performed on cases before he became a federal judge (Tr. 21–23, 922; GXs 6, 7, 9). He also received legal fee income from other attorneys with whom he had worked on cases (GXs 11, 13). He received fee income of $41,072.93 during 1979 (Tr. 475–489) and $87,911.83 during 1980 (Tr. 496–501). On his federal income tax return for 1979, however, he reported only $22,332.87 of his fee income (GX 3 (Schedule C); Tr. 177, 486, 949–950). He reported no fee income on his return for 1980 (GX 5; Tr. 492). Evidence at trial showed that Judge Claiborne kept a personal record book that reflected the true amounts of his legal fee income (Tr. 856–857, 934–936; DX 47).[15]

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[11] Petitioner's first trial, in April 1984, ended in a mistrial when the jury was unable to reach a verdict on any of the counts.

[12] *See* House Hearing, *supra* note 3.

[13] "Tr." refers to the transcript in the second trial.

[14] "GX" refers to government exhibit.

[15] "DX" refers to defense exhibit.

THE 1979 TAX YEAR

During 1979 Judge Claiborne received 14 checks from two former partners for legal fees for cases in which he had a previous client interest (GX 42). Contrary to his former practice of depositing legal fees (Tr. 119–122), he began cashing these checks at local casinos (Tr. 475–489). Eight of the 14 checks were not deposited but rather cashed (Tr. 475–489). Cashing rather than depositing fee checks was a change in how Judge Claiborne had transacted moneys received by him for legal fees. The deposit slips and the bank accounts had previously served as his records for establishing income (Tr. 119–122).

Of the 14 checks received in 1979, only the moneys represented by two and part of one other check were reflected on the Judge's 1979 income tax return (Tr. 488). The moneys represented by 11 of the checks and part of another were not included on the return (GX 42; Tr. 488).

Judge Claiborne's federal income tax return for 1979 was prepared by a public accountant and long-time acquaintance, Joseph "Jay" Wright, who had provided a variety of accounting services, including bookkeeping and tax return preparation, to Judge Claiborne since 1949 (Tr. 118–121, 162–163, 177, 826). Wright charged him an annual fee of $600 for all of his services (Tr. 1167). Prior to 1979, Judge Claiborne provided substantial financial information to Wright (Tr. 118–120, 215, 829–833), but during that year he began to forward less and less information to Wright (Tr. 152–153, 303).

In early March 1980, Judge Claiborne sent Wright a handwritten note in which he asked Wright to prepare a letter to a mortgage company in connection with an application to assume a mortgage (Tr. 157–158, 854). Judge Claiborne stated that he had received earnings from his private practice of $46,371.93 in 1979 and $41,000.00 in January 1980 (GX 28; Tr. 155–158, 854–855, 935). Subsequently, Wright used the $46,371.93 figure to prepare an application for an extension of time to file Judge Claiborne's federal income tax return for 1979 (GX 30; Tr. 167).[16] On April 11, 1980, Judge Claiborne signed the application and gave Wright two checks in the amounts of $8,000 and $2,500 to cover his estimated tax for the last quarter of 1979 and for the first quarter of 1980, respectively (DX 4; GX 30; Tr. 162–167).

On May 22, 1980, Wright used the $45,371.93 figure in two more letters to mortgage companies (GX 29; Tr. 161–162, 168–169). But sometime between that date and June 15, 1980, Judge Claiborne informed Wright that only $22,332.87 of the total represented legal fee income (GX 31; Tr. 169–177, 949). Wright then used the $22,332.87 figure to report legal fee income on Judge Claiborne's 1979 tax return (GX 3; Tr. 486). Previously, on May 14, 1980, Judge Claiborne had reported a $23,050.76 figure for legal fee income in 1979 to the Judicial Ethics Committee (Tr. 953–54; GX 40).

In fact, Judge Claiborne's true legal fee income was $41,072.93 (GX 42; 475–489). The amount of unreported income—$18,740.06

[16] The record is inconsistent on whether the figure used by Judge Claiborne and later by Wright for legal fee income for 1979 was $46,371.93 or $45,371.93. GX 28, in Judge Claiborne's own handwriting, changes $45,371.93 to $46,371.93, and Judge Claiborne during trial admitted that he changed the figure (Tr. 855–856).

(the difference between $41,072.93 and $22,332.87)—reflects his failure to report to Wright most of the checks for legal fees he received in 1979 (GXs 6, 9; Tr. 475–489).

THE 1980 TAX YEAR

Judge Claiborne, prior to filing his federal income tax return for 1980, decided to stop using Wright's services and to utilize those of a new firm called Creative Tax Planning, run by an individual named Jerry Watson (Tr. 883–884, 968–969). Watson, who was not a college graduate, had worked at various jobs, including insurance sales, encyclopedia sales, and farming, until the late 1970's when he set up a bookkeeping business (Tr. 786–790, 795). Watson was hired by Judge Claiborne without any inquiry into his background or qualifications (Tr. 968–970).

Following discussions with Judge Claiborne about his 1980 tax return, Watson sent him a letter dated April 6, 1981, (GX 47) in which Watson stated that "the possibility of taking a loss on your business looks good" (Tr. 797–798). The "business" to which Watson referred was Judge Claiborne's law practice, the assets of which had previously been completely written off on Judge Claiborne's income tax return for 1978 (Tr. 798–807, 921–924).

On or about April 13, 1981, Judge Claiborne filled out and signed a request for extension of time to file his 1980 tax return, in which he reported an estimated tax liability of $42,847.96 (GX 4; Tr. 7). By June 15, 1981, Watson had completed preparation of Judge Claiborne's 1980 return (Tr. 807). After looking through the return and discussing it with Watson for fifteen or twenty minutes, Judge Claiborne signed it (Tr. 813–815, 973–977). Because of his failure to report his legal fee income, Judge Claiborne received a tax refund of $44,256.00 (GX 38; Tr. 368–372). He paid Watson $2,000 for preparing the return, without any additional tax or bookkeeping services by Watson (Tr. 782, 978). Watson admitted that the amount of anticipated tax refund was a "factor" in computing his fee (Tr. 785).

This return was prepared for the most part in pencil (GX 5; Tr. 978). No Schedule C was attached (GX 5). This is the appropriate schedule for the reporting of legal fee income. Judge Claiborne had used Schedule C to report his legal fee income throughout his law practice years (Tr. 922–923). Judge Claiborne was, therefore, familiar with Schedule C. In short, there was no inclusion of the $87,911.83 legal fees which Judge Claiborne had received. That figure appeared nowhere on the return (GX 5).

II. Analysis of Issues Before the Jury

A. INTRODUCTION

At the end of the evidence the primary issue for the jury was essentially framed by the argument of counsel—was Judge Claiborne telling the truth on the witness stand? (Closing arguments of counsel, trial volume dated August 9, 1984, pp. 59–60 (defense), pp. 108–111 (government)). Defense counsel explicitly stated that to find Judge Claiborne guilty the jury would have to believe that Judge

Claiborne committed perjury on the witness stand and had been involved in the forgery of exhibits in preparation for trial.

B. 1979 TAX RETURN

(1) The Government's case

Judge Claiborne's accountant, Joseph "Jay" Wright, received a handwritten letter from the Judge sometime around March 1, 1980 (Tr. 157–158; GX 28). It was a request by Judge Claiborne to have Wright advise lending institutions from whom Judge Claiborne intended to borrow, what Judge Claiborne's earnings had been for the years 1978, 1979 and for 1980 to date (Tr. 155–158, 854).

Included on that signed letter was, in Judge Claiborne's own words, a "tabulation taken from my deposits and authentic" which set out seven dates during 1979 with deposits opposite each date (GX 28). These figures totaled $45,371.93 for legal fee income in 1979. On March 7, 1980, accountant Wright, pursuant to Judge Claiborne's request, wrote the Stanwell Mortgage Company reporting this amount of legal fee income for 1979 (GX 29; Tr. 160–161).

Just prior to April 15, 1980, accountant Wright prepared a worksheet to determine the taxes which would be due so that Judge Claiborne could file a request for an extension of time (until June 15) for the filing of his 1979 federal tax return (Tr. 162–165). In computing the amount of income, Wright used the figures submitted by Judge Claiborne from his early March letter (GX 28) on a worksheet (GX 30; Tr. 164–165).

Based on the figures in the March letter (GX 28), Wright computed Judge Claiborne's additional tax liability for 1979 at $16,080.04 (GX 30; Tr. 266). In addition, he estimated that a $4,000 payment was due for the first quarter of 1980 (GX 30; Tr. 267). In a conversation with Judge Claiborne, Wright was advised that Judge Claiborne had incurred expenses in conjunction with the receipt of his legal fee income and that the taxable income would be reduced (Tr. 331). Judge Claiborne advised that payment of $8,000 should be made for taxes due for 1979 (Tr. 164, 262, 331, 866–867) and that payment of $2,500 should be made for the first quarterly estimate for 1980 (GX 30; Tr. 164–165, 267).

On May 22, 1980, Wright wrote letters to First National Bank of Nevada as well as First Western Savings and Loan Association (Tr. 161–162). In both these letters Wright used the legal income figure of $45,371.93 supplied by Judge Claiborne in his March letter (GX 28; Tr. 168–169).

Sometime between May 22 and June 16 of 1980 (the date that 1979 tax return was signed and filed), Wright received further information from Judge Claiborne (Tr. 168–169).

First, he received a three page document (GX 31) from Judge Claiborne which was in the Judge's own handwriting (Tr. 169). This document was an itemization of all the Judge's 1979 income and expenses (Tr. 169). This document showed his wages as Judge, his legal fee income, his interest income, his personal loss from the sale of his airplane, his property taxes, his alimony, his medical expenses, his expenses incurred in business, his charitable contributions, and his insurance payments (GX 31). On this document,

Judge Claiborne wrote that his earnings from "private law practice before judgeship" were $22,332.87 (Tr. 177, 944). Wright used the figures on this document in preparing Judge Claiborne's 1979 tax return (GX 3; Tr. 939-940, 944).

Second, Wright had a conversation with Judge Claiborne which related to the income figure which Judge Claiborne had reported in his handwritten letter in March (GX 28; Tr. 172, 940, 947-948). Judge Claiborne went through the individual deposits which he had specifically identified by date in his March letter (Tr. 172-175, 947-948). Judge Claiborne indicated to Wright where he had been mistaken with respect to what were in fact legal fees and what money was from other sources. (Tr. 942-944). Judge Claiborne identified for Wright a deposit which included $10,000 which came from a time certificate of deposit (TCD) together with $622.17 interest income (Tr. 173, 942). The Judge also identified a $11,000 deposit resulting from the sale of a plane and further identified two other deposits which were interest payments (GX 28; Tr. 174-175, 942). The reductions Judge Claiborne made in his March letter to Wright (GX 28) resulted in a balance of legal fee income of $22,332.87 (Tr. 171, 175, 949-950). This was the same figure Judge Claiborne included in his three page handwritten document (GX 31; Tr. 950). All of the information which Judge Claiborne gave Wright regarding these specific deposits was noted by Wright next to where the deposit was listed by Judge Claiborne in his March letter to Wright (GX 28; Tr. 172-173).

Wright's time logs verify that he had been working on Judge Claiborne's tax return Saturday, June 14 (no time reported), Sunday, June 15 (3 hours reported), and Monday, June 16 (2¾ hours reported, including the fact that Judge Claiborne had come to Wright's office) (GX 48; Tr. 1161-1163). Judge Claiborne's 1979 income tax return bears his signature and that of accountant Wright; it is dated June 15, 1980 (GX 3; Tr. 177, 960). According to Wright, the tax return was signed and mailed on June 16, 1980 (Tr. 1163-1164).

Corroborating the above proof regarding legal fee income is the fact that on May 14, 1980, Judge Claiborne filed a report with the Judicial Ethics Committee of the Judicial Conference in order to comply with the Ethics in Government Act. In his ethics form, he reported that he had received $23,050.76 from private practice fees in 1979 (GX 40; Tr. 378, 420-421, 953-954).

(2) Judge Claiborne's explanation

a. Recordkeeping and Government Exhibit 28 (Judge Claiborne's March 1980 letter to Wright)

Judge Clairborne, sensitive to the fact that the proof established he had cashed 8 of the 14 legal fee checks which he had received, together with the normal inference which arises from this conduct that it may be done to avoid taxes, testified that he in fact kept an accurate record of payments made to him in a small black book (DX 47; Tr 856-857, 934-936).

However, a problem arose with reliance on the black book because of Judge Claiborne's early March 1980 letter (GX 28). This letter explicitly referred to bank deposits to show his 1979 legal

fees. Judge Claiborne thus had to explain why he used bank deposits rather than his black book which he alleged was his record of these receipts.

Judge Claiborne explained his method in the following terms. When he received a check he would record it on a slip indicating who paid, the date, and what he did with it (i.e., cash or deposit the check). He would then put this slip in an envelope in a desk at his office. After a while, he said, he would from time to time, take the slips from the envelope in the office to his home. He would then place the slips in another envelope in his desk at home. According to Judge Claiborne, he periodically would then make entries in his black book from these accumulated slips (Tr. 856-857, 935-936).

Judge Claiborne further told the jury that his recordkeeping method went awry because he lost the envelope with his slips from his desk drawer at home (Tr. 935-936). Second, even though it was well after 1979, he had not made any entries of these slips in his black book (Tr. 936-937). Because of these failures to respect his own methodology, he said he had to resort to bank deposits (Tr. 935-936).

b. Government Exhibits 31 (three page handwritten itemization of income and expenses for 1979), 40 (Judicial Ethics form for 1979) and 3 (1979 income tax return)

In order to avoid the significance of GX 31 in which Judge Claiborne, in his own hand, identified his private practice income for 1979 to be $22,332.87, he points to a copy of a letter he says he wrote on April 11, 1980 to Wright (DX 1; Tr. 937-938, 945-947).

In this letter, Judge Claiborne tells Wright his 1979 legal fee income was $41,073.93 (Tr. 945). Judge Claiborne testified that just before the April 15th deadline for estimating tax and requesting an extension, he found the envelope with the slips (Tr. 935). He knew Mr. Wright needed accurate information so he tallied up the slips (Tr. 935). Judge Claiborne further testified that he did not use his black book (GX 47) because at that time (mid-April) none of the slips had been entered in the book (Tr. 936-937). In contrast, Wright and his wife, who works for him, both testified that they never saw Judge Claiborne's letter (Tr. 167-168, 278-279, 332-333, 351-353). Wright testified that the only information he had was the figure reported in the March letter from Judge Claiborne (GX 28; Tr. 175-176). Wright used this information in computing the tax due April 15, 1980 (Tr. 177), as well as in writing to lending institutions later in May (Tr. 158).

Judge Claiborne also testified that at the beginning of May, he was given a judicial assignment in Los Angeles (Tr. 872-873, 945, 954). At the time he received the assignment, Judge Claiborne thought it would be extended and that he would not be home on June 15 to take care of his tax return problems (Tr. 876, 945-946). He said he discussed the matter with Wright who suggested that Judge Claiborne get his income and expense material together and then sign a blank tax return (Tr. 872-876). Judge Claiborne testified that he went to his office the night of May 1 and he prepared a three page handwritten itemization of income and expenses for 1979 (GX 31; Tr. 873, 945, 949). He said Wright gave him the $22,332.87 figure in a telephone conversation (Tr. 946-947); and

that he did not know that the number was false by almost 50 percent (Tr. 949). He then stated that he went to Wright's office the next day, delivered the three page itemization of income and expenses (GX 31), and signed a blank return (Tr. 876, 960).

Judge Claiborne also said that on the night of May 1, when he prepared this three page document (GX 31), he did not check his slips on which he recorded his income, nor did he check his recent letter of April 11, nor did he check his black book (Tr. 955, 957). He also indicated that when he received the calculation ($22,332.87) over the phone and put it on his work papers (GX 31), he never realized that it was substantially different from the number ($41,073.93) he had computed three weeks before (DX 1; Tr. 948–949, 1018).

His testimony as to why he only reported $23,050.76 to the Judicial Ethics Committee (GX 40) was that before he went to Los Angeles he just threw a copy of his three page handwritten itemization of income and expenses for 1979 (GX 31) into his brief case (Tr. 954). He had expected to be in Los Angeles a significant period of time and planned to complete his Judicial Ethics report there (Tr. 876, 954). This did not materialize because he returned to Las Vegas (Tr. 955). He still had his work papers with the Judicial Ethics form and so he used the figure ($22,322.87) from exhibit 31 (Tr. 955–957). The fact is, however, that he added a small additional check he thought he had received to the $22,332.87 figure on exhibit 31 (Tr. 955–956). Again he did not check his April 11 letter, his slips, nor the black book (Tr. 955). Nor, when he made his addition, did it refresh his recollection of having only the month before added up his slips to an amount totaling $41,072.93 (DX 1; Tr. 955–958).

Judge Claiborne's explanation for his 1979 tax return (GX 3), is that he signed it in blank on May 2, 1980 (Tr. 876–877, 960, 1022), and therefore did not see that only $22,332.87 was reported for his 1979 legal fee income instead of the $41,072.93 amount which he had actually earned (Tr. 882–883).

(3) Jury verdict

The jury, by finding Judge Claiborne guilty of willfully falsifying his 1979 federal income tax return, clearly did not accept Judge Claiborne's explanation.

C. 1980 TAX RETURN

(1) The Government's case

Judge Claiborne, before filing his 1980 income tax return, decided to stop using the services of his long-time accountant (Joseph Wright). He decided to utilize those of a business named Creative Tax Planning, run by Jerry Watson (Tr. 883–886, 968–969), who had established his bookkeeping and tax preparation business in 1979 (Tr. 774). Watson, a high school graduate, previously had worked at various jobs, including insurance sales, grocery store clerk, encyclopedia sales, and farming (Tr. 785–787). Watson was not an accountant (Tr. 774). Claiborne hired Watson without questioning his background or experience, (Tr. 967–970).

During calendar year 1980 Judge Claiborne recieved four checks for legal fee income totaling $87,911.83 (GX 7, 11, 13, 43; Tr. 28-29, 81-83, 89-93, 495-500, 964). Three of these checks were deposited in banks (Tr. 495-500) and one check—for $37,500—was cashed at the Golden Nugget Hotel and Casino (GX 43; Tr. 499).

On April 6, 1981, Watson, after discussing the 1980 tax return with Judge Claiborne, sent a letter advising the Judge that there was a good possibility of taking a loss on the previous law practice (GX 47; Tr. 797-798). However, the assets to the law practice had previously been written off on Judge Claiborne's income tax return for 1978 (Tr. 798-807, 921-924). Judge Claiborne had provided Watson with income tax returns for the years 1973-1979 (Tr. 798-799, 888).

On April 13, 1981, Judge Claiborne filled out and signed a form for extension of time to file his 1980 tax return (GX 4) (Form 4868), on this form, he reported an estimated tax liability of $42,847.96 (GX 4; Tr. 7, 963-964).

By June 15, 1981, Watson had completed preparation of Judge Claiborne's 1980 return (Tr. 807). On the return, the only income listed was the judicial salary ($54,499.92) and interest income ($2,751.00) (GX 5). In addition, the return reported a capital loss of $3,000.00 based on the sale of Judge Claiborne's previous law practice (GX 5; Tr. 976). The return was prepared mostly in pencil and quite differently than those prepared by Mr. Wright (Tr. 977-978). The appropriate form (Schedule C)—for reporting legal fee income—was not prepared or attached (GX 5; Tr. 978-979). Judge Claiborne, having used Schedule C for reporting legal fee income for almost thirty years, was quite familiar with how to report regular income as opposed to capital gain (or loss) income (Tr. 922-923, 979).

After looking through the return, and discussing it with Watson for a short time period, Judge Claiborne signed it (Tr. 813-815, 974-977). Because of his failure to report his fee income of $87,911.83, Judge Claiborne received a tax refund of $44,256.00 (GX 38; Tr. 368-372, 982). He paid Watson $2,000 solely for preparing the return (Tr. 782, 978). The $87,911.83 in legal fees that Judge Claiborne received in 1980 were not reported on his 1980 federal income tax return (GX 5).

(2) Judge Claiborne's explanation

Judge Claiborne's defense relative to his 1980 tax return basically is that he did not know what was on it (Tr. 973-974). He did not read it or analyze it, but only paged through the return before signing it (Tr. 973-975).

On April 13, 1981, Judge Claiborne signed a request for extension of time to file his tax return form (GX 4 (Form 4868); Tr. 962-964). On this form, he reported that his 1980 taxes would be $42,847.96 (Tr. 7, 963). He reported having already paid $22,030.07 as a result of withholding and the 1979 overpayment (GX 4). On this form he reported he owed $20,817.59 (Tr. 963). He made payment of that amount with his requested extension (GX 4; Tr. 963).

Two months later, when he signed his 1980 tax return, the $42,847.96 tax obligation for 1980 had been reduced to $1,103.00

(GX 5; Tr. 979-980). The tax return called for Judge Claiborne to receive a refund check in the amount of $20,927.00 (Tr. 1029). In addition, the tax return did not include his legal fees received in 1980 in the sum of $87,911.83 (GX 5; Tr. 980). Instead, it included a Schedule D which identified a loss suffered by Judge Claiborne in the sale of his law practice (GX 5). Judge Claiborne's testimony was that at the time he signed the return he just thumbed through it and did not realize his failure to report the $87,911.83 (Tr. 894, 973-975, 980). He stated that an employee at Watson's firm handed him the tax form and at no time did he even see Mr. Watson (Tr. 893-894, 970-973).

After he filed the return, Judge Claiborne received a refund check not for $20,927.00 but for $44,256.00 (GX 38; Tr. 368-372, 982). He spoke to Mr. Watson about this and then cashed the check (Tr. 982).

On the issue of why Judge Claiborne changed from accountant Wright to Watson in 1981, without inquiring into Watson's relative lack of experience and credentials, he said he was impressed with Watson because he sounded professional on the phone (Tr. 1019). He said also that he only needed a tax preparer (Tr. 1020). Judge Claiborne additionally inferred that Wright was too busy (Tr. 1020). With respect to why he did not ever answer Wright's phone calls in 1981 when Mr. Wright was calling to secure the usual tax information, he said he had a conversation with him on August 31, 1978, Judge Claiborne's last day in private practice (Tr. 1019-1020). On that date, he said he told Wright he would only need a preparer in the future (Tr. 1020). However, in fact, Judge Claiborne used Wright after August 31, 1978, in the spring of 1979 for his 1978 return, as well as in the spring of 1980 for his 1979 return (Tr. 1033-1035).

On the issue of why for almost thirty years he had paid Wright, an accountant, $600 per year for services which included monthly bookkeeping as well as preparation of the tax return, compared to the payment of $2,000 to Watson, who was not an accountant, for merely preparing the 1980 return, Judge Claiborne said he did not know what he had paid Wright (Tr. 931).

(3) Jury verdict

The jury, by finding Judge Claiborne guilty of willfully filing a federal income tax form for 1980 that he knew not to be true, did not accept Judge Claiborne's explanation.

D. CONCLUSION

The evidence in this record not only supports the finding of guilt made by the jury on its verdict but it also supports the finding that Judge Claiborne's defense lawyer said the jury would have to make to convict Judge Claiborne. It supports the finding that Judge Harry E. Claiborne was not truthful at his trial.

III. Procedure

The trial and related proceedings at which Judge Claiborne was found guilty of not telling the truth when he signed his 1979 and

1980 tax returns in violation of Title 26, United States Code, Section 7206(1), lasted 10 days. Seven days were spent on the actual trial, two were spent on pre-trial matters, and one day for jury deliberation.

Judge Claiborne was represented by three able attorneys. One was a local attorney (William J. Raggio); a second (J. Richard Johnston) was a respected tax attorney. The third, Oscar Goodman, Esq., his chief counsel, has specialized in criminal defense work for 18 years.[17]

The trial involved three counts. Besides the two on which Judge Claiborne was convicted, there was another alleging the making of a false statement to the Judicial Ethics Committee of the Judicial Conference of the United States in violation of Title 18, United States Code, Sec. 1001. Judge Claiborne was acquitted of this count.

These three counts had been part of an earlier trial which resulted in a hung jury and a mistrial. As a result of the mistrial, the defense in this case had already heard the proof the prosecution would be relying upon. The defense thus had a complete understanding of the prosecution's case in advance of the second trial.

The transcript for the second trial reflects that Judge Claiborne had ample opportunity to tell his story. He was on the witness stand for about a full day. He had told the significant facts relevant to the two tax returns counts when court recessed for the day. The jury thus retired before cross-examination, having heard Judge Claiborne tell his story in a way he had wanted to tell it (Tr. 816–913).

In addition to the three attorneys who appeared for Judge Claiborne at trial, he now appears to be represented in some of the motions which collaterally attack his conviction by three additional attorneys: Robert S. Catz of Cleveland Marshal Law School, Cleveland, Ohio; Terence J. Anderson, University of Miami Law School, Coral Gables, Florida; and Annette R. Quintana, Las Vegas, Nevada.

Judge Claiborne and the Judicial Process

Since H. Res. 461, as amended, is rooted in the jury verdict of guilty on two counts of falsifying federal income tax forms and the judgment of conviction, it is important to set forth a chronology of events leading to those decisions.

The more important legal procedures in the matter of United States v. Claiborne began with a grand jury inquiry after which a seven-count indictment was returned in December 1983 against Judge Claiborne. The indictment was followed by two complete trials each before a jury. The first trial (in March and April 1984) ended in a mistrial when the jury was unable to render a decision. The second trial (in July 1984) resulted in a unanimous guilty verdict on two counts of falsifying federal income tax forms in violation of Title 26, United States Code, § 7206(1) for the years 1977 and 1980. After the verdict was announced in the second trial, the 12 jurors were individually polled and each affirmed his or her verdict. Judge Claiborne had the benefit of a presumption of innocence

[17] *See* House Hearings, supra note 3, at 69, 78.

and the United States had the burden of showing guilt beyond a reasonable doubt. The jury's verdict and the court's judgment support the conclusions that Judge Claiborne willfully under-reported his income for 1979 and 1980.

On October 3, 1984, Judge Claiborne was sentenced under Title 18, United States Code, § 4205(b)(2) to a term of two years on each count to run concurrently and was fined $5,000 on each count. The sentence was stayed pending appeal.

There have been two reported opinions in this matter—the Ninth Circuit denying Judge Claiborne's motion to quash the indictment and then affirming his conviction in the second trial—as well as three published dissenting opinions concerning his motion to hear the case en banc. Judge Claiborne had his direct appeal heard by a special Ninth Circuit judicial panel. On April 21, 1986, his petition for issuance of a writ of certiorari by the Supreme Court was denied. On May 16, 1986, Judge Claiborne reported to the Federal Prison Camp at Maxwell Air Force Base, Montgomery, Alabama.

He continues to receive his judicial salary ($78,700.00) while in prison.

In the course of these proceedings, Judge Claiborne has made a considerable number of motions and received court consideration on each, thereby raising a broad variety of issues on his behalf. Throughout these proceedings, the record reveals that Judge Claiborne has retained the assistance of six capable attorneys.

A chronology of the most important legal events relating to Judge Claiborne is attached.

September 1, 1978: Assumed responsibilities as a Federal District Court Judge.

December 8, 1983: Seven-count (Criminal No. CR-R-83-57, WEH) indictment filed in U.S. District Court, District of Nevada, against Judge Claiborne.

March 5, 1984: Ninth Circuit affirms District Court's order denying Claiborne's motion to quash the indictment and dismiss the proceedings against him. *U.S.* v. *Claiborne,* 727 F.2d 842 (9th Cir. 1984).

March 12, 1984: Opinion in chambers of Justice Rehnquist denying application for stay of proceedings pending Supreme Court consideration of the decision in 727 F.2d 842, supra. *Claiborne* v. *U.S.,* 465 U.S. 1305 (1984).

March 12, 1984: Jury trial (25 days, six for jury deliberations; 3/12-16, 19-23, 26-30, 4/2-7, 4/9, 4/11-13).

March 14, 1984: Order denying application for stay in 465 U.S. 1305, supra. *Claiborne* v. *U.S.,* 465 U.S., 1092 (1984).

April 13, 1984: Mistrial ordered since jury unable to reach verdict; government moved to dismiss Counts I through IV.

July 31, 1984: Second jury trial (10 days, one for jury deliberations; 7/31, 8/1-4, 8/6-9).

August 10, 1984: Verdicts of guilty on Counts V and VI, and of not guilty on Count VII; convicted of two Counts of making and filing false statements on his tax returns [violation of Title 26, U.S.C. § 7206(1)] for the years 1979 and 1980.

October 1, 1984: Denial of certiorari for 727 F.2d 842, supra. *Claiborne* v. *U.S.,* 105 S. Ct. 113 (1984).

October 3, 1984: Sentenced under Title 18, U.S.C. § 4205(b)(2) to serve a two-year prison term and pay a $10,000 fine, plus costs of prosecution.

July 8, 1985: Conviction affirmed by special panel of U.S. Court of Appeals for the Ninth Circuit in *U.S.* v. *Claiborne,* 765 F.2d 784 (9th Cir. 1985).

December 10, 1985: Motion for rehearing denied by special panel of Ninth Circuit. Special panel recommends to full Ninth Circuit that it reject suggested rehearing en banc by a vote of sixteen to three (six out of the twenty-five judges recused themselves and did not participate in the vote).

December 30, 1985, January 30, 1986, and March 4, 1986: Opinions of Circuit Judges Ferguson, Reinhardt, and Pregerson dissenting from order denying rehear-

ing en banc. *U.S.* v. *Claiborne*, 781 F.2d 1325 (9th Cir. 1985), 781 F.2d 1327 (9th Cir. 1986), and 781 F.2d 1334 (9th Cir. 1986).

April 21, 1986: Denial of certiorari of conviction affirmation in 765 F.2d 784, supra. *Claiborne* v. *U.S.*, 106 S. Ct. 1636 (1986).

May 1986: Judge Claiborne filed several collateral motions, some of which are pending and some of which were denied.

May 16, 1986: Judge Claiborne reported to the Federal Prison Camp at Maxwell A.F.B., Montgomery, Alabama.

Explanation of the Criminal Offenses

On December 3, 1983, a seven-count indictment was filed against Judge Harry E. Claiborne. Subsequently, the first four of the counts were dismissed by the United States after the first trial in which the jury was deadlocked. Three counts—Counts V, VI and VII—were the subject of the second trial. On August 10, 1984, the jury found the defendant guilty on Counts V and VI and not guilty on Count VII.

As noted in the indictment, Counts V and VI read as follows:

Count V

> On or about June 15, 1980, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of the Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $80,227.04 whereas, as he then and there well knew and believed he received substantial income in addition to that heretofore stated: in violation of Title 26, United States Code, Section 7206(1).

Count VI

> On or about June 15, 1981, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $54,251.00 whereas, as he then and there well knew and believed he received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

The Government alleged that Judge Claiborne had under-reported his legal fee income in his 1979 tax return and had failed to report his legal fee income on his 1980 tax return.

The relevant statute—Title 26, United States Code, Section 7206(1) provides [18] as follows:

§ 7206. Fraud and flase statements

Any person who—

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter. . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

In order for Judge Claiborne to have been found guilty of filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code, the Government had to prove three facts beyond a reasonable doubt:

First, that the defendant signed a tax return knowing that it contained false information;

Second, that he acted willfully, that is that he acted voluntarily, for the purpose of evading his known legal duty under the tax laws, and not as a result of accident or negligence; and

Third, that the tax return contained a written declaration that it was made under penalties of perjury.[19]

A finding of the above-mentioned factual elements was required in order to return a guilty verdict on Count V and/or Count VI; the jury found the defendant guilty of Counts V and VI.

Article-by-Article Analysis

House Resolution 461, in its "resolving" clause, provides that Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, be impeached for misbehavior and for the commission of high crimes and misdemeanors. Evidence to sustain articles of impeachment was taken by the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the House of Representatives.

The "resolving" clause further provides that if the articles are adopted by the House of Representatives, that they be exhibited to the Senate.

Moreover, the resolution states that any articles exhibited by the House of Representatives are in the name of itself and all the people of the United States of America against the subject of the resolution, Harry E. Claiborne. The articles maintain and support the impeachment of Judge Claiborne for misbehavior and high crimes and misdemeanors.

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[18] On September 3, 1982, the law was amended to increase the maximum fine to $100,000 ($500,000 in the case of a corporation), but since Judge Claiborne's offenses occurred in 1980 and 1981, he could not be sentenced under the amended law. (Public Law 97-248, Title III § 329(c), 96 Stat. 618.)

[19] *See* Transcript of Jury Instructions, Aug. 9, 1984, at 13–14.

ARTICLE I

Article I sets out the facts underlining the indictment (Count V) and trial of Judge Claiborne for willfully and knowingly filing a United States Income Tax Return for the calendar year 1979, having received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of Title 26, United States Code.

Article I further provides that Judge Claiborne verified his 1979 tax return by a written declaration that the return was made under penalty of perjury; that the return was filed with the Internal Revenue Service; and that Judge Claiborne did not believe the return to be true and correct as to every material matter.

The "Wherefore" clause speaks of the commission of a "high crime or misdemeanor" in the constitutional sense.

In the opinion of the Committee, the factual showing necessary to sustain Article I could be made in a Senate trial by relying on the jury verdict rendered on August 10, 1984: that is, the facts were shown at trial beyond a reasonable doubt to warrant a finding of guilty by a unanimous jury on Count V of the indictment.

ARTICLE II

Article II sets out the facts underlying the indictment (Count VI) and trial of Judge Claiborne for willfully and knowingly filing a United States Income Tax Return for the calendar year 1980, having received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of Title 26, United States Code.

Article II further provides that Judge Claiborne verified his 1980 tax return by a written declaration that the return was made under penalty of perjury; that the return was filed with the Internal Revenue Service; and that Judge Claiborne did not believe the return to be true and correct as to every material matter.

The "Wherefore" clause speaks of the commission of a "high crime or misdemeanor" in the constitutional sense.

In the opinion of the Committee, the factual showing necessary to sustain Article II could be made in a Senate trial by relying on the jury verdict rendered on August 10, 1984: that is, the facts were shown at trial beyond a reasonable doubt to warrant a finding of guilty by a unanimous jury on Count VI of the indictment.

ARTICLE III

Article III rests entirely on the conviction itself and stands for the proposition that when a federal judge is convicted of a felony and has refused to vacate his office he has misbehaved in office and by conviction alone he is guilty of having committed "high crimes" in office as that term is set out in the United States Constitution.

Article III, in concise terms, provides that on August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing to a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of Title 26, United States Code. Thereafter, a judgment of conviction was en-

tered against Judge Claiborne for each of the violations of section 7206(1) and a sentence of two years imprisonment for each violation was imposed, to be served concurrently together with a fine of $5,000 for each violation. The "Wherefore" clause in Article III speaks only of "high crimes" and not "misdemeanors."

ARTICLE IV

Article IV makes clear that Judge Claiborne's conviction for falsifying his income tax return for two consecutive years does more than tarnish only his personal reputation as a member of the federal judiciary. The consequence of his illegal and improper actions has brought his court and the entire federal judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice. Such a result renders him unfit to continue to serve on the federal bench.

Good behavior, as that phrase is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. Those entrusted with the duties of judicial office have the high responsibility of ensuring the fair and impartial administration of justice, which in large part rest on the public confidence in and respect for the judicial process. Erosion of that confidence by irresponsible, improper or unlawful conduct by judges violates the public trust and must not go unchecked by the Congress whose constitutional duty it is to redress instances of judicial misbehavior.

As one guide to what is considered "good behavior" befitting a member of the judiciary, and enhancing the integrity and public confidence in the institution, the Code of Judicial Conduct prescribes certain standards of public and private deportment for judges and justices. Canon 1 of the Code provides that "a judge should uphold the integrity and independence of the judiciary." In an explanatory note to Canon 1, it is stated that judges must observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 2 of the Code, provides that a "judge should avoid impropriety and the appearance of impropriety in all his activities." In the accompanying explanatory note to Canon 2, it is stated that "[A] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." These canons reinforce the Committee's determination that Judge Claiborne has brought disrepute upon the profession and severely undermined public confidence in the institution.

Judge Claiborne took an oath—as do all federal judges and justices—faithfully and impartially to discharge and perform all the duties incumbent on him. Implicit in the oath is the requirement that federal judges and justices must uphold and obey the Constitution and laws of the United States. Members of the bar also have the same professional responsibility.

Article IV provides that as a judge of the United States, Judge Claiborne is "required to discharge and perform all duties incumbent on him and uphold and obey the Constitution and laws of the United States." These conditions for public service are directed to

requiring Judge Claiborne and all members of the federal judiciary to uphold the integrity of the judicial branch.

The Article then states that Judge Clairborne transgressed the laws of the United States by "willfully and knowingly" falsifying his income on his federal tax returns for the years 1979 and 1980. By this criminal act, Judge Claiborne betrayed the trust of the American people; and by so doing, undermined confidence in the integrity and impartiality of the federal judiciary.

The "Wherefore" clause in Article IV therefore concludes that because Judge Claiborne is guilty of "misbehavior" and "misdemeanors", as those terms appear and are used in the Constitution. As such, his conduct warrants impeachment and trial and removal from office.

Oversight Findings

The Committee makes the following findings: Article 1, Section 2, of the Constitution of the United States of America vests in the House of Representatives the sole power of impeachment.

Each case of impeachment necessarily must stand on the facts and findings adduced by the House of Representatives with respect to the case before it.

The case of a federal judge, who has been convicted by a jury of his peers and who has exhausted all direct appeals to higher courts, is a matter of first impression for the Committee on the Judiciary. No federal judge has heretofore been adjudged guilty beyond a reasonable doubt of a felony committed while in office. Judge Claiborne's conviction on two counts of falsifying his federal income tax returns presents an explicit case of a sitting judge violating the criminal laws of the United States and by so doing, betraying the public trust of the high office of a federal judge.

As a consequence, the Committee heavily relied upon the jury verdict of guilty rendered unanimously beyond a reasonable doubt and the judgment of conviction to support and sustain the four articles of impeachment. There was no need for an independent finding of facts about Judge Caliborne's conduct by the Committee. The facts have already been found under a judicial procedure which afforded the respondent full due process rights.

In sustaining the four articles of impeachment, the Committee on the Judiciary nonetheless through the hearing process and subsequent deliberations, examined the facts and circumstances supporting the jury verdict and conviction of Judge Claiborne. The Committee's record included complete copies of the trial proceedings, all exhibits admitted into evidence and appellate submissions.

After completing its factual examination, the Committee concluded that, where a complete and final record of adjudicated proceedings leading to a guilty verdict is before it, the Committee is justified in taking action analogous to the concept of "judicial notice", but in a legislative setting. That is, the factual findings have already been made by a unanimous jury beyond a reasonable doubt.

With regard to Clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives, no oversight findings have been submit-

ted to the Committee by the Committee on Government Operations.

Committee Vote

H. Res. 461, as amended, was adopted by the Committee by a recorded vote of 35 to 0, a quorum of Members being present and all Members having voted.

APPENDIX A

Documents Relating to United States v. Claiborne*

1. Order for Disclosure of Return and Taxpayer Return Information, *In Re: Application of the Department of Justice for an Order Under 26 U.S.C. 6103,* Case No. Misc. 82-91 (D. Ore., filed Feb. 21, 1983) (Hoffman, J.) (signed Sept. 22, 1982) (relating to taxpayer return information of Harry Eugene Claiborne).

2. Docket Sheets, *U.S.* v. *Claiborne,* Cr. No. CR-R-83-57-WEH, Dec. 8, 1983 through June 23, 1986.

3. Indictment, *U.S.* v. *Claiborne,* Cr. No. CR-R-83-57-WEH, filed Dec. 8, 1983 (seven-count indictment).

4. Order (relating to pretrial motions, schedule, and bond), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Dec. 21, 1983).

5. Order (denying defendant's motion to extend time in which to file pretrial motions, and setting date—June 9, 1984—for hearing on motion for change of trial and pretrial hearing sites), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed Dec. 27, 1983).

6. Order (relating to defendant's motion to extend time in which to file motions, and motion for change of trial and pretrial hearing sites), *U.S.* v. *Claiborne,* (amending order of Dec. 27, 1983) (Hoffman, J.) (signed Dec. 28, 1983).

7. Order (denying defendant's motion to quash indictment and dismiss proceedings: violation of judicial independence and separation of powers), *U.S.* v. *Claiborne,* (Hoffman, J.) (entered Jan. 11, 1984).

8. Order (granting government's oral motion for protective order), *U.S.* v. *Claiborne,* (Hoffman, J.) (entered Jan. 20, 1984).

9. Amended Order (amending the order of Jan. 11, 1984, relating to defendant's motion to quash indictment and dismiss proceedings, and to the government's request for clarification of the order, and continuing the trial date to March 12, 1984), *U.S.* v. *Claiborne,* (Hoffman, J.) (entered Feb. 8, 1984).

10. Order (relating to government's motion for reciprocal discovery and defendant's response), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed Feb. 13, 1984).

11. *U.S.* v. *Claiborne,* No. 84-1009 (9th Cir., filed Feb. 13, 1984) (order of special panel, directing government to file a response to appellant's emergency motion for a stay and application for a writ of prohibition by Feb. 17, 1984) (Gibson, Garth, and Kennedy, Circuit Judges).

12. Order (relating to procedures for depositions and witnesses), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Feb. 17, 1984).

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* Unless otherwise indicated, the documents are in the case of *United States of America* v. *Harry Eugene Clairborne,* Cr. No. CR-R-83-57-WEH, in the United States District Court for the District of Nevada. Unless otherwise indicated, the documents—*e.g.*, orders—are unpublished.

13. Order (denying motion to disqualify the special prosecutor; denying motion to dismiss for grand jury abuse, to discover grand jury materials, to interview grand jurors, and for evidentiary hearing, but ordering the sealing of certain grand jury transcripts and conditioning the order on the court's en camera review of the proceedings before the Oregon grand jury; denying motion to dismiss Counts IV, V, and VI of the indictment for leaks to IRS by government sources; and for additional discovery), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Feb. 17, 1984).

14. *U.S.* v. *Claiborne,* 727 F.2d 842 (9th Cir. 1984) (Gibson, Garth, and Kennedy, Circuit Judges) (affirming district court's order denying defendant's motion to quash indictment; denying petitions for writs of mandamus and prohibition; and denying as moot renewed motion for a stay) (holding Constitution does not immunize federal judge from criminal prosecution prior to his impeachment) (March 5, 1984).

15. Order (directing defendant to deliver forthwith to FBI material required under Rule 16(b)(1)(A) and (B), Fed. R. Crim. P.; ordering that material not so produced may not be introduced in defendant's case-in-chief; and ordering the U.S. to supplement its disclosure of evidence by March 9, 1984), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed March 7, 1984).

16. *Claiborne* v. *U.S.* [No. A-725], 465 U.S. 1305 (1984) (Opinion in Chambers of Justice Rehnquist, denying application for stay of proceedings pending Supreme Court consideration of 9th Circuit decision of March 5, 1984) (March 12, 1984).

17. *Claiborne* v. *U.S.* [No. A-725], 465 U.S. 1092 (1984), (Miscellaneous Order denying application to stay proceedings in U.S. District Court for the District of Nevada) (White, J.) (March 14, 1984).

18. Minutes of the Court, March 12, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed March 30, 1984).

19. Order (granting government's motion for re-entry of matters on the record), *U.S.* v. *Claiborne* (Hoffman, J.) (filed March 13, 1984).

20. *U.S.* v. *Claiborne*, No. 84-7175 (9th Cir., filed March 14, 1984) (order of special panel directing government to file a response to petition for emergency writ of mandamus by March 16, 1984) (Gibson, Garth and Kennedy, Circuit Judges).

21. *U.S.* v. *Claiborne*, No. 84-7175 (9th Cir., filed March 19, 1984) (order denying the emergency petition for a writ of mandamus) (Gibson, Garth, and Kennedy, Circuit Judges).

22. Transcript of First Trial and Other Proceeding, *U.S.* v. *Claiborne*, Cr. No. CR-R-83-57-WEH (D. Nevada) Volumes I through XVI, pages 1-3793 (March 15, 16, 19-23, 26-30, April 2-7, 9, 11-13), and Government and Defense Exhibits.

23. Memorandum (relating to Oregon grand juries, FBI agents, special prosecutor, and subponea, and holding there was no prejudice to the defendant), *U.S.* v. *Claiborne* (Hoffman, J.) (signed March 27, 1984).

24. Minutes of the Court, April 4, 5, and 6, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 9, 1984).

25. Minutes of the Court, April 13, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 13, 1984).

26. Order (setting schedule for retrial after mistrial and ordering retrial to commence on July 31, 1984, ordering that jury be sequestered and that court convene on Saturdays) *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 13, 1984).

27. Order (denying defendant's motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (signed April 27, 1984, erroneously dated "1983").

28. Order (relating to procedures for retrial including use of exhibits, tests and witnesses, and disclosure of certain "statements" to defendant) *U.S.* v. *Claiborne* (Hoffman, J.) (signed May 3, 1984).

29. Order (relating to jurors), *U.S.* v. *Claiborne* (Hoffman, J.) (filed May 7, 1984).

30. Order (relating to defendant's motion for judicial recusal and to government's motion for temporary release of defense exhibit), *U.S.* v. *Claiborne* (Hoffman, J.) (filed May 21, 1984).

31. Order (relating to sequestration of the jury), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 11, 1984).

32. Memorandum and Order on Defendant's Exhibit No. 47 (granting the government's motion for temporary release of defendant's exhibit No. 47 for examination and necessary testing, but allowing defendant to make a copy of it and to have a representative present at the examination or tests and to be promptly informed of results), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 8, 1984).

33. Order (denying defendant's motion for continuance of the scheduled trial date of July 31, 1984), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 8, 1984).

34. Order (denying defendant's motion for an order that the juror's not be subjected to sequestration) *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 18, 1984).

35. Order (denying defendant's motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 22, 1984).

36. Government's Motion for Leave to Dismiss Counts (Counts One, Two, Three and Four of the Indictment), *U.S.* v. *Claiborne* (filed June 27, 1984).

37. *U.S.* v. *Joseph Conforte,* Criminal Action No. 83-0316 (D.D.C., filed June 27, 1984), Order (denying motion of Judge Harry E. Claiborne to vacate order sealing judicial records, noting that this record was unsealed by the Court on Dec. 15, 1983) (Smith, J.).

38. Order (granting the government's motion for leave to dismiss Counts One, Two, Three and Four, and assuming the dismissal is with prejudice to the government, and allowing John Squire Drendel, Esq., to serve as co-counsel if he will not testify for defendant), *U.S.* v. *Claiborne* (Hoffman, J.) (signed July 5, 1984).

39. Order (denying defendant's second supplement to motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 10, 1984).

40. Order (granting government's motion for release of exhibits) *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 27, 1984).

41. Memorandum Denying Defendant's Second Supplement to Motion for Judicial Recusal, *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 27, 1984).

42. Order (denying (A) defendant's motion for (1) dismissal of all counts of indictment tainted by use of false testimony before grand jury and concealment of truth by prosecutor Shaw; (2) evidentiary

hearings on any factual matter not admitted by the prosecution; (3) discovery of entire circumstances whereby the FBI and Prosecutor Shaw obtained confidential tax returns of defendant; and (B) motion for discovery of documents relating to misconduct of government agents and prosecutors in the unauthorized disclosure of confidential income tax returns and return information), *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 30, 1984).

43. Transcript of (Second) Trial and Related Trial Proceedings before Hon. Walter E. Hoffman and a jury, *U.S.* v. *Claiborne*.

a. Transcript of Opening Statement, Aug. 2, 1984, pp. 1–44.

b. Transcript of Trial, Vol. I, Aug. 2, 1984, pp. 1–186a.

c. Transcript of Trial, Vol. II, Aug. 3, 1984, pp. 187–441a.

d. Transcript of Trial, Vol. III, Aug. 4, 1984, pp. 442–676a.

e. Transcript of Trial, Vol. IV, Aug. 6, 1984, pp. 678–903.

f. Transcript of Trial, Vol. V, Aug. 7, 1984, pp. 904–1111.

g. Transcript of Trial, Vol. VI, Aug. 8, 1984, pp. 1112–1273.

h. Transcript of Closing Arguments and Other Proceedings, Aug. 9, 1984, pp. 1–119.

i. Transcript of Verdict, Vol. VII, Aug. 10, 1984, pp. 1274–90.

44. Trial Exhibits (Second Trial):

INDEX OF EXHIBITS

	Admitted	Identified
August 2, 1984		
Government's:		
1 Form 1040 for 1977 for Harry E. Claiborne	3	
2 Form 1040 for 1978 for Harry E. Claiborne	3	
3 Form 1040 for 1979 for Harry E. Claiborne	5	
4 Form 4868, Application for Automatic Extension of Time for 1980 for Harry E. Claiborne	7	
5 Form 1040 for 1980 for Harry E. Claiborne	8	
6 Copy of nine checks from James Brown to Harry E. Claiborne during 1979	24	
7 Copy of two checks from James Brown to Harry E. Claiborne during 1980	28	
45 Street map, downtown Las Vegas, Nev	42	
8 Copies of five letters from Annette Quintana to Harry E. Claiborne during 1979	50	
9 Copy of five checks from Annette Quintana to Harry E. Claiborne during 1979	51	
10 Copy of a communication from Harry E. Claiborne to Jay Wright	72	
11 Copy of a check signed by George DeRoy to Harry E. Claiborne dated 8/15/80	82	
12 Memorandum prepared by George DeRoy dated August 18, 1980	84	
13 Copy of check from Peter Echeverria payable to Harry E. Claiborne dated December, 1979.	91	
14 Copy of records from Caesar's Palance re Peter Echeverria's trip in 1979	100	
15 Signature card for checking account of Harry E. Claiborne at Pioneer Citizen's Bank	102	
16 Copy of checks and deposits slips for the account of Harry E. Claiborne at Pioneer Citizens Bank for 1979.	104	
17 Copy of cashier's check and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	106	
18 Copy of three checks, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	108	
19 Copy of check, deposit slip and checking account statement for the account of Harry E Claiborne at Pioneer Citizen's Bank.	110	
20 Copy of check, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	111	
21 Copy of a check, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	114	
22 Cash and sales record for Harry E. Claiborne for 1978	123	
23 Check register for Harry E. Claiborne for business account for 1978	125	
25 Work paper listing income and expenses for Harry E. Claiborne for 1978	143	
25A Blow-up of Exhibit 25	144	
26 Check register for Harry E. Claiborne for 1979	153	

INDEX OF EXHIBITS—Continued

	Admitted	Identified
27 Check register for Harry E. Claiborne for 1979	154	
28 Handwritten document prepared for Jay Wright by Harry E. Claiborne	157	
28A Blowup of Exhibit 28		
29 Three letters written to financial institutions by Jay Wright on behalf of Harry E. Claiborne.	159	
30 Work papers to prepare 1979 tax return for Harry E. Claiborne	165	
30A Blowup of Exhibit 30		
31 Documents relating to income and expenses for Harry E. Claiborne for 1979	170	
31A Blowup of Exhibit 31		
August 3, 1984		
Government exhibits:		
32 Signature card for Harry E. Claiborne for account at First Interstate Bank	361	
33 Deposit ticket dated 8/31/78 for $75,000 and bank statement dated 8/31/78 at First Interstate Bank	363	
34 Check in the amount of $76,443.16 dated 8/31/78, No. 144982, signed by Harry E. Claiborne payable to Internal Revenue Service and bank statement dated 9/29/70 at First Interstate Bank.	364	
35 Deposit ticket dated 8/13/80 for $1,778.30, check deposited in the amount of $888.30 and bank statement dated 8/29/80 at First Interstate Bank.	365	
36 Deposit ticket dated 11/24/80 for $7,451.19, check deposited in the amount of $7,071.19 and bank statement dated 11/28/80.	367	
37 Check in the amount of $20,817.59 dated 4/13/81, No. 1046, signed by Harry E. Claiborne, payable to Internal Revenue Service at First Interstate Bank.	367	
38 U.S. Government tax refund check for $44,256 issued to Harry E. Claiborne on 7/24/81	370	
39 Letter dated 6/13/79 from Judge Edward Tamm to Judge Harry Claiborne re 1978 Financial Disclosure Report; letter from Judge Harry Claiborne to Judge Edward Tamm dated 6/20/79 transmitting 1978 Financial Disclosure Report; and 1978 Financial Disclosure Report of Judge Harry E. Claiborne for 1978 dated 6/20/79.	377	
39A Blowup of 1978 Financial Disclosure Report	415	
40 Financial Disclosure Report for 1979 filed May 17, 1980	378	
41 Letter Dated 8/12/81 from Judge Edward Tamm to Judge Harry E. Claiborne in re 1978, 1979 and 1980 Financial Disclosure Reports; letter dated 3/2/81 from Judge Edward Tamm to Harry Claiborne re 1979 Financial Disclosure Report; letter dated 2/18/81 from Harry Claiborne to Judge Edward Tamm re Judicial Ethics Committee; letter dated 10/21/81 from Judge Harry E. Claiborne to Judge Edward Tamm in re 1978, 1979, and 1980 Financial Disclosure Reports; and letter dated 3/31/83 from Judge Harry E. Claiborne to Judge Edward Tamm amending 1978 and 1979 Financial Disclosure Reports.		378, 423, 425, 432, 433, 434, 437
Defendant's exhibits:		
2 Letter dated 5/16/81 from Harry E. Claiborne (Financial disclosure report for 1980, filed 5/16/81).	403	
August 4, 1984		
Government's:		
5A Blowup of Exhibit 5	547	
42 Chart for 1979 Income Tax Preparation	475	
43 Chart for 1980 Income Tax Preparation	495	
Defendant's:		
2 Letter dated 5/16/81 from Harry E. Claiborne	454	
August 6, 1984		
Government's:		
47 Letter from Jerry Watson, Creative Tax Planning, to Judge Harry Claiborne, dated April 6, 1981.		797
Defendant's:		
47 Black Vinyl Pad with Yellow Paper		797
3 Report of Joanne L. Becker		762
41 Handwritten Legal Yellow Sheet		778
1 Letter to Jay Wright From Harry Claiborne dated 4/11/80		861
2-A Blow-Up of Defendant's Exhibit 1		861
4 Check dated 4/11/80 for $8,000		868

INDEX OF EXHIBITS—Continued

	Admitted	Identified
August 7, 1981		
Defense:		
47-A Photographic Blow-up of one page of Defendant's Exhibit 47		911
2-A Photographic Blow-up of first page of Defendant's Exhibit 2		911
5 1979 Schedule Prepared by Gologorsky		1055
6 1980 Schedule Prepared by Gologorsky		1063
August 8, 1984		
Government's:		
48 Log Book of Joseph Wright dated Between 8/31/78 and 6/18/80		1155
Other exhibits received by committee but not indexed by court reporter: Government's exhibits:		
44 Transcript in sentencing of Richard Gordon, CR LV 81-68 HEC, July 12, 1982		
46 Chronology of 1979 legal fees of Judge Claiborne		

45. Order (denying government's introduction of evidence—the transcript of the Richard Gordon sentencing by Judge Claiborne—into its case-in-chief, but reserving the question of possible other uses of the evidence), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed Aug. 3, 1984).

46. Order (setting schedule for filing post-trial motions and for filing motion for assessment of costs, continuing defendant on personal recognizance bond until sentencing date of October 3, 1984, and ordering preparation of presentence report), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Aug. 24, 1984).

47. *Claiborne* v. *U.S.* [No. 83-1992] —— U.S. ——, 105 S. Ct. 113 (1984), (denying petition for writ of certiorari) (denied Oct. 1, 1984) (case below, 727 F.2d 842, relating to pretrial motions).

48. Judgment and Probation/Commitment Order, *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Oct. 3, 1984) (adjudging the defendant guilty as charged and convicted and ordering that the defendant be committed to the custody of the Attorney General for imprisonment for a period of two years and is ordered to pay a fine of $5,000 as to Count V; and under Count VI to serve two years concurrent to Count V and to pay a fine of $5,000. The sentences of confinement were imposed under Title 18 U.S.C., § 4205(b)(2)).

49. Notice of Appeal, *U.S.* v. *Claiborne,* (appeal by defendant to the U.S. Court of Appeals for the Ninth Circuit from the final judgment of conviction and sentence entered Oct. 3, 1984) (filed Oct. 3, 1984).

50. Opening Brief of Appellant, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir. dated Jan. 15, 1985) (D. Ct. No. CR-R-83-57-WEH).

51. Appellant's Excerpts of Record, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Jan. 15, 1985) (D. Ct. No. CR-R-83-57-WEH).

52. Brief of Appellee, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Feb. 12, 1985).

53. Appellee's Supplemental Excerpt of Record, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Feb. 12, 1985) (D. Ct. No. CR-R-83-57-WEH).

54. Appellant's Reply Brief, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Feb. 26, 1985) (D. Ct. No. CR-R-83-57-WEH).

55. Order and Judgment (affirming conviction), *U.S.* v. *Claiborne*, No. 84-1294 (D.C. No. Cr. 83-57-WEH) (9th Cir., filed and entered July 8, 1985).

56. Opinion (affirming conviction), *U.S.* v. *Claiborne*, 765 F.2d 784 (9th Cir. 1985) (Circuit Judge Pell for himself, Lumbard, and McWilliams) (July 8, 1985).

57. *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir. filed Dec. 10, 1985) (order of special panel, denying petition for rehearing and rejecting suggestion for rehearing en banc) [not in Committee's possession at this time] (Lumbard, Pell, and McWilliams, Circuit Judges).

a. *U.S.* v. *Claiborne*, 781 F.2d 1325 (9th Cir. 1985) (Ferguson, Circuit Judge, dissenting) (Dec. 30, 1985).

b. *U.S.* v. *Claiborne*, 781 F.2d 1327 (9th Cir. 1986) (Reinhardt, Circuit Judge, dissenting) (Jan. 30, 1986).

c. *U.S.* v. *Claiborne*, 781 F.2d 1334 (9th Cir. 1986) (Pregerson, Circuit Judge, dissenting) (Feb. 10, 1986, as amended March 4, 1986).

58. Brief for the United States in Opposition [to petition for a writ of certiorari], *Claiborne* v. *U.S.*, No. 85-1197 (U.S., filed March 1986).

59. *Claiborne* v. *U.S.*, [No. 85-1197] —— U.S. ——, 106 S. Ct. 1636 (1986) (denying petition for writ of certiorari) (decided April 21, 1986) (case below, 765 F.2d 784, relating to convictions on Counts V and VI).

60. Order List, U.S. Supreme Court, *Claiborne*, v. *U.S.*, No. 85-1197, notice of denial of certiorari (April 21, 1986).

61. Mandate (affirming conviction and order and judgment of 9th Circuit of July 8, 1985) issued on April 29, 1986, by Ninth Circuit, *U.S.* v. *Claiborne*, No. 84-1294, and filed in D. Ct. D. Nev. on May 1, 1986.

62. Emergency En Banc Motion for Designation of Ninth Circuit Judge, *In the Matter of Harry E. Claiborne*, No. 84-1294 (9th Cir., filed May 2, 1986) (D. Ct. No. CR-R-83-57-WEH).

63. Emergency Petition for Stay of Execution, *In the Matter of Harry E. Claiborne*, No. 84-1294 (9th Cir., filed May 2, 1986) (D. Ct. No. CR-R-83-57-WEH).

64. Motion to Stay Proceedings Pending Action By the United States Court of Appeals for the Ninth Circuit on Motions Pending in that Court Affecting this Proceeding, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 5, 1986).

65. Motion (1) to Vacate Judgment and Sentence; (2) for Evidentiary Hearing; and (3) for Discovery Proceedings, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 5, 1986).

66. Government's Opposition to Emergency Petition for Stay of Execution, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., filed on May 7, 1986) (D. Ct. No. CR-R-83-57-WEH).

67. Government's Opposition to Petitioner's Emergency En Banc Motion for Designation of Ninth Circuit Judge, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., filed on May 7, 1986) (D. Ct. No. CR-R-83-57-WEH).

68. Motion for Disqualification of Government Counsel and for Order Directing Attorney General to Determine Whether Grounds Exist to Investigate Whether High Government Officials Have Committed Felonies That Warrant Appointment of Special Pros-

ecutor, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH, (D. Nev., filed on May 8, 1986).

69. Motion Under Rule 35(a) to Stay Illegal Sentence, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 8, 1986).

70. Letter from Terence J. Anderson (a Counsel for Judge Harry E. Claiborne) to Cathy Catterson (Clerk, U.S. Court of Appeals for the Ninth Circuit) re: *Claiborne* v. *Burger* and Petition for Extraordinary Writs, dated May 8, 1986.

71. Petition for Extraordinary Writs, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

72. Appendix to Petition for Extraordinary Writs, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

73. Suggestion that Petition for Extraordinary Writs Be Heard En Banc, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

74. Supplemental Emergency Motion for Recall of Related Mandate or Stay of Execution, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

75. Government's Opposition to Defendant's Rule 35 Motion, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

76. Government's Opposition to Defendant's Motion for Disqualification of Government Counsel, and for Order Directing Attorney General to Determine Whether Grounds Exist to Investigate Whether High Government Officials Have Committed Felonies That Warrant Appointment of Special Prosecutor, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

77. Government's Opposition to Defendant's Motion to Vacate Judgment and Sentence and For Evidentiary Hearing and Discovery, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

78. Government's Opposition to Motion to Stay Proceedings, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D., Nev., filed on May 9, 1986).

79. Order Denying Request for Stay of Commencement of Sentence, *U.S.* v. *Claiborne* (Hoffman, J.) (D. Nev., signed May 12, 1986).

80. Notice of Appeal (from Order Denying Request for Stay of Commencement of Sentence) *U.S.* v. *Claiborne,* No. CR-R-93-57-WEH (D. Nev., filed on May 13, 1986).

81. Order (denying petitions for stay of execution of sentence, and for appeal from district court's denial of stay of execution of his sentence, and affirming district court's denial of stay), *U.S.* v. *Claiborne,* No. 86-2018 (D.C. No. CR-R-83-57-WEH), *Claiborne* v. *Burger,* No. 86-7267 and *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed May 14, 1986) (before Fletcher, Canby and Beezer, Circuit Judges) (Fletcher, Circuit Judge, dissenting).

82. Emergency Petition for Stay of Execution of Sentence, *In the Matter of the Emergency Petition of Harry Eugene Claiborne to Stay Execution of Sentence,* No. 86-A-883 (U.S., filed on or about May 15, 1986).

83. Order (order denying stays entered May 14, 1986 stands as entered, a majority of the nonrecused active judges of this court voting not to overrule the order), *U.S.* v. *Claiborne,* No. 86-2018, *Claiborne* v. *Burger,* No. 86-7267, and *In the Matter of Harry E.*

Claiborne, No. 86-8089 (9th Cir., filed May 15, 1986) (Fletcher, Canby and Beezer, Circuit Judges).

84. Order (orders filed May 14 and 15, 1986, to be published), *U.S.* v. *Claiborne,* No. 86-2018, *Claiborne* v. *Burger,* No. 86-7267, *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed June 6, 1986) (Fletcher, Canby and Beezer, Circuit Judges).

85. Order (orders filed May 14 and 15 to be published, as well as dissents filed June 6, 1986), *U.S.* v. *Claiborne,* No. 86-2018, *Claiborne* v. *Burger,* No. 86-7267, *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed June 6, 1986) (Reinhardt, Circuit Judge, with whom Circuit Judges Pregerson and Ferguson join, dissenting, filed June 6, 1986) (Kozinski, Circuit Judge, with whom Circuit Judges Pregerson and Ferguson join, dissenting, filed June 6, 1986).

○

House Calendar No. 426

93d Congress, 2d Session | HOUSE OF REPRESENTATIVES | REPORT No. 93-1305

IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES

REPORT

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

PETER W. RODINO, JR., *Chairman*

AUGUST 20, 1974.—Referred to the House Calendar and ordered to be printed

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74TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 2025

IMPEACHMENT OF HALSTED L. RITTER

FEBRUARY 20, 1936.—Referred to the House Calendar and ordered to be printed

Mr. SUMNERS of Texas, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 422]

The Committee on the Judiciary, having had under consideration charges of official misconduct against Halsted L. Ritter, a district judge of the United States for the Southern District of Florida, and having taken testimony with regard to the official conduct of said judge under the authority of House Resolution 163 of the Seventy-third Congress, report the accompanying resolution of impeachment and articles of impeachment against Halsted L. Ritter to the House of Representatives with the recommendation that the same be adopted by the House and presented to the Senate.

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72D CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT No. 2065

CONDUCT OF JUDGE HAROLD LOUDERBACK

FEBRUARY 17 1933.—Referred to the House Calendar and ordered to be printed

Mr. MCKEOWN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 387]

The Committee on the Judiciary, to whom reported the special committee of five members of the House of Representatives, being members of the Committee on the Judiciary of the House, designated by the chairman of said committee, under authority of H. Res. 239, Seventy-second Congress, to inquire into the official conduct of Harold Louderback, a district judge of the United States for the northern district of California, after consideration, recommends that the following resolution be adopted by the House of Representatives:

Resolved, That the evidence submitted on the charges against Hon. Harold Louderback, district judge for the northern district of California, does not warrant the interposition of the constitutional powers of impeachment of the House.

The committee censures the judge for conduct prejudicial to the dignity of the judiciary in appointing incompetent receivers, for the method of selecting receivers, for allowing fees that seem excessive, and for a high degree of indifference to the interest of litigants in receiverships.

MINORITY VIEWS

We can not concur in the recommendation of the committee, favorably reporting a resolution against the impeachment of Harold Louderback, a judge of the northern district of California. We recommend the impeachment of Harold Louderback and attach hereto five articles of impeachment with notice that at the proper time and in accordance with the rules of the House of Representatives said articles of impeachment will be moved for adoption by the House.

The charges are specified in the five articles of impeachment. A summary of the cases in which the judge was guilty of misconduct follows:

(Page references are to the printed record of the hearing.)

The Russell-Colvin Case

The Russell-Colvin Co. was a partnership firm of stock brokers in San Francisco. They got into desperate financial straits, and on March 10, 1930, were suspended by the San Francisco Stock Exchange. This precipitated the crisis. After much conference all the parties interested in the operation of the firm, including the stock exchange, determined on filing a petition for equity receivership in Federal court; and a creditor, Garner Olmsted, through his counsel, Thelan & Marrin, began the action. Defendant company consented in their answer to the receivership, provided Addition G. Strong would be allowed to act as receiver. (Rec. p. 36.) Mr. Strong was a public accountant of wide experience and good standing, who had been watching and auditing the Russell-Colvin Co. for several weeks at the instance of the stock exchange, and was intimately acquainted with all the details of the business. (Rec. p. 42.) He reluctantly consented to act after much persuasion by the parties in interest. (Rec. p. 42.)

The petition, when filed, was assigned to Judge Louderback, and on March 11, 1930, he held a hearing in his chambers, attended by attorneys for plantiff, defendant, the stock exchange, and by Mr. Strong, at which time the judge appointed Strong receiver. When he left the judge's chambers to make bond, the judge requested him to come back to see him after he had qualified. Strong presumed it was to discuss the business of the receivership, and as it was 6 p. m. when the bond was made, he thought the judge was gone, and he left to return first thing the next morning for the conference. (Rec. pp. 44–45.) On his way home he stopped to see Mr. McAuliffe of the prominent firm of Heller, Ehrman, White & McAuliffe, who was an expert in the laws governing brokerage firms, and requested him to serve as counsel for the receiver, which he agreed to do.

Strong returned to the judge's chambers that next morning at 9.30 to find the judge greatly displeased because he did not come back the night before, and inquired of him who he had in mind for attorney.

Strong insisted he did not understand he was to return the night before, had no idea the judge would wait because of the lateness of the hour, and advised of his conference with Mr. McAuliffe. Thereupon, the judge displayed great agitation and anger, threw his pencil down on the table and said:

> That is just exactly what I was afraid of. If you had returned last night as I told you, we would not have had this misunderstanding.

He then insisted that Strong appoint John Douglass Short, who was in the employ of Keys & Erskine as attorney, and said he had Short over there the night before to meet him. When Strong refused he reminded him that he, the judge, had power to fix receiver's fees, that they could range from $10,000 to $80,000 in this case, and asked Strong if he realized what a plum he had picked. He further suggested that if Strong did well in this case there would be other receiverships to give that he might be appointed to, but he was making no promises. (Rec. pp. 45, 52, 61.)

Strong left his conference with orders to think it over two or three days and come back, but not to discuss anything with any attorney. He found the conditions so urgent at the company office he returned at 12 that same day for further conference with the judge. He agreed to take Lloyd Ackerman as attorney for the receiver, if McAuliffe was rejected, but the judge asked him to either name Short or resign. (Rec. pp. 46, 47, 71.) Strong still refused, insisting that the order appointing him receiver authorized the receiver forthwith to employ attorneys and counsel. (Rec. p. 47.) The judge said if McAuliffe should be told there would be no fees allowed his firm he would not be so anxious to represent the receiver (Rec. p. 48) that he, the judge, "had many friends to whom he was under obligation and desired to take care of them whenever he could." (Rec. p. 48.) When Strong insisted he wanted capable attorneys and he did not know Short, the judge said any attorney in San Francisco could handle the work, as it took no special skill. (Rec. p. 49.) In none of these conversations did the judge mention any attorney except Short, and would have no other. (Rec. p. 61.) Short was employed by the firm of Keys & Erskine for $200 per month and a division of the business he brought in. (Rec. p. 116.) Strong left this second conference with permission to consult his counsel. (Rec. p. 49.)

Strong was called back to the judge's chambers at noon the next day, March 13, and was again asked by the judge to resign. When he refused, the judge drew a paper out of his desk and said:

> I now hand you a formal notice of discharge as receiver for good cause.

Handing it to him, he said further:

> You understand what this is? You are fired; you are out.

Thereupon he took Strong by the arm, marched him to the door, sent a copy of the notice to the clerk, went back into his chambers and slammed the door behind him. (Rec. pp. 51.)

The judge stated to Attorneys Francis Brown and Max Thelen, just before the above action, that he had mentioned two prominent firms of the San Francisco Bar to Strong as attorneys for him, but never did mention his contention for the appointment of Short, who was the only one he had offered him. (Rec. pp. 81, 83, 147–148.) In the same conversation the judge complained that Strong consulted

McAuliffe contrary to orders (Rec. p. 81), whereas he had permission from the judge to do so. (Rec. p. 49). He further claimed he had been solicited and declined in this same case to appoint a man receiver who was high up in Masonic circles, because he had as his attorneys Shortridge & McEnerny. (Rec. pp. 84, 148); but he did appoint Shortridge in other cases. Senator Shortridge, at whose instance Judge Louderback was appointed, is the father of this attorney.

The evening of March 12, 1931, Judge Louderback was sitting in the lobby of the Fairmont Hotel in San Francisco talking to his most intimate friend, Sam Leake, when he requested Leake, to find him a man who could, according to Lake's testimony, be substituted for Strong as receiver. Leake asked for time to think. Just as they were talking about the matter H. B. Hunter, who also lives at the Fairmont, walked through the lobby, and Leake said "There is the man you should have, if you can get him." Thereupon the judge said "Who is he?" After a brief discussion of him Leake went over to Hunter and offered him the receivership. Hunter asked time to consult his employer, and was given till the next morning to do this. He reported back to Leake that he could take it, and was sent to the judge immediately by Leake. (Rec. pp. 98–99.) The judge reported back to Leake that he had appointed Hunter. (Rec. p. 99.) This is the version of the Hunter appointment as told by Sam Leake. The judge stated to Thelen and Brown that Hunter had been recommended to him by Sidney L. Schwartz, former president of the San Francisco Stock Exchange.

Hunter was appointed the afternoon of March 13, and called John Douglas Short that night at his Woodside home and told him he was to be appointed attorney for him as receiver. Short says this was his first information that he was being considered and that Judge Louderback told him of his interest in it for the first time on March 14, when the judge claimed the name of Short and a number of law firms were suggested by him to Strong who refused them all. (Rec. pp. 127–128.) Short claimed Hunter selected him. (Rec. p. 116.)

For their services as receiver and attorney in this case, Hunter and Short have been allowed fees on account by Judge Louderback in the sums of $40,500 and $50,000, respectively. (Rec. pp. 6, 10.) The total amount of disbursements was $464,491.39. (Rec. p. 10.) When application for fees was made, one Scampini, representing creditors, contested them on the grounds that they were excessive, and a three days' hearing ensued. At noon on the third day a settlement was agreed to by Scampini after the conference between him and the interested parties and the judge. (Rec. pp. 35, 36–38, 39–41.) The estate lost some $4,000 on a mistake by Hunter, and when mention was made of it Scampini interceded for Hunter to ask that he not be charged with it. (Rec. p. 28.) Afterwards, Scampini applied for a fee out of the estate for his services in contesting the fees and De Lancey Smith, attorney for defendant company, states that Short, on behalf of himself and Hunter, requested him to consent to it. But Short denies it. (Rec. p. 134.)

The attorneys for the plaintiff never consented to the fees allowed, but protested them at every opportunity. (Rec. p. 148.) Attorneys for defendant company were advised by the judge's secretary upon their return after noon of the third day of the hearing that agreement on the fees had been reached and the judge had decided the matter.

(Rec. p. 36.) The receiver and his attorney each separately claimed credit for performing practically every service in the record, and the compiling of the lists of items on which each claim for fees is based represents the most laborious effort in the record of administration. (Ex. 6.) When Strong and McAuliffe understood the task was to be theirs, they tentatively agreed that the fees for each of them would be from $10,000 to $15,000. (Rec. p. 52.)

When an effort was made to throw the company into bankruptcy, where the fees would have been fixed by statute, special counsel was employed by Short and Hunter to prevent it; and as a matter of precaution all creditors were contacted and pledged to support Hunter for receiver in bankruptcy in the event the effort succeeded. (Rec. pp. 140–141.)

W. L. Hathaway is the father-in-law of John Douglass Short. He has known Sam Leake intimately since the eighties, and they have both lived at the Fairmont Hotel for many years, and Hunter has also lived there for several years. In March, 1931, Hathaway loaned Leake $1,000 and took his note for it, which he did not consider good. (Rec. p. 295.) On May 17, 1931, he gave Leake $250 as a present, though he says he has never been a patient of Leake. (Rec. pp. 547, 292, 293.) These amounts were both handed to Leake in cash by Hathaway. (Rec. p. 293.) Two days after the $1,000 loan to Leake, Short paid to Hathaway $5,000 in an involved family transaction, which was more than Short owed him at that time. Rec. pp. 296–297.)

Sam Leake has as his only occupation and means of livelihood the practice of metaphysics, or some kind of healing by mental treatment, for which he receives voluntary contributions. He estimates his income at $2,400 or $2,500 per year. He has no bank account nor safe deposit of any kind. His transactions are all in cash. His hotel bill for himself is about $200 per month, and he pays $72 per month for an office. (Rec. p. 106.)

When Leake was asked where Judge Louderback lives, he said he understood he lives in Contra Costa County, where the judge told him he voted. (Rec. p. 102.) He later stated the judge sleeps, at times, in a room at the Fairmont charged to Leake. (Rec. p. 104.) It developed that the judge stays regularly in this room which is charged to Leake, and has done so for many months; and Leake settles all the bills, mostly with cash, and Judge Louderback's name does not appear in any connection with this room. He produced checks to show that he pays Leake the amount of his bill at the hotel each month.

This investigation revealed to the public for the first time the unusual and strange conditions under which Judge Louderback was living at the Fairmont Hotel, and it was with great difficulty the committee, with the broad powers of investigation, discovered them.

It was developed at the hearings that Judge Louderback had established a fictitious residence in Contra Costa County for the purpose of being able to remove for trial to that county a cause of action which he expected would be filed against him. The judge admits that had his actual residence at the Fairmount Hotel become known his alleged residence in Contra Costa County would have been null and void for the purpose he had in mind.

The judge's statement is as follows:

Then, after a month or two, I found that the separation was probably permanent. In the meantime I had gone over and had established my legal residence with my brother—with legal residence, voting and registration of my machine—in Contra Costa County. But I realized that in actually doing my work when I was in San Francisco, and crossing the bay, that it was quite a burden and wear. And so I continued on there at the hotel.

I asked Mr. Leake, "Have you any objection to my remaining in this room and letting it stay as it is?" because registration is an element upon which to predicate residence and I wanted to maintain residence in Contra Costa County. And I assure you, gentlemen, I believe the only reason why that suit was not instituted was because I had that residence; because, it could have been transferred to Contra Costa County on account of the California law, and Mrs. Louderback would have had to contest it in Contra Costa County; and she thought it would be an advantage to her to have it tried in her own county.

So I continued on. (Rec., p. 342.)

GUY H. GILBERT

Until March, 1932, Guy H. Gilbert was employed by Western Union Telegraph Co. for the past 34 years in respective capacities of clerk, telegrapher, wire chief, supervisor, chief operator, traffic manager. (Rec. pp. 217–218.) The largest salary he drew from Western Union was $255 per month. (Rec. p. 243.) He met Judge Louderback 15 or 16 years ago in his race for police judge, supported him actively for that, and later for superior judge. Growing out of this political connection, Gilbert asked the judge for a receivership to supplement his salary. (Rec. p. 222.)

His first appointment by Judge Louderback was as appraiser in some State court case about 1925 or 1926. He never went on the premises to be appraised, did nothing in the case except sign his name, and received a fee of $500 for such services.

Gilbert and his wife are both patients of Sam Leake and consult him professionally very often. He has been very close to Leake for some 20 years. He and his wife have made contributions to Leake from time to time, possibly $400 in amount. At one time three or four years ago he gave Leake $150. (Rec. p. 221.)

His next appointment as receiver by Judge Louderback was in the Stempel-Cooley case, with five apartment houses involved. He had no kind of previous experience in handling real estate. (Rec. p. 219.) It was a case in bankruptcy and ran for four or five months. He collected $12,000 and was allowed a fee of $500. He continued his job with Western Union, as his duties as receiver were performed after office hours. When he received this appointment he went to Sam Leake for direction, who suggested John Douglass Short as his attorney. He approached Leake on this matter because he is rather influential. (Rec. pp. 220, 221.)

SONORA PHONOGRAPH CASE

Some two years after the Stempel-Cooley case—in 1929 Gilbert was called by Miss Berger, secretary to Judge Louderback, who informed him he was appointed receiver in the Sonora Phonograph Co. case. He intended to appoint John Douglass Short his attorney, but he went to see Sam Leake in the evening after his notice of appointment. (Rec. p. 423.) When he went to the judge's chambers, Attorney J. W. Dinkelspiel was there to draw up his qualifying

papers, and virtually notified Gilbert that he was to be his attorney in the case. This was the first time Gilbert ever saw Dinkelspiel. (Rec. pp. 223, 265–266.)

Gilbert never conferred with the judge about the appointment. (Rec. p. 417.) Dinkelspiel never met the judge until he came into court with Gilbert's petition to appoint him attorney in the case. (Rec. p. 512.) This receivership lasted six or seven months. Not a claim went to litigation. Dinkelspiel was allowed a fee of $20,000 by Judge Louderback. (Rec. p. 266.)

Gilbert continued to work regularly for Western Union through this receivership. The same parties who were in charge before continued to manage the company through the liquidation. (Rec. pp. 225, 226.) For his part-time six months' service Gilbert was allowed $6,800. His version of the disposition of this fee is that he deposited in savings accounts $3,200, paid $960 in obligations, and put the balance in cash in a safe deposit box. (Rec. pp. 226, 227.) The receiver was required to handle some $350,000 and received the statutory award of fees.

PRUDENTIAL HOLDING CO. CASE

In August, 1931, a petition seeking an equity receivership was filed in Federal court, and Gilbert was called by Miss Berger, secretary to Judge Louderback, reported to his chambers, and was appointed receiver. He named Dinkelspiel & Dinkelspiel attorneys for receiver. (Rec., p. 232.) Petition alleged assets of $1,150,000 and liabilities, $1,100,000. (Rec., p. 243.) It was stated at the hearing, on authority of Judge Louderback, that Prudential Holding Co. came into court and consented to the appointment of a receiver through its vice president, James H. Stephens. (Rec., pp. 243–244.) But the attorney for the company states that the first notice the company had of the commencement of suit or appointment of a receiver was when receiver Gilbert and his attorney, Dinkelspiel, appeared at the office to take charge. (Rec., p. 310.) The company at once took steps to resist receivership. The petition was verified on information and belief by an attorney in the case, and no bond of indemnity to the defendant was required when receivership was ordered. (Rec., p. 318; Ex. 24, 25.) Receivership was entirely without justification, without notice, and truthless. The objections to it made by defendant are absolutely conclusive. Judge Louderback failed to dismiss the equity receivership until application for receiver in bankruptcy was applied for. The sole ground alleged for the bankruptcy receivership was the existence of equity receivership which he had wrongfully ordered. (Rec., p. 311.) He then crossed over into Judge St. Shure's division, named Gilbert and Dinkelspiel receiver and attorney there; then, two days later, dismissed the equity receivership as groundless. (Rec., p. 243.)

Judge St. Shure dismissed the bankruptcy receivership at the first hearing before him as no insolvency was shown. (Rec. p. 232.) Petition was then filed seeking to set aside the order dismissing bankruptcy receivership, and in refusing to reopen the matter, Judge St. Shure stated there was a bad smell about the case. (Rec. pp. 311, 312.) Gilbert and Dinkelspiel failed to receive any fees, through the action of Judge St. Shure, into whose court the bankruptcy proceedings fell.

FAGEOL MOTOR CO.

This company was a corporation with assets of $3,000,000 book value, and $1,700,000 liabilities. (Rec. p. 259.) It had an assembling plant, with branch offices and properties in California, Washington, Oregon, and Utah. It had extensive operations in all these places, with sales and service, parts, assembly, and manufacturing, all under control of the Oakland, Calif., office. (Rec. pp. 259, 260.) The largest creditor was Central National Bank of Oakland, with $174,000, and the next largest was Waukesha Motors.

In February, 1932, the company got into financial difficulties, and, in conference with the creditors, decided that the best course, was equity receivership. After difficult negotiations they agreed on Edward Fuller, of Oakland, as receiver, because of his special qualifications with the entire problem. (Rec. pp. 251–254.) All interested parties went to court on February 17, filed the petition, and drew the name of Judge Louderback in the case. (Rec. pp. 251–257.) They took the papers to the judge's chambers at noon, but were asked by his secretary, Miss Berger, to leave the papers and come back at 1.30, when the judge could see them. Miss Berger asked what matter was involved in the case, and they explained the Fageol Co. condition, told her the principal creditors were present by representatives, that they had after difficulty all agreed on the man they wanted for receiver, and wished her to convey the information to the judge and request the privilege of discussing it with him, which she agreed to do. (Rec. pp. 251, 252.)

They came back at 1.30 and the secretary said the judge left early, but if they would come back at 2.30 the judge would see them. (Rec. p. 252.) They returned at the appointed time, and just before they reached his chambers, they met the judge, who walked by them rapidly in the hallway. (Rec. p. 257.) When they entered, the secretary told them the judge was gone, and had already appointed Guy H. Gilbert receiver. She said she did not know who Gilbert was, what his address or telephone number was, but promised to get the information and phone it to them (rec. p. 252), which she did by 3.14 that afternoon. They went away feeling discouraged that after spending four or five days selecting a man for receiver familiar with the automotive industry and able to handle this matter, they were not even granted a hearing. (Rec. pp. 257, 258.)

They went back to their office for further conference. J. W. Dinkelspiel called them at 3.25 that afternoon and said he had been appointed attorney for the receiver, that Gilbert had already qualified, which defeated their chance to dismiss the suit and get rid of Gilbert as receiver. (Rec. p. 253).

The parties in interest then decided to contact Gilbert and Dinkelspiel, and unless they would agree to a limitation on their fees and to take orders from the creditor's committee headed by Mr. J. A. Wainwright of the Central National Bank they would go into bankruptcy at once. (Rec. pp. 254, 255.)

The conference with Gilbert and Dinkelspiel was held the next morning, February 18. They explained to Gilbert the problems of financing, production, and operation of the business, and found he knew nothing whatever about any of it. He was advised of and agreed to his lack of experience and ability, and gave assurance if

left in as receiver he would abide by the counsel and advice of the creditors. (Rec. pp. 257–258, 235).

The creditors protected themselves in the situation by having Gilbert to employ a Mr. Lundstrum to carry on the business (rec. pp. 239, 240, 259), Mr. Wainwright and the creditor's committee to attend to all matters of policy (rec. p. 258). The department foremen handled the employment and construction, the sales manager the orders (Rec. pp. 236, 237), and Gilbert was only regarded as a shield to keep other arrangements from coming in. None regarded him as having the ability to contribute anything to working out the problem; and he was content to do just what he was told. (Rec. pp. 258, 259.)

When fees were allowed Dinkelspiel accepted $6,000 in full, which was doubtless by agreement, as it is a pittance compared to the usual fees allowed by Judge Louderback in such cases. (Rec. p. 274.)

When the case closed for them Gilbert and Dinkelspiel requested letters from Mr. Wainwright commending their ability and successful conduct of the receivership, which he declined to give, but he did write acknowledging their cooperation. (Rec. pp. 261, 262.)

GOLDEN STATE ASPARAGUS CO.

Equity receivership petition was filed in this case September, 1930, showing assets of $1,100,000 and liabilities $700,000. (Rec. p. 283.) The parties in interest asked Judge Louderback to permit them to name the receiver and his counsel, because of the nature of the business, but he said they could designate one. They selected the receiver, and he said he would submit a list of attorneys to the receiver for his selection. (Rec. p. 284.) Instead, he called Dinkelspiel and named him, without reference to the receiver. (Rec. pp. 276, 286.) The legal work connected with the conduct of the receivership was no more or difficult than the ordinary running of the business. The charges had been less than $1,000 per year. But for this same kind of service Dinkelspiel has already been allowed $14,000 on account. (Rec. pp. 283, 285.) If the parties in interest had known of the excessive fees allowed, they never would have filed the petition. (Rec. p. 286.) The only big legal service in the case was performed by the attorneys for plaintiff and defendant before the receiver and his attorney took charge, in stopping a forced sale of property. (Rec. pp. 288, 289.) Judge Louderback allowed this excessive fee to Dinkelspiel on account, but denied the uncontested fees of attorneys for plaintiff and defendant, who asked for $1,500 each and who had opposed Dinkelspiel's fee. (Rec. pp. 290, 291.) When Dinkelspiel's fee was reduced from $15,000 to $14,000, parties partially acquiesced in it, as they realized it was the best they could do. (Rec. p. 292.)

LUMBERMEN'S RECIPROCAL ASSOCIATION

This was a Texas corporation, but writing insurance in California. The California business was prosperous, but the parent company got into difficulty in Texas. Concern was felt for holding California assets for the benefit of local policyholders. Equity receivership was decided on, and it was agreed to have the State commissioner of insurance named as receiver, as he could serve without additional

cost, and the fees in Federal court there were too large. (Rec. p. 152.) It was necessary to have an award made on a claim against the association by the industrial accident commission as a basis for the petition. This was expedited on the basis of above agreement, and a tentative award made (rec. p. 152), as the commission were afraid of large fees to a receiver and attorney in Federal court, and the whole plan was to avoid these (rec. pp. 154, 155). Petition was filed July 29, 1930. The morning after the petition was filed a deputy State insurance commissioner went to Judge Louderback's office, and was told by his secretary that he took the papers in the case home with him the night before to study them. The deputy requested the secretary to make known to the judge the claim to recognition of the commissioner, in accordance with the agreement, which she agreed to do. When the deputy returned to the commissioner's office the secretary immediately telephoned that a receiver, Samuel Shortridge, jr., son of Senator Shortridge, was appointed the night before. (Rec. pp. 158, 159.)

Prior to the filing of the petition the attorneys who appeared never heard who would be appointed receiver or attorney for him; but Shortridge, jr., had been told in advance of the filing he would be appointed, and had Marshall Woodworth to call on the judge before the petition was filed to know whether he would be willing to name him attorney for Shortridge as receiver. (Rec. p. 171.) But when Woodworth called on the attorneys for plaintiff and defendant the next day after appointment he claimed to them he never heard of the case till after the petition was filed; that he just happened to be in Judge Louderback's courtroom, when the bailiff called him as he passed through and advised that the judge wished to see him, and appointed him. (Rec. p. 188.) Shortridge, jr., says after he was appointed he immediately conferred with Judge Louderback; one of them mentioned Mr. Woodworth and appointed him counsel. (Rec. p. 198.)

When the receiver was appointed a list of three names was handed to the attorneys by the judge's secretary to select from, and they were made to understand the judge's wishes. They selected Shortridge as the one he had indicated he wanted. (Rec. p. 187.) When this action in failing to name the State insurance commissioner receiver became known, the industrial accidents commission set aside the tentative award on which the petition was based, and the judge was advised of this action at a hearing before him contesting his right to appoint a receiver. (Rec. p. 153.)

In cases of this kind the State insurance commissioner had summary power to seize all available assets and protect them for the policyholders, which he did on July 25, four days before the filing of the petition. (Rec. pp. 207–208.) Judge Louderback permanently enjoined the commissioner from proceeding under the State statute, but issued an order allowing an appeal, and directing issuance of a citation to be served on the Federal receiver within 30 days. Counsel for the State commissioner was in constant touch with Mr. Woodworth trying to settle the matter, and permitted 30 days to expire without service of a formal citation; but as actual notice was its only purpose, which they had, the order could only be directory. (Rec. pp. 209–210.)

Counsel for appellant tried repeatedly to see the judge to apply for extension of time to docket the cause, but the judge deliberately refused to see him. (Rec. p. 210.) He left an order of extension for the judge to sign on or within two days of November 18. On December 4, counsel called at the judge's chambers and asked for the engrossed statement of the evidence which had been agreed on by counsel and signed by the judge. The judge's secretary took the statement back into the room where the judge was, consulted him, came back out, and in the presence of counsel for appellant clipped the judge's name from it and turned it over. (Rec. pp. 211–212.) Counsel then requested the copy of order to extend the time which he had left there November 18, as he wanted to submit it to the circuit court for action, and to save the time it would take to return to his office and redraft it. This request was refused him, and he had to travel over a mile and back to get another order drawn. (Rec. p. 213.) The judge must have kept in constant touch with Woodworth, for when counsel got back to the circuit court he had already called in and asked to be advised when counsel returned. The order extending the time was granted by the circuit court on Saturday, December 6, and appeal was perfected. (Rec. p. 214.) But after the extension was granted counsel tried for five days and prepared a petition for order of mandate before he procured the signature of the judge to the record. (Rec. p. 214.)

On appeal the case was reversed and remanded. (Rec. p. 401.) On order of the circuit court, Judge Louderback decreed that the Federal receiver turn over to the State commissioner all the assets within 30 days, but only on condition that no appeal was taken by the commissioner from the allowance by him of fees to the Federal receiver and his attorney. And the reversal had been on the ground that no jurisdiction was in the Federal court to appoint a receiver after the State had taken charge. (Rec. p. 215.) The judge's statement as to this order is as follows:

Mr. BROWNING. At the time that the first order of reversal came down to turn over the assets to the receiver in the State court, or the State commission, you provided in the order that the property should be turned over if there was no appeal taken from the fees allowed?

Judge LOUDERBACK. I think that was a very erroneous order to make. That order was presented to me by Mr. Woodworth. I will concede to you that that was erroneous.

He pleaded with me this way: He said, "Can we tell what to hold out? Shall we hold out on all the 52 objections of Mr. Guerena?" He said, "Now, couldn't that order be made in that form?" And he told me that Mr. Guerena was not going to take the appeal, anyway, and then I signed it and later I told him I would not let that stand, that I had made a grave mistake in suggesting even that the money be held, and I will concede that I should not have done that. It was an error. I suppose every judge has been trapped into errors by attorneys. That was wrong, and I do not think that should have been done.

Mr. BROWNING. The property was turned over on stipulation.

Judge LOUDERBACK. I think it was with my order, and my recollection is that it probably was by stipulation, in a way. I will tell you what happened. I sent for Woodworth and I said to him, "I am going to change that; it is not proper." He said, "Judge, if you feel that way, it is all right with me." He may have gone out and stipulated, but the impelling cause was my own act. (Rec. pp. 363, 364.)

A second appeal resulted in a very substantial reduction in the fees and expenses allowed by Judge Louderback to the Federal receiver and his attorney.

Samuel M. Shortridge, jr., has known Sam Leake all his life, and has been a patient and consultant of Leake. He has paid to Leake more than a thousand dollars. His mother is also a patient of Leake, and Shortridge, jr., has delivered to Leake envelopes containing money (Rec. p. 200) from his mother.

GORDON BROWNING.
MALCOLM C. TARVER.
F. H. LAGUARDIA.
CHARLES I. SPARKS.

MINORITY VIEWS OF MR. SUMNERS, OF TEXAS

I agree with the findings of facts of the majority of the Committee on the Judiciary incorporated in its censure of Judge Louderback, and agree with the minority that the facts call for the exercise of the constitutional power of impeachment.

HATTON W. SUMNERS.

PROPOSED ARTICLES OF IMPEACHMENT

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under H. Res. 239, sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States district judge for the northern district of California, on April 17, 1928.

ARTICLE I

That the said Harold Louderback, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned and while acting as a district judge for the northern district of California did on divers and various occasions so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in said district in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior, falling under the constitutional provision as ground for impeachment and removal from office.

In that the said Harold Louderback on or about the 13th day of March, 1930, at his chambers and in his capacity as judge aforesaid, did wilfully, tyrannically, and oppressively discharge one Addison G. Strong, whom he had on the 11th day of March, 1930, appointed as equity receiver in the matter of Olmsted *v.* Russell-Colvin Co. after having attempted to force and coerce the said Strong to appoint one Douglas Short as attorney for the receiver in said case.

In that the said Harold Louderback improperly did attempt to cause the said Addison G. Strong to appoint the said Douglas Short

as attorney for the receiver by promises of allowance of large fees and by threats of reduced fees did he refuse to appoint said Douglas Short.

In that the said Harold Louderback improperly did use his office and power of district judge in his own personal interest by causing the appointment of the said Douglas Short as attorney for the receiver, at the instance, suggestion or demand of one Sam Leake, to whom the said Harold Louderback was under personal obligation, the said Sam Leake having entered into a certain arrangement and conspiracy with the said Harold Louderback to provide him, the said Harold Louderback, with a room at the Fairmont Hotel in the city of San Francisco, Calif., and made arrangements for registering said room in his, Sam Leake's, name and paying all bills therefor in cash under an arrangement with the said Harold Louderback to be reimbursed in full or in part in order that the said Harold Louderback might continue to actually reside in the city and county of San Francisco after having improperly and unlawfully established a fictitious residence in Contra Costa County for the sole purpose of improperly removing for trial to said Contra Costa County a cause of action which the said Harold Louderback expected to be filed against him; and that the said Douglas Short did receive large and exorbitant fees for his services as attorney for the receiver in said action, and the said Sam Leake did receive certain fees, gratuities, and loans directly or indirectly from the said Douglas Short amounting approximately to $1,200.

In that the said Harold Louderback entered into a conspiracy with the said Sam Leake to violate the provisions of the California Political Code in establishing a residence in the county of Contra Costa when the said Harold Louderback in fact did not reside in said county and could not have established a residence without the concealment of his actual residence in the county of San Francisco, covered and concealed by means of the said conspiracy with the said Sam Leake, all in violation of the law of the State of California.

In that the said Harold Louderback, in order to give color to his fictitious residence in the county of Contra Costa, all for the purpose of preparing and falsely creating proof necessary to establish himself as a resident of Contra Costa County in anticipation of an action he expected to be brought against him, for the sole purpose of meeting the requirements of the Code of Civil Procedure of the State of California providing that all causes of action must be tried in the county in which the defendant resides at the commencement of the action, did in accordance with the conspiracy entered into with the said Sam Leake unlawfully register as a voter in said Contra Costa County, when in law and in fact he did not reside in said county and could not so register, and that the said acts of Harold Louderback constitute a felony defined by section 42 of the Penal Code of California;

Wherefore the said Harold Louderback was and is guilty of a course of conduct improper, oppressive, and unlawful and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE II

That Harold Louderback, judge as aforesaid, was guilty of a course of improper and unlawful conduct as a judge, filled with partiality and favoritism in improperly granting excessive, exorbitant, and unreasonable allowances as disbursements to one Marshall Woodward and to one Samuel Shortridge, jr., as receiver and attorney, respectively, in the matter of the Lumbermen's Reciprocal Association.

And in that the said Harold Louderback, judge as aforesaid, having improperly acquired jurisdiction of the case of the Lumbermen's Reciprocal Association contrary to the law of the United States and the rules of the court did, on or about the 29th day of July, 1930, appoint one Marshall Woodward and one Samuel Shortridge, jr., receiver and attorney, respectively, in said case, and after an appeal was taken from the order and other acts of the judge in said case to the United States Circuit Court of Appeals for the Ninth Circuit and the said order and acts of the said Harold Louderback having been reversed by said United States Circuit Court of Appeals and the mandate of said circuit court of appeals directed the court to cause the said receiver to turn over all of the assets of said association in his possession as receiver to the Commissioner of Insurance of the State of California, the said Harold Louderback unlawfully, improperly, and oppressively did sign and enter an order so directing the receiver to turn over said property to said State commissioner of insurance but improperly and unlawfully made such order conditional that the said State commissioner of insurance and any other party in interest would not take an appeal from the allowance of fees and disbursements granted by the said Harold Louderback to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, thereby improperly using his said office as a district judge to favor and enrich his personal and political friends and associates to the detriment and loss of litigants in his, said judge's court, and forcing said State commissioner of insurance and parties in interest in said action unnecessary delay, labor and expense in protecting the rights of all parties against such arbitrary, improper, and unlawful order of said judge; and that the said Harold Louderback did improperly and unlawfully seek to coerce said State commissioner of insurance and parties in interest in said action to accept and acquiesce in the excessive fees and the exorbitant and unreasonable disbursements granted by him to said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, and did improperly and unlawfully force and coerce the said parties to enter into a stipulation modifying said improper and unlawful order and did thereby make it necessary for the State commissioner of insurance to take another appeal from the said arbitrary, improper, and unlawful action of the said Harold Louderback.

In that the said Harold Louderback did not give his fair, impartial, and judicial consideration to the objections of the said State commissioner of insurance against the allowance of excessive fees and unreasonable disbursements to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, in the case of the Lumbermen's Reciprocal Association, in order to favor and enrich his friends at the expense of the litigants and parties in interest in said matter, and did thereby cause said State commissioner of insurance and the parties in interest additional delay, expense, and

labor in taking an appeal to the United States Circuit Court of Appeals in order to protect their rights and property in the matter against the partial, oppressive, and unjudicial conduct of said Harold Louderback.

Wherefore, said Harold Louderback was and is guilty of a course of conduct oppressive and unjudicial and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

ARTICLE III

The said Harold Louderback, judge aforesaid, was guilty of misbehavior in office resulting in expense, disadvantage, annoyance, and hindrance to litigants in his court in the case of the Fageol Motor Co., for which he appointed one Guy H. Gilbert receiver, knowing that the said Gilbert was incompetent, unqualified, and inexperienced to act as such receiver in said case.

In that the said Harold Louderback, judge as aforesaid, oppressively and in disregard of the rights and interests of litigants in his court did appoint one Guy H. Gilbert as receiver for the Fageol Motor Co., knowing the said Guy H. Gilbert to be incompetent, unfit, and inexperienced for such duties, and did refuse to grant a hearing to the plaintiff, defendant, creditors, and parties in interest in the matter of the Fageol Motor Co. on the appointment of said receiver, and the said Harold Louderback did cause said litigants and parties in interest in said matter to be misinformed of his action while said Guy H. Gilbert took steps necessary to qualify as receiver, thereby depriving said litigants and parties in interest of presenting the facts, circumstances, and conditions of the said equity receivership, the nature of the business and the type of person necessary to operate said business in order to protect creditors, litigants, and all parties in interest, and thereby depriving said parties in interest of the opportunity of protesting against the appointment of an incompetent receiver.

Wherefore, the said Harold Louderback, was and is guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was and is guilty of a misdemeanor in office.

ARTICLE IV

That the said Harold Louderback, judge aforesaid, was guilty of misbehavior in office, filled with partiality and favoritism, in improperly, wilfully and unlawfully granting on insufficient and improper papers an application for the appointment of a receiver in the Prudential Holding Co. case for the sole purpose of benefiting and enriching his personal friends and associates.

In that the said Harold Louderback did on or about the 15th day of August, 1931, on insufficient and improper application, appoint one Guy H. Gilbert receiver for the Prudential Holding Co. case when as a matter of fact and law and under conditions then existing no receiver should have been appointed, but the said Harold Louderback did accept a petition verified on information and belief by an attorney in the case and without notice to the said Prudential Holding Co. did so appoint Guy H. Gilbert the receiver and the firm of Dinkelspiel & Dinkelspiel attorneys for the receiver; that the said Harold Louderback in an attempt to benefit and enrich the said Guy H. Gilbert and his attorneys, Dinkelspiel & Dinkelspiel, failed to give his fair, im-

partial, and judicial consideration to the application of the said Prudential Holding Co. for a dismissal of the petition and a discharge of the receiver, although the said Prudential Holding Co. was in law entitled to such dismissal of the petition and discharge of the receiver; that during the pendency of the application for the dismissal of the petition and for the discharge of the receiver a petition in bankruptcy was filed against the said Prudential Holding Co. based entirely and solely on an allegation that a receiver in equity had been appointed for the said Prudential Holding Co., and the said Harold Louderback then and there wilfully, improperly, and unlawfully, sitting in a part of the court to which he had not been assigned at the time, took jurisdiction of the case in bankruptcy and though knowing the facts in the case and of the application then pending before him for the dismissal of the petition and the discharge of the equity receiver, granted the petition in bankruptcy and did on the 2d day of October, 1930, appoint the same Guy H. Gilbert receiver in bankruptcy and the said Dinkelspiel & Dinkelspiel attorneys for the receiver, knowing all of the time that the said Prudential Holding Co. was entitled as a matter of law to have the said petition in equity dismissed; in that through the oppressive, deliberate, and willful action of the said Harold Louderback acting in his capacity as a judge and misusing the powers of his judicial office for the sole purpose of benefiting and enriching said Guy H. Gilbert and Dinkelspiel & Dinkelspiel, did cause the said Prudential Holding Co. to be put to unnecessary delay, expense, and labor and did deprive them of a fair, impartial and judicial consideration of their rights and the protection of their property, to which they were entitled.

Wherefore the said Harold Louderback was, and is, guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was and is guilty of a misdemeanor in office.

ARTICLE V

That Harold Louderback, on the 17th day of April, 1928, was duly appointed United States district judge for the northern district of California, and has held such office to the present day.

That the said Harold Louderback as judge aforesaid, during his said term of office, at divers times and places when acting as such judge, did so conduct himself in his said court and in his capacity as judge in making decisions and orders in actions pending in his said court and before him as said judge, and in the method of appointing receivers and attorneys for receivers, in appointing incompetent receivers, and in displaying a high degree of indifference to the litigants in equity receiverships, as to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to receivers and attorneys for receivers by him so appointed, all of which is prejudicial to the dignity of the judiciary.

All to the scandal and disrepute of said court and the administration of justice therein.

Wherefore the said Harold Louderback was, and is, guilty of misbehavior as such judge and of a misdemeanor in office.

House Calendar No. 160

69TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT No. 653

CONDUCT OF JUDGE GEORGE W. ENGLISH

MARCH 25, 1926.—Referred to the House Calendar and ordered to be printed
MARCH 26, 1926.—Ordered printed with views of the minority

Mr. GRAHAM, from the Committee on the Judiciary, submitted the following

REPORT

On the report of the special committee of the House of Representatives authorized to inquire into the official conduct of George W. English

The Committee on the Judiciary, having had under consideration the report of the special committee of the House of Representatives authorized to inquire into the official conduct of George W. English, United States district judge for the eastern district of Illinois, made to the House of Representatives on the 19th day of December, A. D. 1925 (H. Doc. 145, 69th Cong., 1st sess.), and having examined and considered the evidence gathered by the special committee, and having considered the briefs and arguments of counsel, make the following statement of facts and law and submit their recommendations:

FACTS

APPOINTMENT OF JUDGE ENGLISH

George W. English stated to the special committee and admitted the fact of his appointment and confirmation in the following language: "My name went to the Senate, or I was nominated to the Senate, on the 23d of April, 1918, and was confirmed on the 3d of May, taking the oath of office on the 9th of May, 1918." (P. 566, Vol. I, hearing on H. J. Res. 347.)

DISBARMENT OF WEBB

George W. English, in his official capacity and acting as judge at East St. Louis, State of Illinois, unlawfully suspended and disbarred one Thomas M. Webb, of East St. Louis, a member of the bar of the United States District Court for the said Eastern District of Illinois, of his own motion, without any charges having been preferred and without notice to said Webb and without any opportunity to be heard in his own defense and without due process of law.

DISBARMENT OF KARCH

George W. English, at East St. Louis, Ill., while acting as judge of the eastern district of Illinois, unlawfully disbarred one Charles A. Karch, a member of the bar of the United States District Court for

the Eastern District of Illinois, of his own motion, without any charges having been made against said Karch, without any hearing, and without permitting said Karch to be heard in his own defense and without due process of law.

THREATS AND CENSURE OF STATE OFFICIALS

George W. English, at East St. Louis, while acting as judge in the eastern district of Illinois, improperly and unlawfully used the process of the court to summon State sheriffs and State attorneys in the said eastern district of Illinois, and the mayor of the city of Wamec, in said district, to appear before him in the Federal court room in East St. Louis, on the 8th day of August, 1922, as witnesses (according to the process to testify against one Gourley and one Daggett) when there was no such cause pending, and did abusively, improperly, and with the use of profane language in open court and in public before the bar censure and denounce these officials without assigning any specific cause for so doing, or without any specific cause or offense, and refusing these State officials opportunity to be heard in explanation and answer, and without authority of law and having no authority whatsoever so to do, threatened the officials in various and divers ways.

THREATENING JURY IN COURT

At East St. Louis, while acting as judge in the eastern district of Illinois in trial of a case (U. S. *v.* Hall), George W. English used coercive and threatening language in the presence of and to the jury in open court and said that if he told them that a man was guilty and they did not find him guilty, that he would send them to jail.

UNLAWFUL AND OPPRESSIVE TREATMENT OF KARCH

George W. English while at East St. Louis, in the district court over which he was presiding, refused to try a case then pending and on the list for trial because Charles A. Karch was acting as counsel (the said Charles A. Karch having been restored to membership of the bar in said district) and announced that he would not try any case where Charles A. Karch appeared as counsel and attorney, and this, notwithstanding that the disbarment had been removed.

TYRANNOUS ATTACK ON LIBERTY OF THE PRESS

George W. English, district judge for the eastern district of Illinois, summoned members of the staff of the East St. Louis Daily Journal and reporters, and in his court, in a tyrannical exercise of his judicial power, threatened them with imprisonment if they published any of the facts relating to the disbarment of Charles A. Karch, and likewise did improperly summon before him, while sitting as judge in the said district, Joseph Maguire, of the Carbondale Free Press, a newspaper published in the eastern district of Illinois, and violently, unlawfully, and tyrannically using his power as judge, threatened him with imprisonment for printing in his paper an editorial from the Post-Dispatch, and some proper and lawful handbills that had no reference whatever to said court.

PROFANITY AND OTHER MISBEHAVIOR

George W. English, on the 9th day of May, 1918, and on other days and times, between said date and the present in said district court of the eastern district of Illinois, has habitually used profanity, vulgarity, and committed gross improprieties in public and in open court and in chambers and at side bar. The profanity and indecent language is not stated here, but will be found in the report of the subcommittee. (This report will appear in the Congressional Record and be widely disseminated; hence the omission of the profane and vulgar words.)

APPOINTMENT OF THOMAS SOLE REFEREE IN BANKRUPTCY

George W. English was guilty of partiality and judicial misbehavior in that he improperly appointed as sole referee in bankruptcy for the eastern district of Illinois one Charles B. Thomas.

George W. English had full knowledge at the time of said appointment of the great commercial importance of the eastern district of Illinois, consisting of 45 counties, nearly 300 miles long, and that there was a large volume of business in bankruptcy in said district, and that a referee would be obliged to devote all his time and attention to the bankruptcy cases in the district.

In consequence of the appointment of said Charles B. Thomas as sole referee in bankruptcy and the favors in connection therewith extended him by said George W. English, he the said Thomas acquired a very large and lucrative practice. Notwithstanding these facts George W. English, judge as aforesaid, greatly enlarged the powers and jurisdiction of said referee.

CHANGE IN RULES OF COURT

In order to enable said Charles B. Thomas to conduct the business of referee unhampered and with the utmost license the following rule of court was repealed:

> No receiver in bankruptcy proceedings, whether voluntary or involuntary, shall hereafter be appointed except on application to the judge of the court, who will make or refuse the appointment or refer such application to the referee in bankruptcy for his consideration and action: *Provided*, That if the judge is absent from the district, sick, and unable to sit, or disqualified by reason of interest, the referee may make such appointment in the first instance. And in every case where the referee deems it necessary for the protection of the estate, he may on his own motion appoint such receiver.

And the following rule substituted therefor:

> It is hereby further ordered that the following rule be, and the same is hereby, made and adopted as a rule of this court in bankruptcy, to be effective in all cases from and after this date, namely:
>
> All matters of application for the appointment of a receiver, or the marshal, to take charge of the property of the bankrupt or alleged bankrupt, made after the filing of the petition, and prior to its being dismissed or to the trustee being qualified, shall be and are hereby referred to the referee in bankruptcy for his consideration and action; and the clerk will enter such order of reference as of course in each case; and the referees of this court heretofore or hereafter appointed are hereby authorized and empowered to appoint receivers, or the marshal, upon application of parties in interest, in case the referee shall find same is absolutely necessary for the preservation of the estate, to take charge of the property of the bankrupt; and to exercise all jurisdiction over and in respect to the actions and

proceedings of the receiver or marshal which the court by law may exercise. After adjudication, where the referee deems it necessary for the protection of the estate, he may make such appointment on his own motion.

And it is hereby further ordered that all special rules and general orders heretofore entered or adopted be, and they are hereby, set aside and annulled in so far as they in any way conflict with the provisions of the above rule and general order.

Dated this 7th day of June, A. D. 1919.

GEORGE W. ENGLISH, *Judge.*

And also issued the following additional order:

For the purpose of transacting the business of the court of bankruptcy, it is ordered that the referee [meaning then and there said Charles B. Thomas] be, and he is hereby, authorized and directed to procure and maintain suitable offices for the transaction of said business, and to suitably furnish and equip same for said purpose; that the referee be, and he is hereby, further authorized and directed to employ such clerks, stenographers, and court reporters or any other assistance which he finds and deems necessary for the proper management of said court and offices and the administration of bankrupt estates; to install telephones; to procure and keep on hand needed stationery, and generally to provide all such other and further office equipment proper to transact business of the referee; and it is further ordered that in the event that the charges for referee's expenses authorized by any and all of the rules of this court to be charged against the estates administered before the referee do not amount to a total to pay the expenses which the referee has incurred or for which he may have paid or obligated himself to pay, the referee be, and he is hereby, authorized and directed to make a charge against the bankrupt estates administered before him, in as equitable pro rata share as the nature and circumstances will permit, sufficient in amount to meet the deficit existing by reason of the referee's receipts from expenses or charges authorized by this and other rules being less than the total expenses incurred by the referee.

George W. English, as judge aforesaid, made the appointment and changed the rules of court with the intent and purpose of favoring and preferring said Thomas and to give said Thomas an opportunity completely to control all bankruptcy proceedings and appointments therein and to appoint his friends and members of his family and of the family of said Judge English to receiverships and to use said office as said referee for the improper, personal, and financial benefits of said George W. English and said Thomas and the friends and families of each.

"BANKRUPTCY RING"

George W. English corruptly and improperly connived with Charles B. Thomas, referee in bankruptcy, to set up and establish in East St. Louis, in the eastern district of Illinois, a so-called "bankruptcy ring"; that is to say, the placing in the hands of a group of persons, to the exclusion of others, the administration of bankruptcy proceedings, the appointment of receivers, the deposit of bankrupt funds, the sale and disposition of bankrupt assets, and otherwise by methods and means fully set forth in the articles of impeachment.

CORRUPT USE OF BANKRUPTCY FUNDS

George W. English, in order to receive unlawful and improper gains and profits for himself, his family, and his friends, corruptly and improperly handled and regulated the funds arising from bankruptcy and other cases in his court, and transferred these from one place and from one bank to another in his interest, with the desire to promote the interest of his family or of the said Charles B. Thomas. By im-

properly handling the funds he obtained credits for himself and the appointment of his son, Farris English, to places in banks at a lucrative salary, with the said Farris English receiving in one instance 3 per cent on the deposit of bankruptcy funds. When Farris English would leave one bank and go to another, increased deposits of bankruptcy funds followed him.

FAVORITISM AND PARTIALITY AND UNLAWFUL APPOINTMENT OF RECEIVERS

George W. English, on the 6th day of August, 1920 (in the case of East St. Louis & Suburban Co. et al. *v.* Alton, Granite & St. Louis Traction Co.), refused to appoint the temporary receiver suggested by counsel for the parties interested unless Charles B. Thomas, his referee in bankruptcy, was appointed attorney for the receivers.

On August 11, 1920, he ordered that said Charles B. Thomas receive $200 per month from the receivers, and subsequently, on January 20, 1921, at which time the temporary receivers were made permanent, ordered that there be paid to Charles B. Thomas, counsel for the receivers, the sum of $350 per month and the further sum of $500 per month for his services in assisting the receivers in the management of receivership properties, making a total of $850 per month, which salary he ordered to be retroactive and payable from October 1, 1920. The services of Charles B. Thomas as attorney for the receivers and in assisting in the management of said receivership properties were not required and were not necessary and imposed an unlawful burden upon the receivership properties. Said appointment and orders for the payment of compensation were acts of partiality and favoritism to the said Charles B. Thomas. From October 1, 1920, to January 1, 1925, under said orders, Charles B. Thomas received the sum of $43,350; that said compensation was grossly excessive and was not earned.

On the 10th day of July, 1924, at said East St. Louis, in the case of Handelsman *v.* Chicago Fuel Co., pending before him as judge, said judge improperly and unlawfully appointed Charles B. Thomas as one of the receivers in said case and fixed the salary of said Thomas as receiver at $1,000 per month, and in addition appointed Herman P. Frizzell, United States commissioner for said eastern district of Illinois and chief clerk in the office of said Charles B. Thomas, to be attorney for said receiver and fixed the salary of said Herman P. Frizzell at $200 per month. This was done unlawfully and corruptly to prefer and favor the said Charles B. Thomas and the said Herman P. Frizzell as part of the alleged "bankruptcy ring."

ALLOWED REFEREE TO PRACTICE IN BANKRUPTCY CASES UNLAWFULLY—PARTIALITY AND FAVORITISM TO THOMAS, REFEREE, AND ONE FRIZZELL.

That in the matter of Gideon N. Heuffman et al *v.* Hawkins Mortgage Co., in bankruptcy, a case heard by Judge English, the said Charles B. Thomas was on the 15th day of August, 1924, allowed to appear and conduct said case as attorney and counselor at law in behalf of Morton N. Hawkins, regardless of and in violation of the Statutes of the United States, which provide that "no referee in

bankruptcy shall be allowed to practice as an attorney and counselor at law in any bankruptcy proceedings."

And again, on the 27th day of August, 1924, the said Judge English allowed and permitted the referee in bankruptcy, Charles B. Thomas, to appear as attorney and counselor before him in behalf of said Morton Hawkins; that this was done in violation of the said statutes and in order to permit said Charles B. Thomas to receive the sum of $2,500 for his alleged services.

THE SKYE CASE

One F. J. Skye was convicted before said George W. English for the crime of selling intoxicating liquors, upon whom Judge English imposed a sentence of imprisonment in jail for a period of four months and a fine of $500. At the time of the trial said F. J. Skye was represented by one Charles A. Karch (being the same Karch hereinbefore referred to as a disbarred attorney). After conviction an appeal was taken by said Charles A. Karch to the United States circuit court of appeals, and after the appeal was taken said Skye discharged Charles A. Karch as attorney and retained Charles B. Thomas, to whom he paid the sum of $2,500 as counsel fee in order to get from Judge English a vacation and discharge of jail sentence; that on July 25, 1922, Thomas abandoned the appeal and filed a motion for a stay of sentence of imprisonment. Judge English ordered a stay of sentence until December 31, 1922; on the 7th day of June, 1923, said Judge George W. English, upon a suggestion from the clerk and after the district attorney of the United States declared he knew nothing of the case (he having been recently appointed), and without the presence in court of the said Charles B. Thomas, relieved said F. J. Skye from the sentence of imprisonment, and $2,500 was paid to said Charles B. Thomas.

FURTHER IMPROPER FAVORITISM TO THOMAS (SOUTHERN GEM COAL CO. CASE, HAMILTION *v.* EGYPTIAN COAL MINING CO., WALLACE *v.* SHEDD COAL CO.)

George W. English, while acting as judge as aforesaid, in the case of Hamilton *v.* Egyptian Coal Mining Co., arbitrarily and without cause removed from office the duly appointed receiver in said case without notice to the parties interested and with intent to show favoritism to Charles B. Thomas, appointed said Charles B. Thomas as receiver.

George W. English, while acting as judge as aforesaid, in the case of Wallace *v.* Shedd Coal Co., arbitrarily and without cause removed the receiver one F. D. Barnard and appointed said Charles B. Thomas in his place.

George W. English, while acting as said judge at a hearing held by him at East St. Louis, in the case of Ritchey et al. *v.* Southern Gem Coal Co., appointed Charles B. Thomas, one of the receivers in that case, and then ordered that said Thomas should receive as his salary the excessive and exorbitant sum of $1,000 per month; this appointment was made with intent to prefer unlawfully the said Charles B. Thomas.

FINANCIAL OBLIGATION OF JUDGE ENGLISH TO THOMAS

George W. English, being a judge in the district court of the United States for the eastern district of Illinois, on the 24th day of October, 1921, at East St. Louis, was paid and received the sum of $1,435 from said Charles B. Thomas, which sum was applied toward the purchase of an automobile by said George W. English.

IGNORING CONFESSED NEGLECT OF DUTIES, REAPPOINTED THOMAS REFEREE

George W. English on the 27th day of June, 1924, while acting as judge in the said district, reappointed the said Charles B. Thomas as referee, when it was known and then and there shown to him by the report of the receivers filed in the case of the Southern Gem Coal Corporation, that the said Charles B. Thomas, one of the receivers in the said case, for the first six months of said receivership had spent his time in Chicago, 290 miles away from his office, looking after the interest of said estate.

UNLAWFUL AND CORRUPT CONDUCT IN HANDLING OF BANKRUPTCY FUNDS

George W. English, said judge of the aforesaid district, designated the First State Bank of Coulterville, in the State of Illinois, and within the said eastern district of Illinois, to be the sole United States depository of bankruptcy funds in the district, which bank was situated a great distance from East St. Louis, the office and place of business of Charles B. Thomas, as referee. This was done to favor one J. E. Carlton, a brother-in-law of said George W. English, a large stockholder and director of said bank, and because it was a bank in which said George W. English was a depositor and director.

George W. English was requested to enter into an agreement with the Drovers National Bank of East St. Louis on October 1, 1922, as follows: to wit, that the said bank would employ one Farris English, son of George W. English, as cashier at a salary of $1,500 per year, and that said bank was to be made a Government depository of bankruptcy funds, and that the funds in said district coming under the control of the referee and from receiverships in said district should thereupon be deposited in said bank; that said Charles B. Thomas and Farris English would become depositors in said bank and purchase shares of stock, and that said George W. English was to purchase 10 shares; said stock was to be purchased at $80 per share. Charles B. Thomas purchased 50 shares and Farris English purchased 10 shares, for which his father paid the cost, and George W. English had 10 shares assigned to him on the books of the bank.

George W. English thereafter designated the Drovers National Bank as a depository of Government funds, and said George W. English, Farris English, and Charles B. Thomas became depositors in said bank and then and there made 17 transfers of bankruptcy funds from the Union Trust Co. to the Drovers National Bank to the amount of $100,000. All of these improper acts were done and performed by said George W. English as judge, and that his influence

and office as judge were used for the unlawful and improper profits and gains to himself and said Charles B. Thomas, referee, and to secure the appointment of Farris English to a position in the bank.

On the 2d day of November, 1921, the said George W. English, as judge in the said eastern district of Illinois, designated the Union Trust Co., of East St. Louis, a Government depository of bankruptcy funds; afterwards, about the 1st of April, 1924, said George W. English, as judge, with the knowledge and consent of Charles B. Thomas, as referee in bankruptcy, entered into an agreement with the Union Trust Co. in consideration that said Union Trust Co. would employ Farris English (the son of Judge English) in the bank at a salary of $200 per month, he, the said George W. English, would become, with Charles B. Thomas, depositors in said bank, and that George W. English and Charles B. Thomas would cause to be removed from the Drovers National Bank of East St. Louis the bankruptcy funds deposited there and deposit the same in the said Union Trust Co., and that the Union Trust Co. would pay said Farris English a salary of $200 per month and a sum equal to 3 per cent on monthly balances on bankruptcy funds in addition to his salary and as a part of this agreement said funds should not be withdrawn and deposited in another Government depository while said English was employed.

Farris English was employed by the Union Trust Co. and remained in its employ for 14 months, during which time he received his salary of $200 per month and $2,700 as interest on bankruptcy funds, and the funds in the Drovers National Bank were withdrawn from it and deposited in the Union Trust Co.

On the 4th day of April, 1924, the said George W. English, acting as judge as aforesaid, designated the Merchants State Bank of Centralia, Ill., to be a Government depository of bankruptcy funds, the said George W. English and Charles B. Thomas being then and there depositors and stockholders in said bank. While the said George W. English was a director and said Charles B. Thomas a depositor, and while both were stockholders in the said bank of Centralia, and while said bank was a depository of Government funds deposited by said George W. English, he, George W. English, borrowed from the said bank, without security and at a rate of interest below the customary rate, the sum of $17,200; and the said Charles B. Thomas borrowed from said bank, without security and at a rate of interest below the customary rate, the sum of $20,000; said sums were excessive loans and were obtained by reason of the control of said George W. English and Charles B. Thomas over court funds in designating what disposition should be made of them and into what depository they should be placed.

On or about the 4th day of April, 1925, in concert with the officers and directors of said bank, said Charles B. Thomas and said George W. English, with said directors of said bank, obtained loans which in the aggregate exceeded the total capital stock and surplus of said bank, without security and at a low rate of interest, which facts were concealed from the public and from the public authorities.

THE LAW

CONSTITUTIONAL PROVISIONS RELATING TO JUDICIAL IMPEACHMENTS

The provisions of the Constitution of the United States bearing upon the impeachment of judges are as follows:

The House of Representatives shall choose their Speaker and other officers and shall have the sole power of impeachment. (Art. I, sec. 2.)

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. I, sec. 3.)

The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Art. II, sec. 2.)

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. II, sec. 4.)

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 and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. (Art. III, sec. 1.)

The case of Robert W. Archbald, who was convicted by the Senate and removed from office in 1912 (S. Doc. 1140, 62d Cong., 2d sess.), furnishes the latest case and precedent so far as any case may be a precedent upon the subject of impeachment of judges. Each case of impeachment must necessarily stand upon its own facts. It can not, therefore, become a precedent or be on all fours with every other case.

In the present case we are relieved from the consideration of the debated legal proposition, whether or not a man may be impeached after the term of his office has expired or he has resigned. Other cases indicate that a judge may be impeached if he is still continuing in the same office although under a different commission and election. In the Archbald case it was held that he could not be impeached upon the ground of things done while he was a district judge, his term having ended in that court. In the case of George W. English, however, all of the acts complained of have been performed by him in his judicial capacity and in the exercise of his official functions, and within his term of service.

Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdeameanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for a "breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness when habitual, or in the performance of official duties, gross indecency, profanity,

obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law." No judge may be impeached for a wrong decision.

A Federal judge is entitled to hold office under the Constitution during good behavior, and this provision should be considered along with article 4, section 2, providing that all civil officers of the United States shall be removed from office upon impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Good behavior is the essential condition on which the tenure to judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office.

A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until 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. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it when his behavior ceases to be good behavior.

The conduct of Judge George W. English has been of such a character that one must regard it as reprehensible and tending to bring shame and reproach upon the administration of justice and destroy the confidence of the public in our courts if it be allowed to go unrebuked.

The Federal judiciary has been marked by the services of men of high character and integrity, men of independence and incorruptibility, men who have not used their office for the promotion of their private interests or those of their friends. No one reading the record in this case can conclude that this man has lived up to the standards of our judiciary, nor is he the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.

RECOMMENDATION

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge George W. English, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said George W. English, United States district judge for the eastern district of Illinois.

RESOLUTION

Resolved, That George W. English, United States district judge for the eastern district of Illinois, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Joint Resolution 347, sustains five articles of impeachment, which are hereinafter

set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

ARTICLES OF IMPEACHMENT OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN THE NAME OF THEMSELVES AND OF ALL OF THE PEOPLE OF THE UNITED STATES OF AMERICA AGAINST GEORGE W. ENGLISH, WHO WAS APPOINTED, DULY QUALIFIED, AND COMMISSIONED TO SERVE DURING GOOD BEHAVIOR IN OFFICE, AS UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ILLINOIS, ON MAY 3, 1918

ARTICLE I

That the said George W. English, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as the district judge for the eastern district of Illinois, did on divers and various occasions so abuse the powers of his high office that he is hereby charged with tyranny and oppression, whereby he has brought the administration of justice in said district in the court of which he is judge into disrepute and by his tyrannous and oppressive course of conduct is guilty of misbehavior falling under the constitutional provision as ground for impeachment and removal from office.

In that the said George W. English, on the 20th day of May, 1922, at a session of court held before him as judge aforesaid, did willfully, tyrannically, oppressively, and unlawfully suspend and disbar one Thomas M. Webb, of East St. Louis, a member of the bar of the United States District Court for the Eastern District of Illinois, without charges having been preferred against him, without any prior notice to him, and without permitting him, the said Thomas M. Webb, to be heard in his own defense, and without due process of law; and also,

In that the said George W. English, judge as aforesaid, on the 15th day of August, 1922, in a court then and there holden by him, the said George W. English, judge as aforesaid, did willfully, tyranically, oppressively, and unlawfully suspend and disbar one Charles A. Karch, of East St. Louis, a member of the bar of the United States District Court for the Eastern District of Illinois, without charges having been preferred against him, without any prior notice to him, and without permitting him, the said Charles A. Karch, to be heard in his own defense, and without due process of law; and also in that the said George W. English, judge as aforesaid, restored the said Karch to membership of the bar in said district, but willfully, tyrannically, oppressively, and unlawfully deprived the said Charles A. Karch of the right to practice in said court or try any case before him, the said George W. English, while sitting or holding court in said eastern district of Illinois; and also,

In that the said George W. English, judge as aforesaid, on the 1st day of August, 1922, unlawfully and deceitfully issued a summons from the said district court of the United States, and had the same served by the marshal of said district, summoning the State sheriffs and State attorneys then and there in the said eastern

district of Illinois, being duly elected and qualified officials of the sovereign State of Illinois, and the mayor of the city of Wamac, also a duly elected and qualified municipal officer of said State of Illinois, residing in said district, to appear before him in an imaginary case of "the United States against one Gourley and one Daggett," when in truth and fact no such case was then and there pending in said court, and in placing the said State officials and mayor of Wamac in the jury box and when they came into court in answer to said summons then and there in a loud, angry voice, using improper, profane, and indecent language, denounced said officials without any lawful or just cause or reason, and without naming any act of misconduct or offense committed by the said officials and without permitting said officials or any of them to be heard, and without having any lawful authority or control over said officials, and then and there did unlawfully, improperly, oppressively, and tyrannically threaten to remove said State officials from their said offices, and when addressing them used obscene and profane language, and thereupon then and there dismissed said officials from his said court and denied them any explanation or hearing; and also,

In that the said George W. English, judge aforesaid, on the 8th day of May, 1922, in the trial of the case of the United States *v.* Hall, then and there pending before said George W. English, as judge, the said George W. English, judge as aforesaid, from the bench and in open court, did willfully, unlawfully, tyrannically, and oppressively, and intending thereby, to coerce the minds of the jurymen in the said court in the performance of their duty as jurors, stated in open court and in the presence of said jurors, parties and counsel in said case, that if he told them (thereby then and there meaning said jurymen) that a man was guilty and they did not find him guilty that he would send them to jail; and also,

In that the said George W. English, judge aforesaid, on the 15th day of August, 1922, willfully, unlawfully, tyrannically, and oppressively did summon Michael L. Munie, of East St. Louis, a member of the editorial staff of the East St. Louis Journal, a newspaper published in said East St. Louis, and Samuel A. O'Neal, a reporter of the St. Louis Post-Dispatch, a newspaper published at St. Louis, in the State of Missouri, and when said Munie and the said O'Neal appeared before him did willfully, unlawfully, tyrannically, and oppressively, and with angry and abusive language attempt to coerce and did threaten them as members of the press from truthfully publishing the facts in relation to the disbarment of Charles A. Karch by said George W. English, judge as aforesaid, and then and there used the power of his office tyrannically, in violation of the freedom of the press guaranteed by the Constitution, to suppress the publication of the facts about the official conduct of said George W. English, judge aforesaid, and did then and there forbid the said Munie and the said O'Neal to publish any facts whatsoever in relation to said disbarment under threats of imprisonment; and also

In that the said George W. English, judge aforesaid, on the 15th day of August, 1922, at East St. Louis, in the State of Illinois, did unlawfully summon before him one Joseph Maguire, being then and there the editor and publisher of the Carbondale Free Press, a newspaper published in Carbondale, in said eastern district of Illinois, and then and there, on the appearance before him of said Joseph

Maguire in open court, did violently threaten said Joseph Maguire with imprisonment for having printed in his said paper a lawful editorial from the columns of the St. Louis Post-Dispatch, a newspaper published at St. Louis, in the State of Missouri, and in a very angry and improper manner did threaten said Maguire with imprisonment for having also printed some lawful handbills—said handbills having no allusion to said judge or to his conduct of the said court—and then and there did threaten this member of the press with imprisonment.

Wherefore the said George W. English was and is guilty of a course of conduct tyrannous and oppressive and is guilty of misbehavior in office as such judge, and was and is guilty of a misdemeanor in office.

Article II

That George W. English, judge as aforesaid, was guilty of a course of improper and unlawful conduct as said judge, filled with partiality and favoritism, resulting in the creation of a combination to control and manage in collusion with Charles B. Thomas, referee in bankruptcy, in and for the eastern district of Illinois for their own interests and profit and that of the relatives and friends of said George W. English, judge as aforesaid, and of Charles B. Thomas, referee, the bankruptcy affairs of the eastern district of Illinois.

In that said George W. English, judge as aforesaid, corruptly did appoint and continue to appoint said Charles B. Thomas, of East St. Louis, in said State of Illinois, a member of the bar of the district court of the United States in and for said district, as sole referee in bankruptcy in said district with all of the advantages and preferments of said appointment, notwithstanding he then and there well knew that said eastern district was a great commercial district of 45 counties nearly 300 miles long with a large volume of business in bankruptcy, and that the said volume of business would necessarily take all the time and attention of any appointee as referee in bankruptcy to perform properly the work and duties of said office, and well knew at the time of said appointments that said Charles B. Thomas was practicing in all the courts, both civil and criminal, in said eastern district of Illinois, he, the said Charles B. Thomas, through said appointment as sole referee in bankruptcy and the favors in connection therewith extended to him by said George W. English, judge aforesaid, built up a large and lucrative practice; and that notwithstanding the size of the eastern district of Illinois, the volume of bankruptcy business therein, and the large practice of said Thomas, referee aforesaid, did then and there give said referee in bankruptcy enlarged duties and authority by unlawfully changing and amending the rules of bankruptcy for said eastern district for the sole benefit of said George W. English, judge aforesaid, and the said Charles B. Thomas, sole referee aforesaid, as follows:

It is hereby further ordered that the following rule be, and the same is hereby, made and adopted as a rule of this court in bankruptcy, to be effective in all cases from and after this date, namely:

All matters of application for the appointment of a receiver, or the marshal, to take charge of the property of the bankrupt or alleged bankrupt, made after the filing of the petition, and prior to its being dismissed or to the trustee being qualified, shall be and are hereby referred to the referee in bankruptcy for his

consideration and action; and the clerk will enter such order of reference as of course in each case; and the referees of this court heretofore or hereafter appointed are hereby authorized and empowered to appoint receivers, or the marshal, upon application of parties in interest, in case the referee shall find same is absolutely necessary for the preservation of the estate, to take charge of the property of the bankrupt; and to exercise all jurisdiction over and in respect to the actions and proceedings of the receiver or marshal which the court by law may exercise. After adjudication, where the referee deems it necessary for the protection of the estate, he may make such appointment on his own motion.

And it is hereby further ordered that all special rules and general orders heretofore entered or adopted be, and they are hereby, set aside and annulled in so far as they in any way conflict with the provisions of the above rule and general order.

For the purpose of transacting the business of the court of bankruptcy, it is ordered that the referee [meaning then and there said Charles B. Thomas] be, and he is hereby, authorized and directed to procure and maintain suitable offices for the transaction of said business, and to suitably furnish and equip same for said purpose; that the referee be, and he is hereby, further authorized and directed to employ such clerks, stenographers, and court reporters or any other assistance which he finds and deems necessary for the proper management of said court and offices and the administration of bankrupt estates; to install telephones; to procure and keep on hand needed stationery, and generally to provide all such other and further office equipment proper to transact business of the referee; and

It is further ordered that in the event that the charges for referee's expenses authorized by any and all of the rules of this court to be charged against the estates administered before the referee do not amount to a total to pay the expenses which the referee has incurred or for which he may have paid or obligated himself to pay, the referee be, and he is hereby, authorized and directed to make a charge against the bankrupt estates administered before him, in as equitable pro rata share as the nature and circumstances will permit, sufficient in amount to meet the deficit existing by reason of the referee's receipts from expenses or charges authorized by this and other rules being less than the total expenses incurred by the referee.

Said amendments of the rules of court were then and there made with the intent to favor and prefer said Charles B. Thomas and did thereby give said Charles B. Thomas the power and opportunity to appoint his friends and members of his family and the family of said George W. English, judge aforesaid, to receiverships and to use said office of referee as aforesaid for the improper personal and financial benefit of said George W. English, judge aforesaid, and said Charles B. Thomas, referee aforesaid, and the friends and families of both.

The said Thomas, in pursuance of said unlawful combination and by authority of said rule and order aforesaid, and with the full knowledge and approval of said George W. English, judge aforesaid, did rent and furnish a large and expensive suite of rooms and offices in said East St. Louis near the said judge's chamber, in the Federal building in said East St. Louis, occupied by said George W. English, judge aforesaid, at the expense and cost of the United States and of estates in bankruptcy by virtue of said rule and order;

And the said Charles B. Thomas then and there, with the full knowledge and consent of said George W. English, judge aforesaid, did wrongfully and unlawfully create and organize a large and expensive office force supported by and paid for out of the funds and assets of estates in bankruptcy as aforesaid, and then and there did hire and provide a large number of clerks, stenographers, and secretaries, at the cost and expense of the United States and the funds and assets of the estates in bankruptcy, as aforesaid;

And the said Charles B. Thomas did then and there hire and place in said offices, with the knowledge and approval of the said George

W. English, judge aforesaid, one George W. English, jr., the son of the aforesaid Judge English, at a large compensation, salary, and fees, paid out of the funds and assets of the estates in bankruptcy, in and under the charge and control of said Thomas, referee aforesaid;

And the said Charles B. Thomas, referee aforesaid, did further confer upon said George W. English, jr., appointments as trustee and receiver and appointments as attorney for trustees and receivers in estates in bankruptcy;

And said Referee Charles B. Thomas then and there, with the knowledge, consent, and assistance of the said George W. English, judge aforesaid, did hire and place in the said office and make a part of said organization one M. H. Thomas, son of said Charles B. Thomas; and one D. S. Leadbetter, son-in-law of said Charles B. Thomas; and one C. P. Widman, son-in-law of said Charles B. Thomas;

And the said Charles B. Thomas, referee aforesaid, did then and there wrongfully and unlawfully pay to all of the persons last aforesaid large salaries, fees, and commissions, and did likewise confer upon said persons, appointments as trustees, receivers, and masters in estates in bankruptcy, with the full knowledge, consent, and approval of said George W. English, judge aforesaid;

And said George W. English, judge aforesaid, in order further to carry out and make effective said improper and unlawful organization did appoint one Herman P. Frizzell, United States commissioner in and for said eastern district of Illinois, and said commissioner did occupy free of charge the said offices of Charles B. Thomas, referee aforesaid, and did receive from said Charles B. Thomas, as said referee, large and valuable fees, commissions, salaries, appointments as trustee, receiver, and master in estates in bankruptcy with the knowledge and consent of the said George W. English, judge aforesaid;

And the said George W. English, judge aforesaid, did further allow and permit the said Charles B. Thomas, referee aforesaid, to appear as attorney and counsel before said Commissioner Frizzell in divers and sundry criminal cases; and then and there, further to carry out and make effective the said unlawful and improper combination, the said George W. English, judge aforesaid, with full knowledge of the premises, did improperly and unlawfully consent and approve the appointment by the said referee, Charles B. Thomas, of one Oscar Hooker, of said East St. Louis, as chief clerk in said offices of said referee, and thereby the said Hooker did receive from said Charles B. Thomas, referee aforesaid, large and valuable fees, salaries, appointments as trustee, receiver, and master, and as attorney for trustees and receivers in bankruptcy estates;

And further the said George W. English, judge aforesaid, did improperly allow and permit said Hooker, as the agent of a bonding company, to furnish surety bonds for said George W. English, jr., the son of George W. English, judge aforesaid, and also surety bonds for said Herman P. Frizzell, said United States commissioner, and surety bonds for said M. H. Thomas, son of said Charles B. Thomas, as aforesaid, and surety bonds for D. L. Leadbetter and said C. P. Wideman, sons-in-law of said Charles B. Thomas, in all matters of trusteeships and receiverships to which they were appointed by said Charles B. Thomas, referee aforesaid—the said Oscar Hooker, George

W. English, jr., D. S. Leadbetter, C. P. Wideman, and Herman P. Frizzell being then and there without property or credit;

And, then and there, further to carry out and make effective said unlawful and improper combination, the said George W. English, judge as aforesaid, with full knowledge of the premises, did improperly and unlawfully allow said Charles B. Thomas, referee as aforesaid, to organize and incorporate from his office force and employees a corporation known as the Government Sales Corporation, organized and incorporated November 27, 1922, for the object and purpose of furnishing appraisers in bankruptcy estates and auctioneers in the sale and disposal of assets of estates in bankruptcy, the said Government Sales Corporation being then and there made up and composed, organized, and formed of incorporators and directors from the families and friends of said George W. English, judge aforesaid, and said Charles B. Thomas, referee aforesaid, and from said office force of said Thomas, referee aforesaid;

The said George W. English, judge aforesaid, well knowing the facts and premises, then and there did willfully, improperly, and unlawfully take advantage of his said official position as judge aforesaid, and did aid and assist said Charles B. Thomas, referee aforesaid, in the establishment, maintenance, and operation of said unlawful and improper organization as above set forth, for the purpose of obtaining improper and unlawful personal gains and profits for the said George W. English, judge aforesaid, and his family and friends;

Wherefore, the said George W. English was and is guilty of a course of conduct as aforesaid constituting misbehavior as such judge and was and is guilty of a misdemeanor in office.

Article III

That George W. English, judge aforesaid, was guilty of misbehavior in office in that he corruptly extended partiality and favoritism in divers other matters hereinafter set forth to Charles B. Thomas, said sole referee in bankruptcy in the said eastern district of Illinois, and by his conduct and partiality as judge brought the administration of justice into discredit and disrepute, degraded the dignity of the court, and destroyed the confidence of the public in its integrity;

In that in the matter of the case of East St. Louis & Suburban Co. et al. *v.* Alton, Granite & St. Louis Traction Co., pending before George W. English, judge as aforesaid, upon the petition for appointment of receivers for said Alton, Granite & St. Louis Traction Co., the said George W. English, judge as aforesaid, did improperly and unlawfully refuse to appoint the temporary receivers suggested by counsel for the parties in interest in said case unless said Charles B. Thomas was appointed attorney for the receivers; that by reason of the condition imposed by George W. English, judge aforesaid, the counsel for the parties in interest in said case did agree to the appointment of said Charles B. Thomas as counsel for said temporary receivers at a salary stipulated by said Charles B. Thomas of $200 a month; and thereupon the said George W. English as judge, improperly, corruptly, and unlawfully appointed said Charles B. Thomas as attorney for the temporary receivers and approved of the payment of said salary by an order entered in said case as of August 11, 1920; and that subsequently, to wit, on January 20, 1921, George W English, judge aforesaid, did

issue an order making the temporary receivers permanent and that the said Charles B. Thomas, as attorney and counsel for the receivers, be paid the sum of $350 per month and that the further sum of $500 per month additional be paid to said Charles B. Thomas for his services and responsibilities in assisting the receivers in the control and management of said receivership properties, making a total salary of $850 per month, and that said salary should be retroactive from October 1, 1920; that the services of said Charles B. Thomas, both as attorney for the receivers and for assisting in the management of the receivership properties, were not required or necessary, and thereby an additional burden upon the receivership properties was imposed which said George W. English, judge, aforesaid, well knew; that this salary of $850 per month was continued to be paid to said Charles B. Thomas for a long period of time, to wit, from October 1, 1920, to January 1, 1925, making the total amount received under said order by said Charles B. Thomas $43,350; that the said appointment of said Charles B. Thomas was made by George W. English, judge aforesaid, with the intent wrongfully and unlawfully to prefer and show partiality and favoritism to said Charles B. Thomas, to whom George W. English, judge aforesaid was under obligations, financial and otherwise; and, also,

In that in the case of Handelsman *v.* Chicago Fuel Co. pending before him, George W. English, judge as aforesaid, did improperly and unlawfully appoint said Charles B. Thomas as one of the receivers in said case and then and there did improperly order, direct, and fix the compensation and salary of said Charles B. Thomas as said receiver at the rate of $1,000 per month; and did then and there improperly and unlawfully appoint said Herman P. Frizzell, United States commissioner for said eastern district of Illinois and chief clerk in the office of said Thomas as referee in bankruptcy, to be attorney for the said receiver Charles B. Thomas, and then and there did improperly fix the salary and fees of said Frizzell as said attorney at the rate of $200 per month; that all said acts of said English as judge aforesaid were done with the unlawful and improper intent unlawfully to favor and prefer said Thomas and benefit the said organization.

In that on the 15th day of August, 1924, at a session of court then holden by George W. English, judge as aforesaid, in the matter of Gideon N. Heuffman et al. *v.* Hawkins Mortgage Co., in bankruptcy, did improperly and unlawfully allow and permit said Charles B. Thomas, referee as aforesaid, to appear and conduct said case as attorney and counsellor at law in behalf of Morton S. Hawkins, one of the bankrupts in said case, in violation of the statute of the United States that forbids a referee to practice as an attorney or counsellor at law in any bankruptcy proceedings, and afterwards, to wit, on the 27th day of August, 1924, George W. English, judge as aforesaid, did again improperly and unlawfully allow and permit said Charles B. Thomas, referee as aforesaid, to appear before him and practice as an attorney in behalf of said bankrupt, Morton S. Hawkins; that said unlawful acts were willfully permitted in order to favor said Charles B. Thomas in obtaining from said Morton S. Hawkins, a fee for his services of $2,500, which was then and there paid to said Charles B. Thomas by said Morton S. Hawkins, all with the full

knowledge and consent of George W. English, judge as aforesaid; and, also,

In that on the 18th day of May, 1922, after conviction by a jury of one F. J. Skye, in a case before George W. English, judge as aforesaid, involving the crime of selling and possessing intoxicating liquors, the said George W. English, as judge, did impose a sentence upon said F. J. Skye of imprisonment in jail for four months and the payment of a fine of $500; that on the trial the said F. J. Skye was represented by one Charles A. Karch; that after such conviction and sentence said Charles A. Karch took an appeal to the United States Circuit Court of Appeals for the Seventh Circuit in behalf of his client and filed an appeal bond in due course; that subsequently to the appeal said F. J. Skye discharged said Charles A. Karch as attorney and retained Charles B. Thomas, referee aforesaid; that on July 5, 1922, said F. J. Skye, by his attorney, said Charles B. Thomas, abandoned his appeal to the circuit court of appeals and filed a motion for a stay of the sentence of imprisonment, which motion, after hearing, George W. English, judge as aforesaid, did allow and did stay the sentence of imprisonment until December 31, 1922; and on June 7, 1923, George W. English, judge as aforesaid, did order said jail sentence vacated and said stay of execution and commitment to jail of said F. J. Skye made permanent, relieving said F. J. Skye from imprisonment and only obligating him to pay a fine of $500; that said F. J. Skye paid to said Charles B. Thomas $2,500 as a fee in said case, that said vacation of the jail sentence and the permanent stay of execution and commitment was granted by George W. English, judge as aforesaid, without the presence of said Charles B. Thomas in court and without any investigation of the affidavits filed in support thereof, and was done willfully, improperly, unlawfully, and with intent to prefer and show favoritism to said Thomas, to whom said George W. English, judge as aforesaid, was under obligations, financial and otherwise; and, also,

In that in the case of Hamilton *v.* Egyptian Coal Mining Co., George W. English, judge as aforesaid, did arbitrarily and unlawfully and without notice remove from office the duly appointed receiver in said case, and with intent improperly to prefer and favor Charles B. Thomas, aforesaid, did then and there appoint the said Charles B. Thomas in place of the removed receiver; that this removal of the receiver was made on July 11, 1924, with the intent to prefer unlawfully the said Charles B. Thomas, to whom the said George W. English, judge aforesaid, was under great obligations, financial and otherwise; and, also,

In that on or about March, 1924, at a hearing before George W. English, judge aforesaid, in the case of Wallace *v.* Shedd Coal Co., George W. English, judge aforesaid, did appoint Charles B. Thomas as an attorney for the receiver (one F. D. Barnard), when in truth and in fact no attorney for said receiver was needed, and afterwards, to wit, on or about August, 1924, said George W. English, judge as aforesaid, did arbitrarily and improperly remove from office said F. B. Barnard as such receiver and then and there did improperly appoint as receiver in place of said Barnard said Charles B. Thomas; that the removal of said receiver and the appointment of said Charles B. Thomas was made with the intent to corruptly prefer said Charles

B. Thomas, to whom said George W. English was under great obligations, financial and otherwise; and, also,

In that on or about the 27th day of June, 1924, at a hearing held b him, George W. English, judge as aforesaid, in the case of Ritchey et al. v. Southern Gem Coal Corporation, George W. English, judge as aforesaid, did then and there improperly appoint Charles B. Thomas, aforesaid, one of the receivers in said case and then and there unlawfully did order and decree that said Charles B. Thomas, as said receiver, should have as his salary the excessive and exorbitant sum of $1,000 per month; that said act of George W. English, judge aforesaid, in the appointment of said Charles B. Thomas as receiver aforesaid and in the fixing of said exorbitant salary was all done by George W. English, judge as aforesaid, with intent to prefer unlawfully said Charles B. Thomas, to whom said George W. English was under great obligations, financial and otherwise; and, also,

In that on or about the 24th day of October, 1921, at East St. Louis, in the State of Illinois, George W. English, judge as aforesaid, wrongfully, improperly, and unlawfully did accept and receive from said Charles B. Thomas, sole receiver in bankruptcy aforesaid, the sum of $1,435 which was applied toward the purchase price of an automobile that had been purchased by George W. English, judge as aforesaid; that said sum of money was improperly and unlawfully accepted and received by the said George W. English from the said Charles B. Thomas as a return or in recognition of the favoritism and partiality extended by George W. English, judge as aforesaid, to Charles B. Thomas, aforesaid; and, also,

In that George W. English, judge as aforesaid, at a term of court held by said judge for the eastern district of Illinois in the case of the Southern Gem Coal Corporation in receivership, did receive and approve the report of Charles B. Thomas, as one of the receivers in said case, for the first six months of said receivership; that in said report to George W. English, judge as aforesaid, said Charles B. Thomas stated that he had during those six months spent all of his time in Chicago looking after the interest of said Southern Gem Coal Corporation in receivership; and then and there George W. English, judge as aforesaid, did receive and approve said report; that with full knowledge that said referee, Charles B. Thomas, was neglecting his duties as referee in bankruptcy in his office at East St. Louis in spending six months of his time 290 miles away from his office at East St. Louis, George W. English, judge as aforesaid, did then and there, despite this knowledge and these facts, approve said negligence on the part of said Charles B. Thomas and said neglect of duty without criticism or rebuke by then and there reappointing him for another term.

Wherefore the said George W. English was and is guilty of misbehavior as such judge and was and is guilty of a misdemeanor in office.

Article IV

That George W. English, while serving as judge as aforesaid, in the District Court of the United States for the Eastern District of Illinois, did in conjunction with Charles B. Thomas, sole referee in bankruptcy aforesaid, corruptly and improperly handle and control the deposit of bankruptcy and other funds under his control in said

court, by depositing, transferring, and using said funds for the pecuniary benefit of himself and said Charles B. Thomas, sole referee in bankruptcy, thus prostituting his official power and influence for the purpose of securing benefits to himself and to his family and to the said Charles B. Thomas and his family;

In that George W. English, judge as aforesaid, on or about December, 1918, did designate the First State Bank of Coulterville, in the State of Illinois, to be the sole United States depository of bankruptcy funds within said district; that said bank was situated a great distance from East St. Louis, the office and place of business of Charles B. Thomas, said referee in bankruptcy; and that then and there one J. E. Carlton, a brother-in-law of George W. English, judge aforesaid, was a large stockholder and director and cashier of said bank; and that George W. English, judge as aforesaid, was a depositor, stockholder, and director in said bank; that said improper act of George W. English, judge as aforesaid, in designating said bank, tended to scandalize the court in the administration of its bankruptcy business; and also,

In that on or about July, 1919, George W. English, judge as aforesaid, at a hearing then had before him, in the case of Sanders *v.* Southern Traction Co., in which certain assets had been sold for the sum of $400,000, did willfully and unlawfully order and decree that of said sum of $400,000 the sum of, to wit, $100,000 should be deposited in the Merchants State Bank of Centralia, Ill., a United States depository of bankruptcy funds, said deposit to draw no interest; that said deposit was made in said bank as ordered and that George W. English, judge as aforesaid, was then and there a depositor, stockholder, and director in said bank; that said order and deposit of funds was made for the benefit of himself, George W. English, judge as aforesaid, and for his personal gain and profit and for the benefit of his family and friends, to the great scandal of the said office of judge aforesaid, and all tending to bring the administration of justice in said court into distrust and contempt; and also

In that George W. English, judge as aforesaid, on or about October 1, 1922, and Charles B. Thomas, sole referee in bankruptcy aforesaid, did make and enter into the following improper and unlawful agreement with the officers of the Drovers National Bank of East St. Louis, to wit, that in consideration that said bank would employ one Farris English, son of said George W. English, as cashier in said bank at a salary of $1,500 per year, that George W. English, judge as aforesaid, and Charles B. Thomas, referee aforesaid, would make and designate said bank as a Government depository of bankruptcy funds without interest thereon, and that funds from estates in bankruptcy and receiverships should thereafter largely be sent to and deposited in said bank, and that George W. English, judge as aforesaid, and Charles B. Thomas, sole referee as aforesaid, and said Farris English would become depositors in said bank and then and there would purchase shares of stock therein as follows:

George W. English, judge as aforesaid, 10 shares; said Farris English, 10 shares; and said Charles B. Thomas, 50 shares, at $80 per share; that in pursuance of said agreement said Farris English was hired as cashier at said salary of $1,500 per year and entered upon this employment; that George W. English, judge as aforesaid, in pursuance of said agreement, did designate said bank to be a Govern-

ment depository of bankruptcy funds, and said George W. English and said Farris English and said Charles B. Thomas, in pursuance of said agreement, did become depositors in said bank, and the said George W. English, judge as aforesaid, the said Charles B. Thomas, referee as aforesaid, did make 17 transfers of bankruptcy funds from the Union Trust Co. of East St. Louis and cause the same to be deposited in said Drovers National Bank without interest to the aggregate amount of $100,000, and then and there George W. English, judge as aforesaid, did receive and pay for his said 10 shares of stock and also for the stock of his son, said Farris English; that the said improper acts were done and performed by George W. English, judge as aforesaid, with the wrongful and unlawful intent to use the influence of his said office as judge for the personal gain and profit of himself, said George W. English, and for the unlawful and improper and personal gain of the family and friends of the said George W. English; and, also,

In that George W. English, judge as aforesaid, on or about the 1st day of April, 1924, with the knowledge and consent of Charles B. Thomas, referee in bankruptcy aforesaid, did make and enter into the following improper and unlawful agreement with said Union Trust Co., a Government depository of bankruptcy funds, to wit, that if said Union Trust Co. would then and there employ one Farris English, the son of George W. English, judge aforesaid, at a salary of $200 per month, he, said George W. English, judge aforesaid, with said Charles B. Thomas, would become depositors in said Union Trust Co., and that he, the said George W. English, and said Charles B. Thomas would cause to be removed from the Drovers National Bank of East St. Louis the bankruptcy funds deposited there and would deposit the same in said Union Trust Co. and that said Union Trust Co. should pay to said Farris English, in addition to his said salary of $200 per month, interest on said bankruptcy funds from time to time on deposit in said Union Trust Co. at the rate of 3 per cent on monthly balances, and for this consideration George W. English, judge as aforesaid, further did agree with said Union Trust Co. that while said agreement continued said funds should not be withdrawn and deposited in any other Government depository, and thereupon said Farris English was employed by said Union Trust Co. under said agreement and remained in the services of said company for 14 months and drew out of said company during this said period, in addition to his salary of $200 per month, the sum of $2,700 as interest on bankruptcy funds; that the bankruptcy funds were with drawn from said Drovers National Bank and deposited in the said Union Trust Co. under said agreement; that George W. English, judge as aforesaid, and Charles B. Thomas, referee in bankruptcy aforesaid, did then and there become depositors in said Union Trust Co., the said George W. English did then and there use his influence as judge for the unlawful and improper personal gain and profit to himself, family, and friends; and, also,

In that, George W. English, judge as aforesaid, did improperly designate the Merchants State Bank of Centralia, Ill., to be a Government depository of bankruptcy funds, in which bank he, the said George W. English, and he, the said Charles B. Thomas, were then and there depositors and stockholders, and George W. English was then and there a director; and, also,

In that George W. English, judge as aforesaid, on divers days and times prior to the 7th day of April, 1925, and while George W. English, judge as aforesaid, and Charles B. Thomas, referee in bankruptcy aforesaid, were each depositors and stockholders and George W. English, a director of said Merchants State Bank of Centralia, Ill., and while said bank was a Government depository of bankruptcy funds, did borrow from said bank without security, at a rate of interest below the customary rate, sums of money from time to time amounting in the aggregate to $17,200, and that during said time prior to the 7th day of April, 1925, Charles B. Thomas, said referee in bankruptcy did borrow from said bank without security and at a rate of interest below the customary rate, sums of money to the total of $20,000; that said sums were loaned and said loans were renewed from time to time, and carried by said bank to the said George W. English and said Charles B. Thomas, by reason of the use of the official influence of George W. English, judge as aforesaid, and Charles B. Thomas, sole referee in bankruptcy aforesaid, and by reason of said bank having been made and continued as a United States depository for bankruptcy and other funds without interest; that said George W. English, judge as aforesaid, and Charles B. Thomas, sole referee in bankruptcy aforesaid, acting in concert with officers and directors of said Merchants State Bank of Centralia, Ill.; did borrow with said directors sums of money in the total equal to all of the surplus, assets, and capital of said bank and at a low rate of interest and without security.

Wherefore the said George W. English was and is guilty of a course of conduct constituting misbehavior as such judge and that said George W. English was and is guilty of a misdemeanor in office.

ARTICLE V

That George W. English, on the 3d day of May, 1918, was duly appointed United States district judge for the eastern district of Illinois, and has held such office to the present day.

That during the time in which said George W. English has acted as such United States district judge, he, the said George W. English, at divers times and places, has repeatedly, in his judicial capacity, treated members of the bar, in a manner coarse, indecent, arbitrary, and tyrannical, and has so conducted himself in court and from the bench as to oppress and hinder members of the bar in the faithful discharge of their sworn duties to their clients, and to deprive such clients of their right to appear and be protected in their liberty and property by counsel, and in the above and other ways has conducted himself in a manner unbecoming the high position which he holds and thereby did bring the administration of justice in his said court into contempt and disgrace, to the great scandal and reproach of the said court.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places, while acting as such judge, did disregard the authority of the laws, and, wickedly meaning and intending so to do, did refuse to allow parties lawfully in said court the benefit of trial by jury, contrary to his said trust and duty as judge of said district court, against the laws of the United States,

and in violation of the solemn oath which he had taken to administer equal and impartial justice.

That the said George W. English, as judge aforesaid, during his said term of office, at divers times and places, when acting as such judge, did so conduct himself in his said court, in making decisions and orders in actions pending in his said court and before him as said judge, as to excite fear and distrust and to inspire a widespread belief, in and beyond said eastern district of Illinois that causes were not decided in said court according to their merits but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to one Charles B. Thomas, referee in bankruptcy for said eastern district.

That the said George W. English, as judge aforesaid, during his said term of office, at divers times and places, while acting as said judge, did improperly and unlawfully, with intent to favor and prefer Charles B. Thomas, his referee in bankruptcy for said eastern district, and to make for said Thomas large and improper gains and profits, continually and habitually prefer said Thomas in his appointments, rulings, and decrees.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places while acting as said judge, from the bench and in open court, did interfere with and usurp the authority and power and privileges of the sovereign State of Illinois, and usurp the rights and powers of said State over its State officials, and set at naught the constitutional rights of said sovereign State of Illinois, to the great prejudice and scandal of the cause of justice and of his said court and the rights of the people to have and receive due process of law.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places, did, while acting as said judge, unlawfully and improperly attempt to secure the approval, cooperation, and assistance of his associate upon the bench in said eastern district of Illinois, Judge Walter C. Lindley, by suggesting to said Walter C. Lindley, judge as aforesaid, that he appoint George W. English, jr., son of said George W. English, judge as aforesaid, to receiverships and other appointments in the said district court for said eastern district of Illinois, in consideration that said George W. English, judge as aforesaid, would appoint to like positions in his said court a cousin of said Judge Walter C. Lindley, and thereby unlawfully and improperly avoid the law in such case made and provided; all to the disgrace and prejudice of the administration of justice in the court of George W. English, judge as aforesaid.

That said George W. English, as judge aforesaid, during his said term of office, at divers times and places, did, while serving as said judge, seek from a large railroad corporation, to wit, the Missouri Pacific Railroad Co., which had large trackage, in said eastern district of Illinois, the appointment of his son, George W. English, jr., as attorney for said railroad.

All to the scandal and disrepute of said court and the administration of justice therein.

Wherefore, the said George W. English was and is guilty of misbehavior as such judge and of a misdemeanor in office.

MINORITY VIEWS

We regret our inability to agree with the majority of the committee in regard to the facts and law arising upon the evidence taken by the special investigating committee appointed under House resolution.

Having dissented from the majority view, we feel it our duty to outline to our colleagues some reasons for not joining in the majority report. The evidence in the case is voluminous, covering nearly 1,000 printed pages, and necessarily all the Members of the House will not have the time or opportunity to study this evidence and judge of its probative character and force.

In the majority report the committee undertakes to set out as the basis of the articles of impeachment, which are proposed, certain matter entitled "Facts," and in this expression of the minority we will undertake to follow the arrangement of the report of the majority upon each of these separate statements of fact.

It is, of course, admitted that Judge English was appointed United States judge and took the oath of office on May 9, 1918, and has since that time served as judge of the United States District Court for the Eastern District of Illinois.

DISBARMENT OF WEBB

The evidence shows that Thomas M. Webb was a practicing attorney of good standing in the court of Judge English. He himself states in his testimony that there had never been any unpleasantness between them and that Judge English had always treated him fairly. Upon the occasion in question Judge English had tried a noted criminal known as "Dressed Up Johnnie" Gardner. Gardner was acquitted because of the failure of evidence sufficient to convict. He was not discharged, but the marshal was ordered to hold the prisoner because of certain telegrams from State officials having charges against Gardner. The marshal, by mistake turned over the prisoner to one of the local State officers, and he was held in the State or city jail. About a day later Judge English called for the prisoner to discharge him, as no one had appeared to demand him. It developed that Mr. Webb, as attorney for Gardner, had taken out habeas corpus proceedings before a city judge of East St. Louis, who had discharged the prisoner. Some time later Judge English, evidently believing that Webb had concealed from the State court the fact that Gardner was a Federal prisoner in the habeas corpus proceedings, called Mr. Webb before him, and in a statement which appears in the record, requested that Webb make a statement as to his conduct in connection with the release of this prisoner, and until he did so that he was suspended as a practicing attorney. Later this statement was filed and in about a month or six weeks Mr. Webb was reinstated. No animus or corrupt purposes is even indicated in the evidence.

DISBARMENT OF CHARLES A. KARCH

The evidence as to the disbarment of this attorney, which occurred at about the same time as the Webb suspension, is voluminous. It grew out of an unfortunate difficulty between Judge English and Karch. Attention is called to the evidence of Assistant District Attorney Wolcott. It is well established by the evidence that Karch greatly disliked English; that he had frequently spoken disrespectfully of him and had referred to him in vile epithets (which will not be repeated here as this report will be printed); that he had stated that certain persons had threatened to assassinate English and that he, Karch, had kept them from doing so, and that he had made a mistake in preventing them, and that if other members of the bar had as much nerve as he had that English would not remain on the bench. This statement, in all its harshness, had been communicated to Judge English. Judge Bandy, a well-known lawyer, had also told Judge English of remarks of the same general character that Karch had made in regard to English; and Cooper Stout, former deputy marshal, had also talked with Karch about these matters and that Karch had at first denied making these statements but subsequently admitted-making them. There is clear proof of this feeling of Karch toward English in the statements which he had made, and of which Judge English had been advised.

On the day on which Karch was disbarred, he appeared before Judge English to defend certain persons for contempt, charged with violating an injunction issued by Judge English in a shopmen's strike. At this time and other previous times Karch had requested jury trials. At the time in question there was no jury present and the next jury term would be at the Danville term, a month later. Judge English told Karch that if he desired a jury trial to make a motion therefor on behalf of his clients and his case would be continued until the Danville term in September. Notwithstanding, Karch continued to make arguments for a jury trial after the judge had told him his views about it. After he had heard Karch, Karch sat down in the court room, and Judge English took up other matters. He sat down in a menacing and contemptuous mood, and thereupon Judge English asked him if he had further business in the court. He said that he had not, and Judge English asked him to retire. He demurred to this, saying that he had a right to stay in the court room, and it led to a colloquy between him and Judge English, which led to his disbarment. Later Judge English appointed a committee of three lawyers to make a report to him on Karch's application for reinstatement. This was made, and appears in the printed record on page 179, in which Karch admitted his misconduct. About a year later Karch was restored to practice. While this was an unfortunate occurrence, evidence is lacking that Judge English proceeded therein with any wicked purpose or bad motive, and that the incident is totally insufficient to maintain a charge of impeachment under the Constitution.

The attention of the House is called to the fact that it was claimed that Judge English refused to allow jury trials in these contempt proceedings, and this was made the subject of attack in an editorial in the Post-Dispatch, a great newspaper of St. Louis, in an editorial

entitled "Judge English un-American." They attacked him for not permitting jury trials.

Judge English had on several occasions, expressly told Mr. Karch that he did not think under the law that defendants in these cases cited for contempt of court for violating the court's injunction against picketing, etc., were entitled to jury trial, but in each instance he told Karch to file his motion and it would be passed on at the Danville term.

It is further of interest to note that the Circuit Court of Appeals of the Seventh Circuit, presided over by Judge Alschuler, in a case pending before that court, had held under the Clayton Act, defendants in cases of this kind were not entitled to jury trial. It is true that this case was recently overruled by the Supreme Court, but this fact is referred to for the purpose of showing the views of the appellate court upon this question at the time of Karch's disbarment.

As a matter of fact, the evidence shows, however, that Judge English did not deny jury trials, but in fact allowed jury trials in each instance where it was demanded or requested. In regard to the disbarment of Karch and the suspension of Webb, attention at this point may be called to the impeachment case against Judge James H. Peck, of Missouri, Hinds' Precedents, volume 3, page 772. Judge Peck was impeached by the House of Representatives and tried by the Senate in 1826 for oppression and tyranny growing out of the conviction for contempt and imprisonment of an attorney at law. Judge Peck had tried a case and rendered an opinion, which had been criticized by the public. In defense of this opinion Judge Peck published an article in a St. Louis newspaper. The case at the time was on appeal to the appellate court. When this article by Judge Peck was published the attorney in the case published a reply, most deferential in every respect. Judge Peck cited him before him for contempt for the publication of this article, confined him in jail for 24 hours, and disbarred him for 18 months.

No corrupt motive being shown, the Senate acquitted Judge Peck, evidently upon the ground that no corrupt motive was shown. Certainly the Peck case was subject to far more unfavorable inferences against Judge Peck than the two incidents mentioned against Judge English.

THREATS AND CENSURE OF STATE OFFICIALS

We respectfully dissent from the statement of facts contained in the majority report on this matter. The evidence does not sustain the charge that the court unlawfully used the process of the court to summon state sheriffs and state attorneys before him in the Federal court. This incident occurred in August, 1922, also. At that time there was much unrest growing out of the strike. The massacre at Herrin, Ill., had just occurred and this was about 50 or 60 miles away from East St. Louis. Judge English had issued certain injunctions relating to picketing, etc., in and around the railroad shops at Centralia, which was near the city of Wamac. In fact Wamac was situated partly in three counties, Washington, Marion and Clinton, and it got its name from the first letter of each of these counties. A deputy sheriff had reported to the judge that

there were grave disorders there; that there was shooting in and out of the barracks by the strikers and strike breakers. One man had just been killed the night before. It was a time of tenseness. Excitement and apprehension were in the minds of everyone. A repetition of the Herrin massacre was threatened. A fair conclusion of all the evidence is that Judge English told the marshal to ask the state's attorneys and the sheriffs for the three counties mentioned to come to his court or offices for a conference with him in regard to maintaining order. They came, but the records show no summons issued. If subpœnas had been issued they would have been a matter of record and readily produced. They are not found in the record of the evidence. On the morning in question there was no jury present and no trial of cases going on. English signed some orders, the court recessed, and he retired to his chambers. He came out on being advised that attorneys and sheriffs were present, and went on the bench and asked the state attorneys and sheriffs to come around to the jury box when he did proceed to lecture them. He charged them with no offense, but did urge them in vehement language to help him maintain order, and stated that if they were not willing to do this that he could send sufficient forces there to enforce his injunction. Some of these men stated that he used profane and obscene language. One of them states that he did not hear such language except the word "damn." Other witnesses who were present state that he did not use any vulgar or profane language. We submit that any fair reading of the fact and interpretation of this incident does not justify the facts alleged in the proposed articles of impeachment, but that on the contrary the facts establish beyond a doubt that in a time of great excitement and stress English was undertaking to maintain law and order. He may have done it brusquely, probably vehemently, and probably in a way that was distasteful, but we submit that he did no unlawful act and that his conduct on this occasion is entirely susceptible of the best and most honest motives, if not commendation.

THREATENING JURY IN COURT

We most respectfully submit that this is an incident attempted to be used in this case that is not worthy of consideration. One Wayne Ely appeared in the trial of the case of United States *v.* Hall. When the jury was being selected he persisted in asking each member of the jury the question as to whether, if Judge English should charge the jury in the case, expressing his view of the evidence, such juror if he disagreed with the judge's view of the evidence, would acquit the defendant. The witness testified that Judge English thereupon used the language set out in the majority report. Judge English states that he does not recall the instance and that the assistant district attorney did not recall it. Judge English states that he never expressed an opinion upon the evidence in any case and in the particular case the defendant was acquitted. We submit that this was not a high crime and misdemeanor under the Constitution, even if the statement of this witness should be taken as entirely true.

UNLAWFUL AND OPPRESSIVE TREATMENT OF KARCH

This statement is but a phase of the Karch disbarment. Thomas W. Webb, the same attorney above referred to, and Karch appeared in a case against one Keller for trial in the Danville court. Webb testified that Judge English continued the case and that at chambers told him that he continued it because Karch was an attorney in it; that he did this because of the recent trouble he had with him he feared he might not be just to Karch's clients. Judge Walter C. Lindley had at that time been appointed as an additional judge for the same district, and Judge English said that he preferred that Judge Lindley should try the case.

We utterly fail to see how any corrupt conduct amounting to a high crime or misdemeanor under the Constitution can be attached to this incident.

TYRANNOUS ATTACK ON LIBERTY OF THE PRESS

This is a high-sounding title with nothing to support it. Karch had filed an application in the nature of a mandamus with the circuit court to secure reinstatement as an attorney.

This application was passed upon in the ordinary course of business, but before final determination Judge English, upon his own motion, reinstated Karch. A statement filed by a committee of lawyers of this court is a part of the record. While mild in its statements, there is sufficient matter to show that in the opinion of these disinterested attorneys, Karch was worthy of blame. The fact is that he was reinstated and that, although the procedure in the matter of his disbarment may be said to have been irregular, yet no corrupt or improper motive on the part of Judge English is shown, and this is admitted by a majority of this committee not to support an article of impeachment.

PROFANITY AND OTHER MISBEHAVIOR

In answer to this alleged "finding of fact," it is stated with all confidence that the evidence fails to support it. The witnesses upon whose testimony this conclusion is drawn declared that Judge English used violent, profane, and obscene words, but they irreconcilably differ among themselves as to the phraseology of Judge English. As opposed to this is the evidence of an attorney above reproach, sitting in court at the time, who heard all that was said and who testifies that he heard no obscene language.

APPOINTMENT OF THOMAS SOLE REFEREE IN BANKRUPTCY

The facts are that Mr. Thomas was the sole referee in Judge English's district; also that this district consisted of 45 counties, nearly 300 miles long, and that there was a large volume of bankruptcy business in said district. The imputation is that because Judge English appointed only one referee there should be therefrom an inference of malconduct, but the testimony discloses that there had never been but one referee in bankruptcy in this district and that, although a new judge was authorized for this district in the

year 1922 and in pursuance of this act of Congress an additional judge was appointed with concurrent jurisdiction in all matters.

There has not been since the appointment and confirmation of this judge an additional referee in bankruptcy.

There has never been even a suggestion that more than one referee was necessary. The fact that Judge English appointed only one referee in bankruptcy in his district is not an impeachable offense.

CHANGE IN RULES OF COURT

Upon being inducted into office, Judge English found upon the records an order intended to control the activities of referees in bankruptcy, and shortly after his assumption of office he wrote a new rule, dated the 7th of June, 1919. A comparison of these two rules, concerning which much is attempted to be made by the majority report, discloses that there is no difference whatever in the real purport and order of the ministration of the rule. It may reasonably be said that they are the same rule, couched in different phraseology, but each the same in their purport and effect. Both of said rules being set out in the majority report and in such juxtaposition that they may be easily compared; further comment is unnecessary, but in connection with the rule made by Judge English on the date aforesaid, it is charged that this rule was made for the purpose of preferring Mr. Thomas, his referee in bankruptcy, and giving him an opportunity to control the bankruptcy deposits and thereby secure benefits to himself and to his family by reason of the operation and application of this rule. This inference is wholly unwarranted from the testimony and we emphatically declare that any such inference is without foundation.

BANKRUPTCY RING

Under the general heading "Bankruptcy ring," Judge English is charged with various acts which are classed as misdemeanors in the majority report, which said acts are the official acts of Charles B. Thomas, referee in bankruptcy. There is a substantial volume of testimony which relates to and illustrates the various official activities of Mr. Thomas as referee. It is charged that Mr. Thomas established a bankruptcy ring and that under the operation of the alleged ring he and members of his family received unlawful and improper gains in money arising from the bankruptcy court. It is further charged that Judge English corruptly and improperly handled and regulated the bankruptcy funds of his district and so manipulated their deposit and disposition that he and members of his family received substantial financial benefit from the handling of these funds.

In complete answer to this alleged "finding of fact," it is sufficient to say that all of the testimony in this case shows that Judge English established five depositories in his district, where, before he became Federal judge there was but one depository; that the bankruptcy funds were equitably distributed among these banks, depositories; that at no time did any one given depository hold an unusual excess of bankruptcy funds; that in every instance the amount of bankruptcy funds on hand were proportional to the bond required and filed for the protection of such funds and consistent in every instance with the natural amount of funds arising from the administration of bank-

ruptcy estates in the vicinity of the several depositories. In fact, that Coulterville, where Judge English is charged with having designated a bank as depository in which his brother-in-law was cashier, the evidence shows that this bank at all times had the smallest amount of any bank in the district—the deposits running from $7,000 to $13,000.

FAVORITISM, PARTIALITY, AND UNLAWFUL APPOINTMENT OF RECEIVERS

Under this heading various allegations are made, the purport of which is that C. B. Thomas, in that Judge English appointed him to receiverships, is not only not supported by the evidence but is refuted by the evidence. Judge English was appointed judge in 1918. For the following two years of his judgeship Judge Thomas was not appointed to any receivership. In 1920 certain parties, representing the matter of the appointment of receivers in the case of the East St. Louis & Suburban Co. *v.* Alton, Granite City & St. Louis Traction Co., came before Judge English. This property involved a number of suburban lines of railroads, difficult of operation and involving a large amount of assets. The parties in interest suggested the appointment of two receivers who had been agreed upon. Both of these receivers lived outside of the State of Illinois. Judge English agreed to the appointment of the receivers but later suggested that Mr. Thomas should be named as attorney for these receivers because of the fact that he had confidence in Mr. Thomas, that Mr. Thomas lived in the district and could keep him advised of the receivership. This was agreed upon by the parties in interest, and Thomas was appointed at a salary of $200 per month.

This was the temporary receivership. A few months later the matter came up for the appointment of permanent receivers. These receivers appeared in court and filed a petition setting out the valuable service that Mr. Thomas had rendered them, and petitioned the court to appoint Thomas as attorney at a monthly salary which they named as adequate compensation. This petition is set out in full in the record; Judge English merely acted upon this petition; and Judge Thomas continued as attorney upon the request of the receivers themselves made in open court. He continued to occupy this position from that time until 1925, and this constitutes one of the charges for impeachment.

It will be noted that Mr. Thomas was merely attorney for the receivers and it is difficult to see where Judge English did anything in this instance that was of an impeachable nature.

The next act of favoritism charged is the appointment of Judge Thomas as receiver in the Southern Gem Coal Co. case. This appointment, it will be noted, was not made until January, 1924, so that a period of four years intervened between his first appointment as attorney in the Alton Granite City, etc., case and his appointment as receiver in the Southern Gem Coal Co. case, the evidence as to this point being undisputed.

The Southern Gem Coal Co. was a large concern with headquarters in Chicago. It had a very large overhead expense amounting to about $100,000 a year. The parties in interest asked for the appointment of two receivers in this instance, to which Judge English was ready to agree, when attorneys for miners who had been employed

by the coal company intervened and opposed the appointment of one of the men suggested as receiver upon the ground that he was responsible for the condition of the property. The attorneys for the miners argued the matter in open court and stated that their clients desired the appointment of Judge C. B. Thomas as one of the receivers. The coal company at that time owed to the miners substantially $300,000 of wages. The property was appraised at an amount in excess of $3,200,000. Acting upon the request made by the attorneys for the miners and made openly in court and for reasons stated in writing in the application, Judge English, upon this request, appointed Judge Thomas. Judge Thomas immediately took charge of the property as coreceiver, went to Chicago, got rid of a large number of clerks or executives of the company, who had been receiving salaries of $10,000, $15,000, and $25,000 a year, and reduced the exorbitant overhead charges from $100,000 a year to less than $25,000 a year. No person connected with this receivership has ever complained of any maladministration of this property, neither receiver, attorneys for receivers, attorneys for creditors, stockholders, claimants, bondholders, or any person having an interest in the property. The only complaint is in this report, that he was given for a short while what was recommended to him as adequate compensation for his services.

The next appointment of Judge Thomas was also made in 1924 on the 10th day of July, in the case of Handleson *v.* Chicago Fuel Co. The facts set out in the majority report state that Judge English improperly and unlawfully appointed Charles B. Thomas as one of the receivers in this case. As a matter of fact, undisputed, as shown in the evidence, this appointment was made not by Judge English but by Judge Walter C. Lindley, who had been appointed as additional judge for this same district in which Judge English presided. Judge Lindley himself testified that the parties in this case came before him and asked that Judge Thomas be appointed and that he did appoint him upon their recommendation and urgent request. They stated that they did it because of some interrelation of the Chicago Fuel Co. with the Gem Coal Co. and they thought Judge Thomas was the best fitted man to handle the situation with his coreceiver.

The only other receiverships were in the cases of the Egyptian Coal Co. and the Shedd Coal Co. These companies so far as the evidence shows were concerns without assets and probably connected with the other coal companies, and the evidence shows that no fees or emoluments whatever were paid to Judge Thomas on account of such receiverships.

These appointments to receiverships were in 1924, running from January to July or August. The facts in each instance fail to show anything that even indicated an impeachable offense on the part of Judge English. In each important receivership Thomas was appointed at the specific request of the parties in litigation. Evidently Thomas managed them with discretion and ability, as no parties in interest complained in this record. But if a further and more complete answer were desired it also appears in the undisputed evidence in this case.

On August 19, 1924, the entire records of the office of the referee in bankruptcy were examined by an examiner from the Department of Justice, which, in fact and in law, has jurisdiction over these

matters. This report was presented to the Attorney General of the United States in accordance with the law. In this report the examiner referred to the fact that Thomas, the referee, had been appointed to certain receiverships. He did not complain of it as unlawful but as probably interfering with the time which was to be given to bankruptcy estates. Upon this report the Assistant Attorney General directed a letter to Judge English, dated November 19, 1924, calling his attention to a number of matters contained in this report, including the matter of receiverships. Immediately Judge English transmitted a copy of the report with the letter of the Assistant Attorney General to Thomas, calling his attention to this criticism of the department. In the record appears the official reply of Thomas to this letter, in which he thoroughly answers each criticism, and upon the subject of receiverships stated that before he accepted these receiverships he had consulted with a number of attorneys who had advised him that no reason existed why a referee should not act as receiver in appointments made in equity cases pending in Federal courts, but that he had always had the deepest respect for Judge English and his court, and for all Federal courts, and if it was thought or even suspected that a referee should not be appointed receiver in equity cases arising in the court, he would gladly and immediately resign his office. His resignation followed in January, 1925.

This evidence is clear and undisputed, that upon the first official information that any matters were subject to criticism against Thomas, both in handling the office of referee and in these appointments to receiverships, Judge English immediately and promptly brought it to the attention of Thomas with the results above stated. This report containing all the facts is fully set out in the record.

Under the power of positive proof, an impeachment upon the grounds of these receiverships can not be justly sustained.

UNLAWFUL AND CORRUPT CONDUCT IN HANDLING OF BANKRUPTCY FUNDS

George W. English assumed the duties of judge of the eastern district of Illinois May 9, 1918. It was the custom in this district, prior to his appointment, to have one referee in bankruptcy and one depositary for bankruptcy funds. The custom of one referee for the district was continued by Judge English in the appointment of Charles B. Thomas, East St. Louis, Ill. Thomas is a lawyer of ability, integrity, and highly respected by the bar and people generally. Prior to his appointment as referee in bankruptcy he had served, by election, as judge of a State court for eight years; two terms. Five banks were designated as depositaries for bankruptcy funds, namely: Merchants State Bank, of Centralia, Ill.; First National Bank, of Coulterville, Ill.; Union Trust Co., of East St. Louis, Ill.; Drovers National Bank, East St. Louis, Ill.; and National Bank of Carmi, Ill. The funds in these depositaries were protected by good and sufficient personal and surety bonds.

Judge English was a stockholder in the Centralia Bank before coming to Washington to accept employment as attorney in the income tax department, Washington, D. C. On his coming to Washington, he disposed of 12 shares of stock which he owned in said bank. After his appointment as Federal judge and on his return

to Illinois, he purchased on February 3, 1919, 12 shares of stock in this bank, of the par value of $1,200. The total capital stock of the bank at the time of this purchase was $100,000. Later he disposed of this stock. For a short time Judge English owned 21 shares, of a total of 250 shares, of the First National Bank of Coulterville, Ill. This stock was disposed of in January, 1925. Judge English carried a personal account in the Union Trust Co. of East St. Louis, Ill. (R. p. 255–262.) His balances rarely exceeded $1,000, and were usually not above $400.

Under the law, Federal district judges are authorized to appoint and remove referees in bankruptcy, to pass upon questions of appeal from the referee to the court, approve final reports, and grant discharges to bankrupts on proper application and showing. The administration of the bankruptcy law is under the jurisdiction of the Department of Justice. The Department of Justice maintains a corps of special examiners who examine and audit the accounts of referees in the several Federal districts of the United States and report thereon to the United States Attorney General. The records of the office of Referee Thomas were examined from time to time and these examinations show that the office was properly and efficiently managed, that all funds received were carefully handled and properly distributed, that the bankrupt estates under the jurisdiction of Referee Thomas were handled at a cost below that which prevails in most of the districts in the country. There is no evidence in the record showing collusion between the referee in bankruptcy, Thomas, Judge English, and the depositary banks. The banks designated as depositaries have the confidence of the communities where they are located and are rated as financially sound. They are operated by the leading citizens of their respective communities.

Many bankrupt asset and nonasset estates were administered by Charles B. Thomas during the time he was referee in the eastern district of Illinois, and, so far as is disclosed by the record, no complaint was ever made to George W. English with respect to the administration and settlement of these estates. The record does show affirmatively that proper distribution was made of all funds received by Referee Thomas. The depositaries paid no interest on bankrupt funds. No interest is charged on bankrupt funds in any district in the country. The fact that it is an ever changing fund and estates are being liquidated makes it impracticable for interest to be charged. On November 19, 1924, on order of Hon. Rush L. Holland, Assistant Attorney General, an exhaustive and thorough audit and analysis of the books and records in Referee Thomas's office was made by Plato Mountjoy, an examiner for the Department of Justice. (R. pp. 682–710.) This examiner's report is full and complete, and is to the effect that the bankrupt estates have been honestly, prudently, and competently administered by Referee Thomas. On this he gives the following statement:

CONDUCT AND DISPATCH OF BUSINESS

All work is done that can be done as soon as the papers come in to him. Meetings are held promptly. Adjudications are made and notices sent out at once. Sometimes county trustees delay the work for a while. He has efficient clerks who send out notices promptly. Trustees' accounts are checked up through

Mr. Oscar Hooker, the chief clerk, who is a practical accountant. Dividends are declared promptly and final meetings are always held in all cases and upon proper notice. (R. p. 684.)

He concludes his report with this statement:

Judge Thomas is universally allowed to be a man of ability and since he has been referee he has not practiced as attorney and counselor at law in bankruptcy proceedings. He has not purchased directly, or indirectly, any property of an estate in bankruptcy, nor was he guilty of any other acts of impropriety or any violation of law in connection with the discharge of his official duties; nor, as far as I know, is there any evidence of collusion among referee, trustees, and attorneys. He has published two pamphlets for attorneys and tustees in bankruptcy, and those pamphlets seem to have real merit. (R. p. 688.)

Referee C. B. Thomas resigned in the early part of 1925. His successor is Hon. J. G. Burnside, former United States district attorney for eastern district of Illinois, admitted by all to be a man of ability and integrity. Some time in 1922 Hon. Walter C. Lindley was appointed associate judge of the United States District Court for the Eastern District of Illinois. Judge Lindley has equal control with Judge English in the management of bankruptcy matters. Judge Lindley is conceded to be an upright, capable judge, a man against whom nothing can be urged. No doubt Judge Lindley had full knowledge touching the bankruptcy situation in this district and the fact that no change was made after he became judge or during the years since he has been judge is persuasive proof that there was no mismanagement of bankrutcy affairs in the district and no misconduct on the part of Referee Thomas.

In connection with the general charge of the corrupt use of bankruptcy funds there is alleged a specification that Judge English and Judge Thomas borrowed from Merchants State Bank of Centralia, Ill., a sum of money in total equal to the surplus, assets, and capital of said bank at a low rate of interest and without security.

In reply to this allegation it is declared, first, that any amount under any terms borrowed by Thomas without the knowledge or solicitation of Judge English constitutes no matter for which he should be called upon to answer; second, the evidence specifically shows that Judge English borrowed from time to time the sum of $17,200 from this bank. The evidence further shows that the officers and stockholders of this bank had been life-long personal friends and neighbors of Judge English with whom he was accustomed to do business and who were competent to form a correct judgment as to the moral and financial risk involved in any loan made to Judge English. The principal item in the grand total of $17,200 is the sum of $12,000, which sum was borrowed for the specific purpose of buying a home in East St. Louis; that this money was to be so invested was well known to the officers of the bank and one of them inspected the house and lot which Judge English was proposing to buy and reported favorably upon it as an investment. Judge English offered to give a mortgage on the property but this was declared unnecessary by the bank. However, Judge English's wife signed the note for the loan and a policy on the life of Judge English in the sum of $10,000 was taken out by him as additional protection for the repayment of the loan. Furthermore, upon this loan Judge English paid monthly interest at the rate of 5 per cent, thus we see that instead of this money being loaned without security it was fully and completely secured. First, in the honor and integrity of Judge English; second,

in the property itself; and, third, in the $10,000 life insurance policy. The fact that Judge English, when needing a substantial sum of money, was, by reason of his reputable conduct, able to borrow the same from those who knew him best and longest should not be held against him and made a basis for a charge of misconduct as a judge of the Federal court.

ALLEGED IMPROPER SOLICITATION OF JUDGE LINDLEY

In the fifth article of impeachment, Judge English is charged with having made improper overtures to Judge Walter C. Lindley to appoint his son, George W. English, jr., to receiverships, etc., upon the implied promise of Judge English to appoint a cousin of Judge Lindley to like positions.

A proper consideration of the testimony bearing upon this specification wholly dispels and refutes any such conclusion. The facts are fully set forth without dispute in a letter from Judge English to Judge Lindley, which is printed in the record; the letter speaks for itself and is susceptible of but one reasonable construction and that is this: That in a conversation with parties who requested the appointment of George W. English, jr., as receiver in a case in which they were interested parties, Judge English made the remark that he could not appoint his own son to such position, but that Judge Lindley might have the authority to do it. It is evident that later upon reflection Judge English realized that he was probably in error in this statement with respect to the power of Judge Lindley in the premises, and thereupon addressed the letter aforesaid in which it is clearly shown that Judge English desired merely to call the attention of Judge Lindley to the remark of Judge English, and to state that upon reflection he did not think that Judge Lindley had such authority. This is all that happened, nobody was appointed, no damage is alleged, no complaint was made, and no corrupt or improper motive is shown.

The charge is made that bankruptcy funds were improperly manipulated so that Judge English and friends, especially his son, Farris English, profited thereby. This charge is made in connection with the fact that the Union Trust Co., an East St. Louis bank, that had been designated a depository by Judge English in 1918, paid to Farris English, a son of Judge English, from April, 1924, to December of that year about $2,700 as interest on bankruptcy funds.

Whatever may be said in regard to this matter, the fact remains that not only did Judge English not know of this until after the employment of Farris English terminated, but the fact was carefully concealed from him during the time it was being paid. Farris English, the son, was 25 or 26 years of age and had a wife and family. He had worked some in the Riggs National Bank in Washington, D. C., had taken a special course in the University of Illinois to prepare himself for the career of a banker and had been cashier of the Drovers Trust Co., an East St. Louis bank, until he had a misunderstanding with some of the officials.

Being out of employment it was but natural that his father would be interested in securing a position for him. The matter was suggested by Mr. Ackerman, not an official of the Union Trust Co.,

but a solicitor of new accounts and afterwards employed in the bond department on a commission basis. Ackerman was an old friend of Judge English and later the matter was talked over and Judge English specifically stated that if Farris went into the bank he wanted him considered on his own merits.

Farris was hired by the bank officials at a salary of $150 per month. After about three months his salary was raised to $200 per month. Farris was dissatisfied, thinking he was not progressing rapidly enough, and wanting more money, was considering a change. The bank officials, to induce him to stay, arranged to pay him 3 per cent on the monthly balances on bankruptcy funds in addition to his regular salary. This arrangement was concealed from Judge English, as shown by the undisputed evidence. Neither was it shown by the evidence that there was a shifting of funds from one bank to the other by the order, or with the knowledge, consent, or approval of Judge English. A district judge has nothing to do with designating that funds go into any particular depository. He simply designates the depository and the referee alone has the right to direct the trustees to place the money in a particular depository. If there was a shifting of funds from one depository to another, certainly Judge English, who did not direct or countenance it and who was absolutely ignorant of its being done, should not be held to answer an impeachment charge.

So far as Judge English is concerned, it did not constitute corruption or improper conduct on his part, however indefensible the practice may be as to those who indulged in it.

ALLOWING MR. THOMAS TO PRACTICE IN BANKRUPTCY CASES

Mr. Thomas was referee in bankruptcy and the Federal statutes declare that no referee in bankruptcy should be allowed to practice as an attorney and counsel at law in any bankruptcy proceedings. The facts with reference to this case are as follows:

There was pending in the Federal court a petition in bankruptcy entitled, Heuffman et al. *v.* Hawkins Mortgage Co. It was an involuntary petition that the Hawkins Mortgage Co. should be adjudged a bankrupt. Wholly ancilliary to this proceeding, a petition was filed in the Federal court sitting at Indianapolis, Ind., praying for an order to prevent waste or disposition of assets by the defendant. As a matter of law, it is at best a close question whether this proceeding to prevent waste was a bankruptcy proceeding. If it was not, this averment of judicial misconduct on the part of Judge English necessarily fails, but at any rate the court proceedings were wholly outside Judge English's district in another State. Judge English was especially appointed by Judge Alschuler, of Chicago, to sit and hear and determine the motion. Upon this petition heard in Indianapolis, Judge English presided. Judge Thomas appeared as attorney for one of the parties in interest. The cause was heard, an interlocutory decree was entered, and because Judge Thomas was at this time a referee in bankruptcy in another State Judge English is charged with having permitted Mr. Thomas to practice in bankruptcy courts in violation of the law.

THE SKYE CASE

Judge English is further charged with having vacated a sentence of imprisonment imposed upon one F. J. Skye, and merely for the reason, as disclosed by the evidence, that Thomas was Skye's attorney and received a fee of $2,500, an inference of corruption is drawn against Judge English. As disclosed by the testimony, the facts are as follows: Upon the trial of Skye, a fine of $500 was imposed by Judge English and a sentence of four months' jail imprisonment. Upon two former, separate occasions application was made to Judge English for the remission of the jail sentence, but because of insufficiency of proof the application was denied.

Upon the incident occasion upon the testimony of two reputable physicians, who made affidavit that Skye was suffering from pericarditis and that a jail sentence would endanger his life. The assistant district attorney brought the matter up, read the affidavits to Judge English and in view of the fact that the fine of $500 had been paid, Judge English remitted the jail sentence. There is not one word of testimony that in any way Judge English received any benefit, financial or otherwise, by reason of his order in this case, and the inference that he acted corruptly is wholly without foundation.

FINANCIAL OBLIGATIONS OF JUDGE ENGLISH TO THOMAS

Judge English is charged with having received from Charles B. Thomas the sum of $1,435, which sum was applied toward the purchase of an automobile by Judge English. The facts is this case, as disclosed by the evidence are that one of the sons of Judge English traded in an old automobile for a new one, promising to pay $1,435 difference. This amount was advanced by Mr. Thomas. It was afterwards repaid to Mr. Thomas by Judge English in full.

IN CONCLUSION

We wish to refer to the proposed article five of the impeachment charges. This purports to be an omnibus charge and includes all of the charges formerly preferred. The attempt is made by pleading to establish "a course of conduct" as the majority term it, showing tyranny and oppression and habitual official misbehavior.

This charge is wholly unsupported by the testimony. The evidence of the clerk of the district court, testifying from the records of the court, shows that during his service as judge in the eastern district of Illinois Judge English disposed of more than 3,000 criminal cases and about 3,500 civil cases. He was beyond question a busy judge. In addition he was called upon to hold court in other jurisdictions during this period, which occupied months of his time. We find from this record that in all of this enormous volume of litigation Judge English had controversies with but two lawyers, Thomas M. Webb and Charles A. Karch, and we submit that the conduct of these two attorneys was open to criticism and was of such a nature as to be subject of inquiry from the bench. Instead of establishing a course of tyrannical conduct, we submit that a fair mind can draw from this evidence only the conclusion that English was apt in the discharge of business and had

fewer difficulties with lawyers than the average judge, State or Federal. In this record no lawyer other than the two mentioned and one, Ely, a nonresident of the district, have complained of his conduct; and yet we are asked, in face of this substantive proof establishing a remarkable record of efficiency, to draw the conclusion that Judge English was tyrannical, oppressive, and corrupt.

As to bankruptcy matters it is evident from a consideration of the many duties that Judge English had to perform it was a physical and mental impossibility for him to superintend each bankruptcy case, nor did the law charge him ~~with~~ any such duty. But even in bankruptcy cases, cases handled by Mr. Thomas, amounting to some four or five hundred annually for a period of seven years, there is not the slightest evidence of any wrongful administration of a single estate, no person in interest in any of these hundreds of cases has complained in this record; and the affirmative evidence of the two examiners Zimmerman and Mountjoy which are set out in this record, completely exonerate Judge Thomas from any charge of wrongful conduct in connection with the administration of these estates.

Certainly if there had been any wrongful handling of these estates by any supposed bankruptcy ring, or otherwise, Judge Walter C. Lindley, who was appointed judge for this district in 1922, with authority concurrent with Judge English, would have interposed and would have been appealed to for relief.

Neither do we find any evidence on this record of any attorney or litigant outside his district, either in New York or elsewhere where Judge English held court, complaining of his conduct as a judge.

We will not discuss the law applicable to this case at any length, because upon the facts the impeachment can not be sustained and for the further reason that the law applicable to impeachment is well known and well settled and accessible in the third volume of Hind's Precedents.

We do, however, wish the House to consider the well-established principle that every defendant has thrown around him the presumption of innocence until his guilt is established beyond a reasonable doubt. And further, that if from a given state of facts there may be drawn two inferences, the one favorable and the other unfavorable, it is the duty of him who sits in judgment to adopt that inference favorable to the accused.

ANDREW J. HICKEY.
W. B. BOWLING.
ZEBULON WEAVER.

MINORITY VIEWS OF MR. RICHARD YATES

To my great regret I find myself unable to agree with my colleagues who constitute the majority of the Committee on the Judiciary in the case of George W. English, judge of the United States Court for the Eastern District of Illinois. It is sought to impeach this officer of high crimes and misdemeanors. It is well settled, as all must concede, that an official can not be impeached on general principles, or simply because it is charged he is unfit, or because of the accumulation of acts of misconduct, which do not themselves, individually and separately, constitute high crimes or misdemeanors. I have studied this record thoroughly, have read and reread every word of the testimony and of the briefs, and have listened attentively to the arguments of counsel and the opinions presented by the members of the committee. Upon the whole record I can not satisfy myself that this judge has been proven guilty of such acts as would justify the House of Representatives, in preparing articles of impeachment and in appointing managers upon the part of the House, to prosecute those articles before and in the Senate. Believing profoundly, as I do, that this extraordinary proceeding should be invoked only in cases of extreme gravity, and that it is a proceeding of such supreme solemnity that it ought not to be begun without proof, before this House, sufficient to command the attention and concurrence of the Senate. I propose to vote "No," and so can not vote for the majority committee report.

I say this without intending to cast any reflection upon the distinguished and industrious and conscientious subcommittee, and without any admiration for the mistakes of the judge.

RICHARD YATES.

MARCH 25, 1926.

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Calendar No. 75

111TH CONGRESS *1st Session* | HOUSE OF REPRESENTATIVES | REPORT 111–159

IMPEACHMENT OF JUDGE SAMUEL B. KENT

JUNE 17, 2009.—Referred to the House Calendar and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 520]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 520) impeaching Samuel B. Kent, judge of the United States District Court for the Southern District of Texas, for high crimes and misdemeanors, having considered the same, report favorably thereon without amendment and recommend that the resolution be agreed to.

I. THE RESOLUTION

H. RES. 520

Impeaching Samuel B. Kent, judge of the United States District Court for the Southern District of Texas, for high crimes and misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

JUNE 9, 2009

Mr. Conyers (for himself, Mr. Smith of Texas, Mr. Schiff, Mr. Goodlatte, Ms. Jackson Lee of Texas, Mr. Sensenbrenner, Mr. Delahunt, Mr. Daniel E. Lungren of California, Mr. Cohen, Mr. Forbes, Mr. Johnson of Georgia, Mr. Gohmert, Mr. Pierluisi, and Mr. Gonzalez) submitted the following resolution; which was referred to the Committee on the Judiciary

Resolved, That Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas, 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 Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

Incident to his position as a United States district court judge, Samuel B. Kent has engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge, as follows:

(1) Judge Kent is a United States District Judge in the Southern District of Texas. From 1990 to 2008, he was assigned to the Galveston Division of the Southern District, and his chambers and courtroom were located in the United States Post Office and Courthouse in Galveston, Texas.

(2) Cathy McBroom was an employee of the Office of the Clerk of Court for the Southern District of Texas, and served as a Deputy Clerk in the Galveston Division assigned to Judge Kent's courtroom.

(3) On one or more occasions between 2003 and 2007, Judge Kent sexually assaulted Cathy McBroom, by touching her private areas directly and through her clothing against her will and by attempting to cause her to engage in a sexual act with him.

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE II

Incident to his position as a United States district court judge, Samuel B. Kent has engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge, as follows:

(1) Judge Kent is a United States District Judge in the Southern District of Texas. From 1990 to 2008, he was assigned to the Galveston Division of the Southern District, and his chambers and courtroom were located in the United States Post Office and Courthouse in Galveston, Texas.

(2) Donna Wilkerson was an employee of the United States District Court for the Southern District of Texas.

(3) On one or more occasions between 2001 and 2007, Judge Kent sexually assaulted Donna Wilkerson, by touching her in her private areas against her will and by attempting to cause her to engage in a sexual act with him.

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE III

Samuel B. Kent corruptly obstructed, influenced, or impeded an official proceeding as follows:

(1) On or about May 21, 2007, Cathy McBroom filed a judicial misconduct complaint with the United States Court of Appeals for the Fifth Circuit. In response, the Fifth Circuit appointed a Special Investigative Committee (hereinafter in this article referred to as "the Committee") to investigate Cathy McBroom's complaint.

(2) On or about June 8, 2007, at Judge Kent's request and upon notice from the Committee, Judge Kent appeared before the Committee.

(3) As part of its investigation, the Committee sought to learn from Judge Kent and others whether he had engaged in unwanted sexual contact with Cathy McBroom and individuals other than Cathy McBroom.

(4) On or about June 8, 2007, Judge Kent made false statements to the Committee regarding his unwanted sexual contact with Donna Wilkerson as follows:

(A) Judge Kent falsely stated to the Committee that the extent of his unwanted sexual contact with Donna Wilkerson was one kiss, when in fact and as he knew he had engaged in repeated sexual contact with Donna Wilkerson without her permission.

(B) Judge Kent falsely stated to the Committee that when told by Donna Wilkerson his advances were unwelcome no further contact occurred, when in fact and as he knew, Judge Kent continued such advances even after she asked him to stop.

(5) Judge Kent was indicted and pled guilty and was sentenced to imprisonment for the felony of obstruction of justice in violation of section 1512(c)(2) of title 18, United States Code, on the basis of false statements made to the Committee. The sentencing judge described his conduct as "a stain on the justice system itself".

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

ARTICLE IV

Judge Samuel B. Kent made material false and misleading statements about the nature and extent of his non-consensual sexual contact with Cathy McBroom and Donna Wilkerson to agents of the Federal Bureau of Investigation on or about November 30, 2007, and to agents of the Federal Bureau of Investigation and representatives of the Department of Justice on or about August 11, 2008.

Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office.

II. INTRODUCTION

The Committee on the Judiciary, acting through and with the assistance of its duly appointed Impeachment Task Force, has conducted an inquiry into the conduct of Samuel B. Kent, United States District Judge for the Southern District of Texas. In par-

ticular, the Committee has considered whether Judge Kent committed sexual misconduct against two women—Cathy McBroom and Donna Wilkerson—who worked in the courthouse where he presided. The Committee also has considered whether Judge Kent made false statements to his fellow judges who were investigating allegations of sexual misconduct made by one of the two women, and whether he made further false statements to agents of the Federal Bureau of Investigation (FBI) on one occasion, and to FBI and Department of Justice personnel on another occasion.

After a careful study of the evidence, the Committee finds that Judge Kent did commit sexual misconduct against both Ms. McBroom and Ms. Wilkerson, conduct that included unwanted touchings and sexual assaults. The Committee also finds the Judge Kent made false statements to judges investigating this conduct, and made false statements to the FBI agents and Department of Justice prosecutors.

Judge Kent's conduct is wholly unacceptable for a Federal judge and has brought disrepute upon the Federal judiciary. These acts reflect Judge Kent's abuse of his Office and his betrayal of the trust bestowed upon him by the people of the United States. Indeed, Judge Kent, whose duty it was to uphold and enforce the laws, instead thwarted and undermined the laws. It was his duty to use his position to dispatch justice impartially, but he instead abused the power of his position.

As discussed below, Judge Kent has pled guilty to a felony, obstruction of justice, and has been convicted and sentenced to Federal prison. The Committee does not base its recommendation solely on the fact of the guilty plea and conviction, however. Rather, the Committee finds the facts underlying the guilty plea and the evidence regarding his sexual misconduct to overwhelmingly demonstrate that he is unfit to hold office. The Committee therefore recommends that Judge Samuel B. Kent be impeached by the House of Representatives and tried by the United States Senate.

III. A BRIEF DISCUSSION OF IMPEACHMENT

A. Pertinent Constitutional Provisions

The following are the pertinent provisions in the United States Constitution that relate to impeachment:

Article I, § 2, clause 5:

> The House of Representatives . . . shall have the sole Power of Impeachment.

Article I, § 3, clauses 6 and 7:

> 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.
>
> 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 In-

dictment, Trial, Judgment and Punishment, according to Law.

Article II, § 2, clause 1:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article II, § 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.

In this regard, it has long been recognized that Federal judges are "civil Officers" within the meaning of Article II, Section 4.[1] Finally, as to the life tenure of Federal judges, the Constitution provides:

Article III, § 1:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, ...

B. THE MEANING OF "HIGH CRIMES AND MISDEMEANORS"

Thirteen Federal judges have been impeached in our Nation's history. The precedents from these prior judicial impeachments as to the meaning of the phrase "high crimes and misdemeanors" is highly instructive. The Committee takes note of these precedents in informing its recommendations to the House.

The House Report accompanying the 1989 Resolution to Impeach United States District Judge Walter L. Nixon, Jr., 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 violation of the public trust, not necessarily indictable offenses under criminal laws. Of course, in some circumstances the conduct at issue, such as that of Judge Nixon, constituted

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[1] A commentator wrote in 1825:

> All executive and judicial officers, from the president downwards, from the judges of the supreme court to those of the most inferior tribunals, are included in this description.

W. Rawle, A View of the Constitution of the United States of America, Philip H. Nicklin ed., (1829), 213 (The Law Exchange reprint (2003)). Another prominent commentator, Joseph Story, wrote:

> All officers of the United States . . . who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.

2 Joseph Story, Commentaries on the Constitution of the United States § 790 at 258 (1833) (citing Rawle) (quoted in Statement of Professor Arthur D. Hellman, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009), at 17).

> conduct warranting both punishment under the criminal law and impeachment.[2]

That 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 questions 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.[3]

The Impeachment Report that accompanied the Resolution to Impeach United States District Judge Alcee L. Hastings 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."[4] That Report stressed that impeachment is "non-criminal," designed not to impose criminal penalties, but instead simply to remove the offender from office,[5] 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."[6]

IV. BACKGROUND OF INQUIRY INTO THE CONDUCT OF JUDGE KENT

A. Judge Samuel B. Kent

Samuel B. Kent was and remains a United States District Judge. He was appointed by President George H. W. Bush in 1990, and served nearly his entire judicial career in the Galveston Division of the Southern District of Texas. He was the sole judge in the Galveston courthouse, and wielded substantial power over the employees who worked there.

B. Facts Leading to Judge Kent's Conviction

On May 21, 2007, Cathy McBroom filed a judicial misconduct complaint with the United States Court of Appeals for the Fifth Circuit, alleging sexual misconduct on the part of Judge Samuel B. Kent. In particular, she alleged that he sexually assaulted her in March of that year. In response, the Judicial Council of the Fifth Circuit appointed a Special Investigative Committee to investigate Ms. McBroom's complaint.

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[2] H.R. Rep. No. 101–36, "Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87," 101st Cong., 1st Sess., (1989) [hereinafter "Nixon Impeachment Report"] at 5 (1989) (footnote omitted).

[3] Id. at 12.

[4] H.R. Rep. No. 100–810, "Impeachment of Alcee L. Hastings, Report of the Committee on the Judiciary to Accompany H. Res. 499," 100th Cong., 2d Sess. (1988), at 6.

[5] Id.

[6] Id. at 7. The last three impeachments—those of Judge Walter L. Nixon, Jr., Judge Alcee Hastings, and Judge Harry Claiborne—followed Federal criminal proceedings, and the impeachment articles were to a great extent patterned after the Federal criminal charges. Similarly, the grounds for the Committee's recommendation of impeachment of Judge Samuel B. Kent also involve conduct for which he was indicted (and, in connection with one Article, pled guilty). However, the principles that underpin the propriety of impeachment do not require that the conduct at issue be criminal in nature, or that there have been a criminal prosecution.

On June 8, 2007, Judge Kent, pursuant to his request, was interviewed by the Special Investigative Committee. The Special Investigative Committee sought to learn from Judge Kent whether he had engaged in unwanted sexual contact with Ms. McBroom or with others.

One person whose name came up in this interview was that of Donna Wilkerson, Judge Kent's secretary. As to Ms. Wilkerson, Judge Kent falsely stated that the extent of his non-consensual contact with her was one kiss, when in fact he had engaged in repeated non-consensual sexual contact with Ms. Wilkerson. He also stated to the Special Investigative Committee that once told by Ms. Wilkerson that his advances were unwelcome, no further contact occurred, when in fact he continued his non-consensual sexual contact with Ms. Wilkerson.

On September 28, 2007, in an order signed by Chief Judge Edith H. Jones, the Judicial Council for the Fifth Circuit suspended Judge Kent with pay for 4 months and transferred him to Houston.[7] The Order did not disclose the underlying findings of fact or conclusions of law by the Special Investigative Committee.

The Department of Justice commenced a criminal investigation relating to Judge Kent's conduct, and on August 28, 2008, a Federal grand jury returned a three-count indictment charging Judge Kent with two counts of abusive sexual contact, in violation of 18 U.S.C. § 2244(b), and one count of attempted aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1). The abusive sexual contact counts charged him with "intentional touching, both directly and through the clothing, of the groin, breast, inner thigh, and buttocks of [Ms. McBroom]." The attempted aggravated sexual abuse count charged him with attempting to force Ms. McBroom's head towards his penis.

After various pre-trial proceedings, the grand jury issued a superseding indictment on January 6, 2009.[8] That indictment re-alleged the three counts involving Ms. McBroom. It also added two counts relating to Ms. Wilkerson. Count four of the superseding indictment charged aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1), namely, that "[o]n one or more occasions between January 7, 2004 and at least January 2005, any one and all of which [would constitute the offense]," Judge Kent "did engage in [aggravated sexual abuse of Ms. Wilkerson] by a hand and finger by force. . . ." The superseding indictment also charged "abusive sexual contact" in count five, namely, that Judge Kent engaged in the "intentional touching, directly and through the clothing, of [specified parts of Ms. Wilkerson's body]."

Finally, the superseding indictment charged "obstruction of justice" in Count Six, stemming from Judge Kent's June 2007 lies to the Fifth Circuit concerning his conduct relating to Ms. Wilkerson.

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[7] Order of Reprimand and Reasons, In re: Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent under the Judicial Conduct and Disability Act of 1980, Docket No. 07-05-351-0086, Judicial Council of the Fifth Circuit, Sept. 28, 2007, *available at* http://www.ca5.uscourts.gov/news/news/Judicial%20Council%20Order.pdf.

[8] Superseding Indictment, United States v. Kent, Crim. No. 4:08CR0596-RV (U.S. Dist. Ct., S.D. Tex., Houston Div., Jan. 6, 2009).

C. ADDITIONAL FACTS RELATED TO JUDGE KENT'S CONDUCT DURING THE INVESTIGATION

At sentencing, the prosecutor represented that Judge Kent's obstruction conduct was not limited to the single set of false statements made to the Fifth Circuit. The prosecutor set forth three other incidents of obstructive conduct or false denials.

First, at some point Judge Kent told Ms. Wilkerson that he had falsely denied his repeated attacks on her—and by so doing, according to the prosecutors, "sent a clear and unambiguous statement that she must repeat that lie too. . . . She, in fact, drew from his statements that she was supposed to testify falsely before the grand jury, as well."[9]

In addition, the prosecutor described two other occasions where Judge Kent made false statements in the course of the investigation:

> [O]n two separate occasions, the defendant asked for and was granted a meeting with, first, the Federal Bureau of Investigation, law enforcement agents. And that was in December 2007. . . . He reached out to the FBI and asked to sit down with them.
>
> During the voluntary interview, he was interviewed regarding his conduct, and he repeated the same false statements that he later told to the Special Investigative Committee, both about [Ms. McBroom] and about [Ms. Wilkerson].
>
> Then, [prior to the initial indictment in August 2008], defendant through his attorney asked for a meeting at Main Justice Headquarters, and there in the Assistant Attorney General's conference room, he sat down with his attorney and met with, among others, the trial team, the FBI agents, the [C]hief of the Public Integrity Section and the Acting Assistant Attorney General. And during the interview portion of that meeting, he again repeated the same lies.
>
> He said that he had been honest with the FBI in December 2007. He said that any attempt to characterize the conduct between him and [Ms. McBroom] as nonconsensual was absolutely nonsense. And that's in stark contrast, Your Honor, to the factual basis for his plea during which he admitted engaging in repeated nonconsensual sexual contact with [Ms. McBroom] without her permission.
>
> Then as to [Ms. Wilkerson], the defendant falsely stated that he had kissed her on two separate occasions when, in fact, it was over a much longer period of time and it was much more serious conduct. Again, as the defendant admitted in his factual basis.
>
> * * *
>
> [H]is false statements both to the FBI and to the DOJ trial team and his implication that [Ms. Wilkerson] should

[9] Transcript of Sentencing, United States v. Kent, CIM. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tex., Houston Div.), May 11, 2009 [hereinafter "Transcript of Sentencing"], at 5.

testify falsely before the grand jury did significantly obstruct and impede the official investigation.[10]

D. THE PLEA PROCEEDING

On February 23, 2009, Judge Kent pleaded guilty to Count Six of the superseding indictment, obstruction of justice, pursuant to a plea agreement. As part of the plea agreement, the Government agreed to dismiss the remaining five counts at sentencing. In addition, the Government promised that it would not seek a sentence in excess of 36 months incarceration.

In connection with the plea, the defendant signed a "Factual Basis for Plea" that was filed with the court and set forth the conduct that constituted the offense. That factual statement represented, among other facts:

> 4. In August 2003 and March 2007, the defendant engaged in non-consensual sexual contact with [Ms. McBroom] without her permission.
> 5. From 2004 through at least 2005, the defendant engaged in non-consensual sexual contact with [Ms. Wilkerson] without her permission.
>
> * * *
>
> 10. [On June 8, 2007], [t]he defendant falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the [Fifth Circuit Special Investigative] Committee that the extent of his non-consensual contact with [Ms. Wilkerson] was one kiss, when in fact and as he knew the defendant had engaged in repeated non-consensual sexual contact with [Ms. Wilkerson] without her permission.
> 11. The defendant also falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the Committee that when told by [Ms. Wilkerson] that his advances were unwelcome, no further contact occurred, when in fact and as he knew the defendant continued his non-consensual contacts even after she asked him to stop.[11]

At the plea proceeding, Judge C. Roger Vinson placed Judge Kent under oath, and inquired of him as to whether the representations in the "Factual Basis for Plea" were accurate:

> THE COURT [JUDGE VINSON]: I have a factual basis that has been filed in this case, which has three numbered pages and appears to have been signed by you and your attorney Mr. DeGuerin and Mr. Ainsworth on behalf of the Public Integrity Section of the Department of Justice. That is your signature on this agreement?
>
> THE DEFENDANT [JUDGE KENT]: Yes,
>
> THE COURT: And have you carefully read and gone over this factual basis for the plea with Mr. DeGuerin?
>
> THE DEFENDANT: Yes, sir.

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[10] Id. at 5–8.

[11] "Factual Basis for Plea," United States v. Kent, Crim. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tex., Houston Div., [Feb. 23, 2009]) [hereinafter "Factual Basis for Plea"], at 2–3.

THE COURT: Are those facts true and correct?
THE DEFENDANT: Yes, sir.[12]

Thereafter, Judge Vinson questioned Judge Kent as to his understanding of the rights Judge Kent would be giving up by pleading guilty, Judge Kent's understanding of the terms of the plea agreement, and Judge Kent's mental competence to enter the plea. Judge Kent then pleaded guilty to Count Six of the Superseding Indictment:

> THE COURT: I find that the facts which the government is prepared to prove with evidence at trial and which are set out in the factual basis for this plea and which you have admitted under oath are true [and] are sufficient to sustain a plea of guilty to Count 6 of the superseding indictment.
>
> I find that you're fully aware of the possible sentence or punishment that may be imposed under the law for this offense and you're aware of the operation and effect of the sentencing guidelines and how those guidelines may possibly affect your sentence.
>
> And, most importantly, I find that you have made your decision to plead guilty to this charge freely and knowingly and voluntarily and you have made that decision with the advice of counsel, an attorney with whom you've indicated your full satisfaction.
>
> So, let me ask you now, Mr. Kent: How do you plead to Count 6 of the superseding indictment?
>
> THE DEFENDANT: Guilty.[13]

Sentencing was set for May 11, 2009.

E. The Sentencing

The May 11 sentencing proceeding commenced with a lengthy colloquy concerning the calculation of the Federal sentencing guidelines. Thereafter, the two victims each addressed the court.

First, Ms. McBroom spoke. She stated, in part:

> When I think of the events leading up to his conviction, I'm consumed with emotion. Even though I have been able to move on in both my personal life and my career, I will forever be scarred by what happened to me in Galveston.
>
> * * *
>
> The abuse began after Judge Kent returned to work intoxicated. He attacked me in a small room that was not 10 feet from the command center where the court security officers worked. He tried to undress me and force himself upon me while I begged him to stop. He told me he didn't care if the officers could hear him because he knew everyone was afraid of him. I later found out just how true that was. He had the power to end careers and affect everyone's livelihood. That incident left me emotionally wrecked and

[12] Transcript of Plea Hearing, United States v. Kent, Crim. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tex., Houston Div.), Feb. 23, 2009 at 12.
[13] Id. at 17–18.

humiliated. It was so difficult to face my coworkers when I knew they had seen what happened to me.

* * *

[E]ach time an assault occurred, he would later promise to leave me alone and behave professionally, and I so wanted to believe that.

What I didn't know was that behind the scenes he was telling a much different story. Now that the truth has been exposed, I know so much more about his evil and deliberate manipulation, and I'm utterly disgusted. He was telling his staff members that I was the one pursuing him. He even told his secretary that I would do anything to have her job. . . . After the criminal investigation began, he even bragged about his gift of manipulation, which he thought would save him from conviction. People were asking him to just resign, and he would tell them if he had just 15 minutes with a jury, he would be exonerated.

There were times that other employees warned me that judge was intoxicated, and that he was asking for me. And during those times, I would refuse to answer my phone or I would hide in an empty office.

* * *

The last assault I had was more terrifying and threatening than ever before. After forcing himself upon me and asking me to do unspeakable things, he told me that pleasuring him was something I owed him. That was it for me. He had finally won. He had broken me and forced me out. I could handle no more of his abuse.

Keep in mind that I had already reported his behavior to my manager. She knew about the assaults from the very beginning. . . . She was also very afraid of him. She had experienced his inappropriate behavior herself.

* * *

Even though my children have been supportive and mature from the beginning, I cringe when I think of how they must have felt when they read in the paper Judge Kent's claims that their mother was enthusiastically consensual. . . .

This judge has hurt so many people in so many ways. Every employee in Galveston has been afraid of his power and control. . . .[14]

Ms. Wilkerson spoke next:

For the last 7 years, I was sexually and psychologically abused and manipulated. Sexual abuse began on the fifth day, the fifth day of my career working with Sam Kent. I knew Sam Kent better than anyone and sadly no one really knows Sam Kent or the truth of his life and how he has conducted himself. . . .

[14] Transcript of Sentencing, United States v. Kent, Crim. No. 4:08CR0596–RV (U.S. Dist. Ct., S.D. Tx., Houston Div.), May 11, 2009 [hereinafter "Sentencing Transcript"] at 48–51.

> I would like to tell you about the real Sam Kent. Sam Kent has spent his life manipulating people and abusing his relationships with people. Certainly this has been my experience the time I have known him. He has also spent this time lying to everyone. He will never acknowledge what he has done to the people around him. He continues to try to manipulate the system and make excuses for his aberrant behavior. Some of his lies have now been uncovered by his own admission, yet because of his narcissism and inability to admit fault and accept fault, except in an instant—or an instance such as today when he thinks it will gain him some mercy, or the day he pled guilty, he turns to even more lies by publishing ridiculous statements in the newspaper and blaming everyone and everything but himself.
>
> * * *
>
> He continues his manipulative behavior in seeking a mental disability when just 2 years ago he fought hard to make his accusers and the investigators know that he was fully capable of keeping his bench.[15]

Thereafter, Judge Kent's attorney addressed the court. He requested that Judge Kent be sentenced to a medical facility, and that the court order drug and alcohol counseling. He further noted that "although [Judge Kent] says that he is not an alcoholic, [he] is an alcoholic."[16]

Then Judge Kent addressed the court on his own behalf. He said he was a "completely broken man, but in some ways a better person. . . ."[17] He apologized to his staff—though he did not mention the two women directly—and to "my wife and family and to my marriage, all of whom and which I have likely irretrievably lost."[18] He apologized "to all who seek redress in the Federal system for tarnishing its image and because never again can I vouchsafe their interest[.]"[19] He continued:

> I have had the benefit of 26 months of absolute sobriety, a wonderful pretrial officer, a sensitive and thoughtful presentencing officer, terrific attorneys and excellent medical help. Through their assistance, I have come to see what a flawed, selfish, thoughtless and indulgent person I have been, and I have already begun to try and put myself right and emerge from this a better person.[20]

The prosecutor spoke and after summarizing Judge Kent's conduct requested a 36-month sentence, consistent with the plea agreement.

Finally, Judge Vinson imposed the sentence:

> The consequence to you of your wrongful conduct is not only the loss of a job which many feel is the best job in

[15] Id. at 52–54. Judge Kent sought to retire on a medical disability. On May 27, 2009, Chief Judge Edith H. Jones of the Fifth Circuit denied this request.
[16] Id. at 58.
[17] Id. at 59.
[18] Id. at 59.
[19] Id. at 59–60.
[20] Id. at 60.

> the world, but also punishment under the law. And as you well know, the law is no respecter of persons, and everyone stands equal in this Court. And former judges are no exception.
>
> Your wrongful conduct is a huge black X on your own record. It's a smear on the legal profession, and, of course, it's a stain on the justice system itself. And, importantly, it is a matter of grave concern within the Federal courts.[21]

Judge Vinson thereafter imposed upon Judge Kent a sentence of 33 months incarceration to be followed by 3 years of supervised release, a $1,000 fine, and restitution to Ms. McBroom of $3,300 and to Ms. Wilkerson of $3,250. Judge Kent was permitted to remain on release and required to surrender voluntarily to the prison designated by the Bureau of Prisons no later than 12:00 noon on June 15, 2009.

V. COMMITTEE ACTIONS

A. Establishment of the Impeachment Task Force

On May 12, 2009, one day after Judge Kent's sentencing for obstruction of justice, the House passed House Resolution 424, providing that "the Committee on the Judiciary shall inquire whether the House should impeach Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas." The next day, May 13, 2009, the Committee passed a resolution amending its January 22, 2009 resolution (which had established a Task Force to inquire into whether a different Federal judge should be impeached) to provide that the Task Force was to additionally conduct "an inquiry into whether United States District Judge Samuel B. Kent should be impeached."

B. Task Force Hearing of June 3, 2009

The Task Force held an evidentiary hearing on its inquiry into whether Judge Kent should be impeached on June 3, 2009. Testimony was received from Alan Baron, Esq., the lead Task Force attorney, Ms. Cathy McBroom, Ms. Donna Wilkerson, and Professor Arthur Hellman, University of Pittsburgh School of Law. Judge Kent was also invited to appear and testify before the Task Force. However, both Judge Kent and his lawyer declined to appear.

1. Statement of Alan Baron

Alan Baron, Esq., the lead Task Force attorney, provided an overview of the investigation. As part of his statement to the Task Force, he identified and introduced into the record the following documents:

1) The original Indictment dated August 28, 2008, and the Superseding Indicment dated January 6, 2009;
2) The transcript of the February 23, 2009 Plea Proceeding;
3) The February 23, 2009 "Factual Basis for Plea;"
4) The transcript of the May 11, 2009 Sentencing Proceeding;

[21] Id. at 70.

5) The Court's Judgment (setting out Judge Kent's sentence), signed by Senior United States District Judge Roger Vinson, May 11, 2009;
6) The May 27, 2009 letter from Chief Judge Edith H. Jones to Judge Kent c/o his attorney denying Judge Kent's disability claim;
7) The June 1, 2009 letter from Judge Kent to the Task Force declining its invitation for him to testify;
8) The June 2, 2009 letter of Judge Kent to President Obama purporting to resign effective June 1, 2010.

One issue in particular that Mr. Baron highlighted was the fact that the prosecutor at Judge Kent's sentencing proceeding represented to the Court that Judge Kent had made false statements to law enforcement in connection with the Federal investigation.

In addition, Mr. Baron informed the Task Force that Judge Kent and his attorneys had been provided the opportunity to make submissions to the Task Force or to appear before it. The invitation to appear personally had been declined.

2. Testimony of Cathy McBroom

Ms. McBroom submitted a lengthy written statement which she adopted under oath as truthful.

In her written statement she described the following encounters in specific:

> [I]n August 2003, I encountered my first incident of sexual assault by Judge Kent after he returned from a long lunch, obviously intoxicated. After going to his chambers to check my outbox, he greeted me in the hallway next to the command center on the 6th floor. Several court security officers were in the command center at the time. Judge Kent asked me to show him the workout room, which was about ten feet from the command center. The security officers had set up some weight equipment and used the room as a make-shift gym. Judge Kent's speech was slurred, so I suspected he was drunk, but felt I should respect his request. Once inside the small room, he grabbed me and forced his tongue into my mouth while trying to remove my clothing. He had one arm around my waist and was using the other hand to pull up my blouse and my bra, exposing my entire breast. He also tried to force his hand down my skirt. All the while, I tried to push him away, begging him to stop. I tried to reason with him by telling him his actions were inappropriate, but I became more and more panicked, because he was not letting up. The door was partially cracked open and I knew the guards must have heard the struggle. I told Judge Kent that the guards were right outside and could hear him, but he laughed and said that he didn't care who heard him, or what they thought. Finally, I threatened to scream. He stopped abruptly, looked down at me with disgust, and left the room. I sat down on the bench and cried for several min-

utes before I was able to collect myself enough to leave the room.[22]

She described another encounter as follows:

> Once a security guard had warned me of Judge Kent's drunken condition, and when I refused to answer his calls, he came down to the 4th floor, into my office, and sat in the chair in front of me. He started telling me jokes and was being very loud and obnoxious. Suddenly he stood up and started around my desk. I stood up and backed up as far as I could, but he pinned me between my desk and credenza, and started kissing me, while grabbing my backside and breasts. While trying to fight him off, I caught a glimpse of someone in my doorway, but couldn't tell who it was. The person left immediately without a sound. Again, after struggling with me for a few minutes, Judge Kent gave up and left. I felt humiliated, scared, and shaken. A coworker came in sometime later and noticed that I had perspiration stains on my blue silk blouse, and that I looked disheveled. When she asked what was wrong, I confessed to her that Judge Kent had tried to force himself on me.[23]

She described the March 2007 encounter that resulted in her filing a formal complaint as follows:

> The last and final sexual assault occurred on March 23, 2007. I was summoned to chambers to discuss an internal administrative action that had occurred in the clerk's office. After a brief discussion, he got up and asked me for a hug. I told him that I would rather not, but he indicated that he thought I owed him that much. I finally agreed, but when I reached up to give the hug, he grabbed my butt. I tried to pull away and told him that I didn't consider that a hug. Judge Kent asked if he could have just 5 minutes with me, pulled up my sweater and my bra all at once, and quickly got his mouth on my breast. I told him to stop and tried to push him away. His bulldog started getting excited and barking when he saw the struggle. I dropped some paperwork that I had taken to chambers and the dog started stepping on the papers, which momentarily distracted the Judge. When I tried to leave, he grabbed me again and reminded me that I owed this to him. He tried to push my head towards his crotch and told me to "[commit oral sex]." I resisted and he grabbed my hand and forced me to rub his crotch. Suddenly he heard someone enter the outer reception area and he became irritated. He went to investigate and I was able to break free. As I was leaving his office he said "you know, Cathy, I keep you around because you are a great case manager and do great work. That doesn't change the fact that I want to spend about 6 hours [performing oral sex on you]." I just turned and left the office. By the time I reached the

[22] Statement of Cathy McBroom, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009) [hereinafter "McBroom Statement"], at 1.

[23] Id. at 2.

> elevators, I was in tears. A court security officer asked me if the judge had tried to hit on me and I just shook my head "yes."[24]

She generally described Judge Kent's efforts to gain access to her alone, sexual references that he made when speaking to her, and her efforts to avoid him. She also described the power that Judge Kent had and exercised as the only Judge in the Galveston Federal courthouse.

3. Testimony of Donna Wilkerson

Ms. Wilkerson submitted a lengthy written statement which she adopted under oath as truthful. Ms. Wilkerson described generally Judge Kent's conduct towards her as follows:

> His sexual abuse and misconduct with me began on the fifth day of my job. I had worked the first week at my job with Judge Kent's secretary of 20 years. She was retiring. On Friday of that first week, a retirement luncheon was given for her at a local restaurant. I was invited to and attended the luncheon, which lasted approximately 2–3 hours where food and alcohol were served. Mr. Kent, with others, became intoxicated, being loud and obnoxious. During the party, pictures were taken of several groups, including Sam Kent with his wife, former law clerks, attorneys and his retiring secretary. During the taking of those photos Judge Kent joked and laughed and grabbed his wife's breasts and buttocks in front of the room full of people. After the party, everyone left except the few courthouse staff and Judge Kent, who returned to the courthouse. Once there, while his retiring secretary and others were in the reception area of his chambers, he called me into his office and shut the door. He sat behind his desk and I sat in a chair in front of his desk. He told me that he was very excited to have me coming on board to take Ms. Henry's place, that he thought I would be an asset to him and the operations of the court, and that he thought I was intelligent and pretty, and other random compliments. As he got up, appearing to be showing me out of his office, I was walking in front of him to the door. He reached for the door as if to open it for me, but put one of his hands on the door and the other one on the other side, putting me between the door and him. He leaned in and placed a kiss on my mouth. After that, he told me how beautiful he thought I was and that, again, he was glad I was there. I did not know what to do, but in my shock, I did nothing but exit the room, thinking, "what in the world was that and how am I supposed to handle this?" From that point forward, the abuse became more frequent and more severe. The number of these incidents, from minor to the most severe, can be averaged at 1–2 times per month over a year's time, for a period of approximately 5–5½ years, from 2001–2007. However, there were periods of time during these years that the incidents did not occur as frequently as 1–2 times per month because he had periods

[24] Id. at 3.

of weeks and months of not drinking, as well as several periods of extended time that he was out of the office. These episodes were routinely followed by Judge Kent's returning from long lunches wherein he was intoxicated. I have explained in the past that the severity of the sexual abuse can be described using a Bell Curve as an example—starting with the most minor of incidents of hugs and kisses, then escalating to worse incidents of touching me inappropriately, groping me outside my clothes, then inside my clothes (top and bottom), then attempting to and gaining penetration of my genitals with his hand, placing my hand on his crotch, and then topping the curve at the most severe episode of once, and possibly twice, pulling down my pants and performing oral sex on me. These episodes always occurred inside of his chambers—sometimes in his office, and sometimes in the reception area or wherever in chambers he could corner me. Preceding the incidents, he would always begin speaking in a vulgar and inappropriate way to me and telling me graphically what he wanted to do to me. Statements of "you have the cutest [breasts]," "let me see those cute [breasts]," "you have the cutest ass," "I want to [commit oral sex on you]," and "why don't you [commit oral sex on me]" were common to the more severe episodes. During these episodes, I repeatedly told him "no," "stop," "stop acting like a pig," "quit," "cut this out," "you/we can't be doing this," "I don't want to do that/this," "behave yourself," and so on and so on. There were times when he would approach me from behind while I was sitting at my desk and working at my computer. He would quickly come up behind me and put his hands over my shoulders and grope me on the outside of my clothes and down my shirt and into my bra.

* * *

During the most severe episode, he pinned me to a chair in his office after pulling my pants and underwear down.[25]

She also elaborated on Judge Kent's views of his own power:

During my interview for this job and several times subsequent to my being hired, Sam Kent told me that he was the sole person responsible for his personal staff's hiring and firing (his personal staff consisted of me and his two law clerks). He also told me that he was the Government—"I am the Government"; "I'm the Lion King—it's good to be king," "I'm the Emperor of Galveston," and "the man wearing the horned hat, guiding the ship." He warned me of three things which he said would not be tolerated and would be grounds for my/our immediate dismissal: disloyalty to him, "talking out of school," and by engaging in

[25] Statement of Donna Wilkerson, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009) [hereinafter "Wilkerson Statement"], at 1–3.

behavior which would be an embarrassment to the Court.[26]

Ms. Wilkerson claimed that she was afraid of speaking out and losing her job, and thus had not been forthright with investigators and law enforcement when initially questioned about Judge Kent's conduct towards her. It was not until her third grand jury appearance that Ms. Wilkerson described the full extent of Judge Kent's non-consensual sexual contact with her.

4. Testimony of Professor Arthur Hellman

Professor Hellman provided expert testimony that, in essence, concluded that Judge Kent's conduct in making false statements to fellow judges (and thereby obstructing justice), as well as abusing his power as a Federal judge to sexually assault women, constituted independent grounds to justify his impeachment and removal from office.

First, Professor Hellman reviewed the history of the phrase "high crimes and misdemeanors" including the views of the Framers, the accepted body of scholarly interpretation, and the House impeachment precedents. He concluded that this phrase generally described acts that constituted an abuse of power, or otherwise generally rendered the judge unfit to hold office—including a judge's exercise of "arbitrary power."[27] As but one example, Professor Hellman cited from an influential 19th-century treatise in making that point:

> [William] Rawle then explains why the availability of impeachment is particularly valuable as a means of dealing with misconduct by members of the judiciary:
>
> > We may perceive in this scheme one useful mode of *removing from office him who is unworthy to fill it*, in cases where the people, and sometimes the president himself would be unable to accomplish that object. A commission granted during good behaviour can only be revoked by this mode of proceeding.
>
> The premise, then, is that the purpose of impeachment is to remove from office "him who is unworthy to fill it." It follows, I think, that it is a sufficient ground for impeachment of a civil officer—particularly an Article III judge—that he has engaged in behavior that makes him "unworthy to fill" that particular office.[28]

Professor Hellman concluded that, as a legal matter, there were "two broad (and overlapping) categories of conduct that may justify impeachment. The first is serious abuse of power. The second is conduct that demonstrates that an official is 'unworthy to fill' the office that he holds."[29]

Professor Hellman likewise concluded that the facts in the record rose to the level necessary to warrant Judge Kent's impeachment. As to Judge Kent's false statements to the Fifth Circuit (the basis

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[26] Id. at 1.

[27] See Statement of Professor Arthur D. Hellman, Hearing on the Possible Impeachment of Samuel B. Kent of the Southern District of Texas, House Committee on the Judiciary Impeachment Task Force (June 3, 2009), at 13–20 ("abuse of power" discussed at 18–19; "arbitrary power" at 18).

[28] Id. at 19 (emphasis supplied by Hellman) (quoting William Rawle, A View of the Constitution of the United States of America, (2d ed. 1829), at 218 (1970 reprint)).

[29] Id. at 21–22.

of his criminal conviction), Judge Hellman noted: "False testimony by a Federal judge in a judicial misconduct proceeding falls easily within the realm of 'high crimes and misdemeanors' that warrant impeachment."[30]

As to Judge Kent's sexual misconduct towards Ms. McBroom and Ms. Wilkerson, Professor Hellman stated that if the evidence showed that Judge Kent abused his position in committing the acts and otherwise exhibited conduct that demonstrated his unfitness for office, then impeachment would be warranted on the basis of his sexual misconduct. As Professor Hellman stated:

> If [Ms. McBroom and Ms. Wilkerson] describe their experiences in the way they did at the sentencing hearing, and if the House credits their testimony, the record will make a strong case for serious abuse of power that does warrant Judge Kent's impeachment.
>
> * * *
>
> The evidence would then point to the conclusion that Judge Kent relied on his position of authority and control in the Galveston Division of the District Court to coerce employees of that court to engage in sexual acts for his personal gratification—and to remain silent rather than to report his attacks to a higher authority. Such behavior is, in Wooddeson's words, "official oppression" that "introduce[s] arbitrary power." It is a high crime and misdemeanor.[31]

Professor Hellman provided the following analogy to support his conclusion why the sexual misconduct would support impeachment:

> If Judge Kent had demanded that court employees give him 10 percent of their salaries as a condition of holding their jobs, no one would doubt that he committed an impeachable offense. The sexual coercion described at the sentencing hearing is no less "obnoxious," and the result should be the same.[32]

5. Judge Kent's Letter

In his letter of June 1, 2009, Judge Kent stated, in pertinent part:

> For several years, influenced by misguided emotions that probably stemmed from innate personality flaws exacerbated by alcohol abuse and a series of life tragedies (most notably the emotional horror I endured for years in connection with my first wife, Mary Ann's slow, excruciating death from brain cancer), I began relating to Mrs. McBroom and Mrs. Wilkerson in inappropriate ways. . . . In doing so, I allowed myself to maintain unrealistic views of how they perceived me and my actions. I sincerely re-

[30] Id. at 26.

[31] Id. at 28–29 (citation omitted). Richard Wooddeson—the individual quoted by Professor Hellman—was an English historian of the late 18th century, a contemporary of the Framers. Professor Hellman, in his Task Force Statement, described Wooddeson's writings as having been relied on by the Supreme Court in other contexts associated with Constitutional interpretation.

[32] Id. at 31 (internal footnote omitted).

gret that my actions caused them and their families so much emotional distress.[33]

C. FACTUAL DEVELOPMENTS SUBSEQUENT TO THE HEARING

1. Obtaining Information Regarding Judge Kent's False Statements to Law Enforcement

Alan Baron, Esq., has interviewed the FBI agent who was in attendance when Judge Kent was interviewed by the FBI on November 30, 2007, and when Judge Kent made statements to the FBI and Department of Justice in a meeting of August 11, 2008, where he attempted to persuade the Department not to seek an indictment of him. In both instances, his testimony was inconsistent with that of Ms. McBroom and Ms. Wilkerson, and misrepresented the nature and duration of his non-consensual sexual contact with both women. Mr. Baron provided a copy of his memorandum describing those interviews to the Task Force.[34]

2. Prior Statements of Donna Wilkerson

As noted in the discussion of her testimony, Ms. Wilkerson acknowledged that she was not fully forthright with law enforcement when first questioned about Judge Kent's conduct towards her. She provided some explanation for this, describing generally that Judge Kent told her what his story was (namely, a few kisses that stopped when she told him they were unwelcome) as a signal for how she should testify, and otherwise manipulated her by suggesting, prior to her first grand jury appearance, that her appearance might provoke him to commit suicide.[35]

The prosecutors at sentencing specifically referenced that Ms. Wilkerson had not been truthful in her initial grand jury appearances—a fact they attributed to Judge Kent's attempts to influence her testimony. In the context of a discussion of the applicability of the "obstruction" enhancement under the Sentencing Guidelines, the prosecutor stated:

> The defendant in telling [Ms. Wilkerson] that he had—he himself had falsely denied his repeated attacks on her, he was sending a clear and unambiguous statement that she must repeat that lie too. . . . She, in fact, drew from his statements that she was supposed to testify falsely before the grand jury, as well.[36]

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[33] Letter from Judge Samuel B. Kent to Task Force Members, Re: Statement of Judge Samuel B. Kent, Provided to The Task Force to Consider the Possible Impeachment of Judge Samuel B. Kent (June 1, 2009), at 1. He also represented he had no pension or retirement and needed health insurance for his medical and mental health problems. Id. at 2.

[34] The Task Force also obtained the FBI "302" statements of interviews from the two dates on which Judge Kent met with the FBI and Department of Justice and which detail his effort to mislead investigators during those meetings.

[35] Ms. Wilkerson testified:

> Before my first grand jury appearance after he returned from administrative leave—20 minutes before my scheduled appearance—he came to my desk and told me, "If anyone from Dr. Hirschfield's office [his psychiatrist] calls, please put them through right away—you know they have me on suicide watch again, right?" He even instructed his law clerk, Carey Worrell, in my presence, to research his life insurance policy to make sure that it did not contain "suicide exclusion" so that if he killed himself, his wife would still be paid the benefits. On another occasion before my last grand jury appearance, he told Ms. Worrell that if I "rolled" on him, it would be all he could take and he would kill himself.

Wilkerson Statement at 7.

[36] Sentencing Transcript at 5.

Similarly:

> [I] need to point out also that [Ms. Wilkerson] also denied that involvement continuously until the third time she appeared before the grand jury.[37]

Subsequent to the hearing, the Task Force obtained and reviewed the prior grand jury testimony of Ms. Wilkerson.

D. TASK FORCE MEETING AND INTRODUCTION OF RESOLUTION

On June 9, 2009, the Task Force met and approved a proposed resolution containing four articles of impeachment for recommendation to the Committee. Also at this meeting, four additional documents were submitted into the record. They were:

1) The Judgment of Conviction of Judge Kent;[38]
2) Memorandum of Interview signed by Alan Baron, Special Impeachment Counsel to the Task Force, summarizing an interview with FBI Special Agent David Baker;
3) Memorandum of Interview signed by Kirsten Konar, Esq., counsel assisting the Task Force, summarizing an interview with Ms. Donna Wilkerson;
4) Medical and mental health records of Judge Kent submitted by Ms. Jackson Lee

Later that day, H. Res 520 was introduced by Chairman John Conyers, Jr., along with Ranking Member Lamar Smith, Task Force Chairman Adam Schiff, Task Force Ranking Member Bob Goodlatte, and every other member of the Task Force. The resolution was referred to the Committee.

E. JUDICIAL CONFERENCE CERTIFICATE TRANSMITTED TO HOUSE

By way of a letter dated June 9, 2009, the Judicial Conference of the United States transmitted to Speaker of the House Nancy Pelosi a certificate setting forth its "determination that consideration of impeachment of United States District Judge Samuel B. Kent, of the Southern District of Texas, may be warranted."[39] The Judicial Conference noted, as a basis for its determination:

> In sum, Judge Kent has stipulated, as the basis for his plea of guilty, that
>
> (a) in August 2003 and March 2007, he engaged in non-consensual sexual contact with a person ([Ms. McBroom]) without her permission;
>
> (b) from 2004 through at least 2005, he engaged in non-consensual sexual contact with a person ([Ms. Wilkerson]) without her permission; and
>
> (c) in connection with a judicial misconduct complaint against him, he testified falsely before a Fifth Circuit special investigative committee regarding his unwanted, non-consensual sexual contact with [Ms. Wilkerson], by understating the extent of that contact

[37] Id. at 10.
[38] That document was also made part of the record at the Task Force Hearing of June 3, 2009.
[39] A copy of the transmittal letter and Certificate is attached to this Report.

and by falsely stating that it had ended after [Ms. Wilkerson] told him it was unwelcome.[40]

F. FULL COMMITTEE MARKUP ON JUNE 10, 2009

On June 10, 2009, the Committee on the Judiciary voted to consider the four Articles of Impeachment set forth in House Resolution 520. In connection with that Markup, two additional documents were identified and made part of the record:

1) Letter from Judge Kent's attorney, Dick DeGuerin to the Committee on the Judiciary (June 9, 2009);
2) "Certificate To The Speaker, United States House of Representatives [regarding District Court Judge Samuel B. Kent]," from the Judicial Conference, dated June 9, 2009.

VI. DISCUSSION OF THE ARTICLES OF IMPEACHMENT

Article I charges that Judge Kent "engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge." In particular, Article I charges that "[o]n one or more occasions between 2003 and 2007, Judge Kent sexually assaulted Cathy McBroom, by touching her private areas directly and through her clothing against her will and by attempting to cause her to engage in a sexual act with him." Ms. McBroom testified to facts consistent with this Article, and Judge Kent, in his signed "Factual Basis for Plea," admitted: "In August 2003 and March 2007, the defendant engaged in non-consensual sexual contact with [Ms. McBroom] without her permission."[41] The Article thus provides: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

Article II charges that Judge Kent "engaged in conduct with respect to employees associated with the court that is incompatible with the trust and confidence placed in him as a judge," in particular, that "[o]n one or more occasions between 2001 and 2007, Judge Kent sexually assaulted Donna Wilkerson, by touching her in her private areas against her will and by attempting to cause her to engage in a sexual act with him." Ms. Wilkerson testified to facts consistent with this Article, and Judge Kent, in his signed "Factual Basis for Plea," admitted: "From 2004 through at least 2005, the defendant engaged in non-consensual sexual contact with [Ms. Wilkerson] without her permission."[42] The "Factual Basis" also sets forth Judge Kent's admissions that he "had engaged in repeated non-consensual sexual contact with [Ms. Wilkerson] without her permission[,]" and that he "continued his non-consensual contacts even after she asked him to stop."[43] The Article thus con-

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[40] Factual Basis for Plea at 2. 28 U.S.C. §§ 351 et seq sets forth the procedures for the judicial branch to refer concerns regarding judges that might warrant impeachment to the House of Representatives. 28 U.S.C. § 355(b)(1) provides:

> **In general.**—If the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the Hosue of Representatives considers to be necessary.

[41] Factual Basis for Plea at 2–3.

[42] Id.

[43] Id.

cludes: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

Article III charges that on June 8, 2007, when Judge Kent appeared before the Special Investigative Committee appointed by the Fifth Circuit to investigate Ms. McBroom's complaint, he made false statements concerning his non-consensual sexual contacts with Ms. Wilkerson. Judge Kent has admitted this during the February 2009 plea proceeding, and specifically admitted in the "Factual Basis" the substance of the false statements, as follows:

> 10. [On June 8, 2007], [t]he defendant falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the [Fifth Circuit Special Investigative] Committee that the extent of his non-consensual contact with [Ms. Wilkerson] was one kiss, when in fact and as he knew the defendant had engaged in repeated non-consensual sexual contact with [Ms. Wilkerson] without her permission.
>
> 11. The defendant also falsely testified regarding his unwanted sexual contact with [Ms. Wilkerson] by stating to the Committee that when told by [Ms. Wilkerson] that his advances were unwelcome, no further contact occurred, when in fact and as he knew the defendant continued his non-consensual contacts even after she asked him to stop.[44]

Article III goes on to note that Judge Kent was indicted, pled guilty, and was sentenced to imprisonment for the felony of obstruction of justice (in violation of title 18, United States Code, section 1512(c)(2)) arising from that conduct, and that the sentencing judge described the conduct as "a stain on the justice system itself." The Article thus concludes: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

Article IV charges that on or about November 30, 2007, Judge Kent made material false and misleading statements about the nature and extent of his non-consensual sexual contact with Ms. McBroom and Ms. Wilkerson to agents of the Federal Bureau of Investigation, and that on or about August 11, 2008, he made similar material false and misleading statements to agents of the Federal Bureau of Investigation and representatives of the Department of Justice. These statements were described by the prosecutor at Judge Kent's sentencing, and were confirmed by a Federal Bureau of Investigation Special Agent during the Impeachment Task Force investigation. The Article thus concludes: "Wherefore, Judge Samuel B. Kent is guilty of high crimes and misdemeanors and should be removed from office."

VII. CONCLUSION

The following language from the House Report accompanying the Judge Walter L. Nixon, Jr., articles of impeachment also aptly sets out the core principles underlying and justifying the Impeachment Resolution against Judge Kent:

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[44] Id.

> The [House's] role is not to punish [Judge Kent], but simply to determine whether articles of impeachment should be brought. Under our Constitution, the American people must look to the Congress to protect them from persons unfit to hold high office because of serious misconduct that has violated the public trust. Where, as here, the evidence overwhelmingly establishes that a federal judge has committed impeachable offenses, our duty requires us to bring articles of impeachment and to try him before the United States Senate.[45]

VIII. Committee Consideration

On June 10, 2009, the Committee met in open session and ordered the resolution, H. Res. 520, favorably reported without amendment by a rollcall vote of 29 to 0, a quorum being present.

IX. Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes took place during the Committee's consideration of H. Res. 520:

1. Impeachment Article 1. Approved 30 to 0.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		

[45] Nixon Impeachment Report, at 33–34.

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	30	0	

2. Impeachment Article 2. Approved 28 to 0.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin			
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Issa			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	28	0	

3. Impeachment Article 3. Approved 30 to 0.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	30	0	

4. Impeachment Article 4. Approved 28 to 0, with one Member passing.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			Pass
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	28	0	

5. Motion to report H. Res 520 favorably. Passed 29 to 0.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Lungren			
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper			
Total	29	0	

X. LETTER FROM JUDICIAL CONFERENCE REGARDING JUDGE KENT

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

June 9, 2009

Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

At a special session held today, the Judicial Conference of the United States, by its members present, determined unanimously to transmit to the House of Representatives, under 28 U.S.C. § 355(b)(1)-(2), the enclosed Certificate and attachments in a proceeding under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364. One member was not present and did not participate in the Conference's deliberations on this matter.

Please be advised that the Certificate is a "determination" within the meaning of the following provision in 28 U.S.C § 355(b)(1): "Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination." The Judicial Conference will make no public statement on this matter, but has transmitted the Certificate and attachments to the subject judge and to the Chief Judge of the Fifth Circuit Court of Appeals in her capacity as chair of the Judicial Council of the Fifth Circuit.

Sincerely,

James C. Duff

James C. Duff
Secretary

Enclosures

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

CERTIFICATE

TO THE SPEAKER, UNITED STATES HOUSE OF REPRESENTATIVES:

Pursuant to 28 U.S.C. § 355(b), the Judicial Conference of the United States certifies to the House of Representatives its determination that consideration of impeachment of United States District Judge Samuel B. Kent, of the Southern District of Texas, may be warranted. Having been informed that Judge Kent was convicted of a felony, and that the judgment has become final by the exhaustion or termination of all rights of direct judicial review, the Conference, under Rule 1 of its *Rules for the Processing of Certificates from Judicial Councils that a Judicial Officer Has Engaged in Conduct that Might Constitute Grounds for Impeachment*, accepts the judgment as conclusive and has determined in its discretion to issue this certificate.

The Conference's determination in this matter is based on

(1) the court record in Case No. 4:08-cr-00596, *United States* v. *Samuel B. Kent*, filed in the Southern District of Texas at Houston, which reflects Judge Kent's February 23, 2009, plea of guilty to obstruction of justice in violation of 18 U.S.C. § 1512(c)(2); the resulting judgment of conviction, dated May 11, 2009, in which Judge Kent is sentenced to a term of 33 months' imprisonment; and the absence of any timely notice of appeal of that judgment; and

(2) the certification of the Fifth Circuit Judicial Council, premised on the judgment of conviction in said case, that Judge Kent has engaged in "conduct which constitutes one or more grounds for impeachment under Article II of the Constitution."

This certificate is transmitted with the certification of the Fifth Circuit Judicial Council and relevant portions of the court record.

TO THE SPEAKER, UNITED STATES HOUSE OF REPRESENTATIVES
Page 2

In sum, Judge Kent has stipulated, as the basis for his plea of guilty, that

(a) in August 2003 and March 2007, he engaged in non-consensual sexual contact with a person ("Person A") without her permission;

(b) from 2004 through at least 2005, he engaged in non-consensual sexual contact with a person ("Person B") without her permission; and

(c) in connection with a judicial misconduct complaint against him, he testified falsely before a Fifth Circuit special investigative committee regarding his unwanted, non-consensual sexual contact with Person B, by understating the extent of that contact and by falsely stating that it had ended after Person B told him it was unwelcome.

Judge Kent's conduct and felony conviction, as described above, have brought disrepute to the Judiciary.

Executed this 9th day of June, 2009.

James C. Duff
Secretary

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

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; W. Eugene Davis, U. S. Circuit Judge; James L. Dennis, U. S. Circuit Judge; Edith Brown Clement, U. S. Circuit Judge; Jennifer Walker Elrod, U. S. Circuit Judge; Leslie H. Southwick, U. S. Circuit Judge; Eldon E. Fallon, U. S. District Judge; James J. Brady, U. S. District Judge; Robert G. James, 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; Hayden Head, U. S. District Judge; David Folsom, U.S. District Judge; Orlando L. Garcia, U. S. District Judge

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DOCKET NO. 07-05-351-0086

IN RE: Samuel B. Kent
United States District Judge
Southern District of Texas

Pursuant to Title 28, Section 354 (b)(2)(A), the Judicial Council of the Fifth Circuit, based on the court record in Case No. 4:08-cr-00596, *United States of America v. Samuel B. Kent*, filed in the Southern District of Texas at Houston, and the subsequent lapse of fifteen days after sentencing without a notice of appeal or any post-judgment motion being filed, determines that Samuel B. Kent, a United States District Judge for the Southern District of Texas, has pled guilty to obstruction of justice in violation of 18 U.S.C. § 1512(c)(2) and has thus

by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution, and so certifies its determination to the Judicial Conference of the United States.

The Judicial Council urges the Judicial Conference of the United States to take expeditious action on this matter pursuant to 28 U.S.C. § 355(b).

The foregoing events and certification, together with the facts that Judge Kent has voluntarily moved out of his chambers and ceased handling cases, moot this Council's reopening of the disciplinary proceeding against Judge Samuel B. Kent.**

FOR THE COUNCIL

Edith H. Jones

Chief Judge

Dated: May 27, 2009

*United States Circuit Judge Catharina Haynes stood recused and did not participate in this Judicial Council decision.

**Copies of this Council certification and resolution are being contemporaneously delivered to the complainant and to Judge Kent pursuant to 28 U.S.C. § 354(b)(3).

62D CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 946.

ROBERT W. ARCHBALD, JUDGE OF THE UNITED STATES COMMERCE COURT.

JULY 8, 1912.—Referred to the House Calendar and ordered to be printed.

Mr. CLAYTON, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. Res. 524.]

The Committee on the Judiciary, having had under consideration House resolution 524, make the following report:

The resolution is in the following words:

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to inquire into and concerning the official conduct of Honorable Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now a judge of the Commerce Court, touching his conduct in regard to the matters and things mentioned in House Resolution numbered five hundred and eleven; and especially whether said judge has been guilty of an impeachable offense, and to report to the House the conclusions of the committee in respect thereto, with appropriate recommendation;

And resolved further, That the Committee on the Judiciary shall have power to send for persons and papers, and to subpœna witnesses and to administer oaths to such witnesses; and for the purpose of making this investigation said committee is authorized to sit during the sessions of this House; and the Speaker shall have authority to sign and the Clerk to attest subpœnas for any witness or witnesses.

ORIGIN OF THIS IMPEACHMENT.

This impeachment proceeding had its origin in the resolution adopted by the House of Representatives on April 25, 1912, which is set out in the following message of the President to the House of Representatives on May 3, 1912:

To the House of Representatives:

I am in receipt of a copy of a resolution adopted by the House on April 25, reading as follows:

"*Resolved*, That the President of the United States be, and he is hereby, requested, if not incompatible with the public interest, to transmit to the House of Representatives a copy of any charges filed against Robert W. Archbald, associate judge of the United States Commerce Court, together with the report of any special attorney or agent appointed by the Department of Justice to investigate such charges, and a copy of any and all affidavits, photographs, and evidence filed in the Department of Justice in relation to said charges, together with a statement of the action of the Department of Justice, if any, taken upon said charges and report."

In reply, I have to state that, in February last, certain charges of improper conduct by the Hon. Robert W. Archbald, formerly district judge of the United States court for the middle district of Pennsylvania, and now judge of the Commerce Court, were brought to my attention by Commissioner Meyer of the Interstate Commerce Commission. I transmitted these charges to the Attorney General, by letter dated February 13, instructing him to investigate the matter, confer fully with Commissioner Meyer, and have his agents make as full report upon the subject as might be necessary, and, should the charges be established sufficiently to justify proceeding on them, bring the matter before the Judiciary Committee of the House of Representatives.

The Attorney General has made a careful investigation of the charges, and as a result of that investigation has advised me that, in his opinion, the papers should be transmitted to the Committee on the Judiciary of the House to be used by them as a basis for an investigation into the facts involved in the charges. I have, therefore, directed him to transmit all of the papers to the Committee on the Judiciary; but in my opinion—and I think it will prove in the opinion of the committee—it is not compatible with the public interests to lay all these papers before the House of Representatives until the Committee on the Judiciary shall have sifted them out and determined the extent to which they deem it essential to the thoroughness of their investigation not to make the same public at the present time. But all of the papers are in the hands of the committee and, therefore, within the control of the House.

WM. H. TAFT.

THE WHITE HOUSE, *May 3, 1912.*

INQUIRY INTO THE ALLEGED MISCONDUCT OF JUDGE ARCHBALD.

Your committee began the hearings under House Resolution 524 hereinbefore set out on May 7, 1912, and concluded such hearings on June 4, 1912. The testimony was taken by the committee in open session from day to day or from time to time until concluded. At the hearings witnesses were sworn and examined, and Judge Archbald was present in person and was represented by counsel in accordance with his request made of the committee. His counsel was permitted to cross-examine the witnesses.

The testimony taken by the committee is now presented to the House, but on account of its volume it is deemed not advisable to have the same again printed in extenso as a part of this report. A copy of such testimony and of the proceedings had at the hearings in this matter is, however, accessible to each Member of the House.

JUDGE ARCHBALD'S APPOINTMENT.

Robert W. Archbald was appointed in vacation a United States district judge for the middle district of Pennsylvania and was duly commissioned as such judge on the 29th day of March, 1901, as appears from his commission, which is in the following words and figures:

WILLIAM MCKINLEY,

PRESIDENT OF THE UNITED STATES OF AMERICA.

To all who shall see these presents, greeting:

Know ye, that, reposing special trust and confidence in the wisdom, uprightness, and learning of Robert Wodrow Archbald, of Pennsylvania, I do appoint him United States district judge for the middle district of Pennsylvania, as provided for by act approved March 2, 1901, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Robert Wodrow Archbald, until the end of the next session of the Senate of the United States, and no longer, subject to the conditions and provisions prescribed by law.

In testimony whereof I have caused these letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Given under my hand, at the city of Washington, the 29th day of March, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States of America the one hundred and twenty-fifth.

[SEAL.] WILLIAM MCKINLEY.

By the President:

JOHN W. GRIGGS,
Attorney General.

After the vacation and upon the convening of Congress, Robert W. Archbald was appointed a United States district judge for the middle district of Pennsylvania and was duly commissioned as such judge on the 17th day of December, 1901, as appears from his commission, which is in the following words and figures:

THEODORE ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA.

To all who shall see these presents, greeting:

Know ye, that, reposing special trust and confidence in the wisdom, uprightness, and learning of Robert W. Archbald, of Pennsylvania, I have nominated, and by and with the advice and consent of the Senate, do appoint him United States District Judge for the Middle District of Pennsylvania, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Robert W. Archbald, during his good behavior.

In testimony whereof I have caused these letters to be made patent, and the seal of the Department of Justice to be hereunto affixed.

Given under my hand, at the city of Washington, the 17th day of December, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States of America the one hundred and twenty-sixth.

[SEAL.] THEODORE ROOSEVELT.

By the President:

P. C. KNOX,
Attorney General.

The said Robert W. Archbald was duly appointed an additional circuit judge of the United States from the third judicial circuit and designated as a judge of the United States Commerce Court, and was confirmed by the Senate and was duly commissioned as such judge on the 31st day of January, 1911, as will appear from his commission, which is in the following words and figures, to wit:

WILLIAM H. TAFT, PRESIDENT OF THE UNITED STATES OF AMERICA.

To all who shall see these presents, greeting:

Know ye that, reposing special trust and confidence in the wisdom, uprightness, and learning of Robert Wodrow Archbald, of Pennsylvania, I have nominated, and, by and with the advice and consent of the Senate, do appoint him additional circuit judge of the United States from the third judicial circuit, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Robert Wodrow Archbald, during his good behavior. Appointed pursuant to the act of June 18, 1910 (36 Stats., 540), and hereby designated to serve for four years in the Commerce Court.

In testimony whereof I have caused these letters to be made patent, and the seal of the Department of Justice to be hereunto affixed.

Given under my hand, at the city of Washington, the thirty-first day of January, in the year of our Lord one thousand nine hundred and eleven, and of the independence of the United States of America the one hundred and thirty-fifth.

[SEAL.] WILLIAM H. TAFT.

By the President:

GEORGE W. WICKERSHAM,
Attorney General.

THE FACTS.

The facts found by your committee are substantially as follows:

THE NEGOTIATIONS WITH THE HILLSIDE COAL & IRON CO. RELATIVE TO THE KATYDID CULM DUMP AT MOOSIC, PA.

[See Article 1.]

On or about March 31, 1911, Judge Archbald entered into a partnership agreement with one Edward J. Williams, of Scranton, Pa., for the purchase of a certain culm dump known as the Katydid culm dump, located near Moosic, Lackawanna County, Pa., for the purpose of disposing of the said property at a pecuniary profit to themselves.

Most of the coal contained in this culm dump was taken from land known as the Caldwell lot, which is owned in fee simple by the Hillside Coal & Iron Co. The larger portion of the dump now rests on land known as Lot 46, which is jointly owned by the Hillside Coal & Iron Co. and the Everhart estate. The entire capital stock of the Hillside Coal & Iron Co. is owned by the Erie Railroad Co. and a number of the managing officers and directors of the railroad company are also managing officers and directors of the coal company. The Katydid dump was formed from the operation of the Katydid colliery by the firm of Robertson & Law, and later by John M. Robertson, who succeeded the firm, which operated the colliery under a verbal agreement to pay the Hillside Coal & Iron Co. certain royalties on all coal mined. It appears that the Everhart estate received certain royalties from the Hillside Coal & Iron Co. for all coal above the size of pea taken from the tract in which the Everhart estate held a one-half undivided interest. The plant was operated from 1887 to 1909, when the breaker and washery were destroyed by fire, and since then the operation has been abandoned by Robertson.

In furtherance of his agreement with Williams, Judge Archbald used his official position as judge of the Commerce Court, on March 31, 1911, and at various other times, by correspondence, personal conferences, and otherwise, to improperly induce and influence the officers of the Hillside Coal & Iron Co. and the Erie Railroad Co. to enter into an agreement with himself and Williams to sell the interest of the Hillside Coal & Iron Co. in the Katydid culm dump for a consideration of $4,500, against the policy and practice of the Erie Railroad Co. and its subsidiary, the Hillside Coal & Iron Co.

Judge Archbald and Williams then secured an option to purchase whatever equity Robertson held in this property for a consideration of $3,500 and entered into negotiations with several parties with a view to the sale of the culm dump at a large profit. One of these parties was the manager of an electric railroad who was then purchasing large quantities of coal consumed in the operation of the road from the Hillside Coal & Iron Co. at the usual market rates. It was claimed that there were certain complications in the title to this property; but however this may be, Judge Archbald considered that the options from the Hillside Coal & Iron Co. and Robertson

covered the entire interest in the dump, and so stated in a letter to this prospective purchaser.

After a careful survey a disinterested mining engineer estimates that the Katydid culm dump contains about 90,000 gross tons, of which approximately 46,704 tons are marketable coal. This coal is appraised by the engineer at $47,533.18, subject to an increase of $3,803.40 provided that an increment of small coal can be saved in the process of reclamation. It is further estimated that the operation of this culm dump by the Hillside Coal & Iron Co. would net it approximately $35,000 and that the Erie Railroad Co. would realize a profit in the neighborhood of $35,000 for the transportation of the coal to tidewater, making a total profit to the Erie and its subsidiary of about $70,000.

During the period covering these negotiations with the officers of the Hillside Coal & Iron Co. and the Erie Railroad Co. Judge Archbald was a United States circuit judge, duly assigned to serve in the Commerce Court, and the Erie Railroad Co., a common carrier engaged in interstate commerce, was a party litigant in certain suits then pending in the Commerce Court and known as The Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 38, and The Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 39. In the opinion of your committee Judge Archbald's participation in this transaction, under all the circumstances, was reprehensible and prejudicial to the confidence of the American people in the Federal judiciary.

THE ATTEMPT TO SELL THE STOCK OF THE MARIAN COAL CO. TO THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.

[See Article 2.]

On October 18, 1910, the Marian Coal Co., which operated a washery at Taylor, Pa., filed a complaint against the Delaware, Lackawanna & Western Railroad Co. and several other railroads before the Interstate Commerce Commission, containing a demand for reparation for damages alleged to have been suffered by the complainant in the amount of $55,238.27, with interest, for overcharges and discriminations in freight rates, and concluding with a prayer that the Interstate Commerce Commission issue an order requiring the defendants to cease various acts alleged to have been committed for the purpose of suppressing the competition of the complainant in the coal market, and establishing just and reasonable rates upon commodities shipped by the complainant from its washery at Taylor, Pa., to all points within the jurisdiction of the commission.

Some time in July or August, 1911, William P. Boland and Christopher G. Boland, who were the controlling stockholders of the Marian Coal Co., employed one George M. Watson, of Scranton, Pa., as an attorney to effect a sale of two-thirds of the stock of the Marian Coal Co. to the Delaware, Lackawanna & Western Railroad Co., and to settle this case which was still pending before the Commerce Commission. The decision of the Interstate Commerce Commission in this case was subject to review by the Commerce Court, and there was at that time pending in the Commerce Court a suit

entitled "The Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 38," to which the Delaware, Lackawanna & Western Railroad Co. was a party litigant.

With full knowledge of these facts, Judge Archbald entered into an agreement to assist George M. Watson, for a valuable consideration, to sell the stock of the Marian Coal Co., held by the Bolands, to the Delaware, Lackawanna & Western Railroad Co. and settle the case between the said coal company and the railroad company. In pursuance of this agreement, Judge Archbald by means of correspondence, personal conferences, and otherwise persistently attempted to induce the officers of the Delaware, Lackawanna & Western Railroad Co. to enter into an agreement with Watson to settle the case then pending before the Interstate Commerce Commission and purchase the stock of the Marian Coal Co. at a highly exorbitant price.

In all of his correspondence with the officers of the Delaware, Lackawanna & Western Railroad Co. relative to this matter, Judge Archbald used the official stationery of the United States Commerce Court, and it is apparent from an examination of the testimony taken before this committee that he used his influence as a judge of that court to bring about the successful consummation of these negotiations. His persistent activity in said negotiations forces the conclution that he expected to receive a portion of the fee which the Bolands had agreed to pay Watson in the event that a settlement should be effected, together with a portion of the large amount demanded by Watson, of the Delaware, Lackawanna, & Western Railroad Co. in excess of the price which the Bolands were willing to accept for their stock in the Marian Coal Co.

THE NEGOTIATIONS WITH THE LEHIGH VALLEY COAL CO. AND THE GIRARD ESTATE RELATIVE TO A CULM DUMP KNOWN AS PACKER NO. 3, NEAR SHENANDOAH, PA.

[See Article 3.]

The Lehigh Valley Coal Co., which is owned by the Lehigh Valley Railroad Co., holds a lease on certain coal land located near Shenandoah, Pa., and owned by the Girard estate. This lease was made to run for a period of 15 years, of which about 13 years have elapsed.

On August 11, 1911, and at numerous other times thereafter, Judge Archbald, by means of correspondence and personal interviews, persistently sought to induce, and did induce, the officers of the Lehigh Valley Coal Co. to relinquish the right of that company to operate a certain culm dump, known as Packer No. 3, containing approximately 472,670 gross tons, and located on the land leased from the Girard estate, provided that a very small royalty should be paid the coal company for coal reclaimed from the dump, and provided further that the coal should be shipped over the lines of the Lehigh Valley Railroad. Judge Archbald thereafter applied to the Girard estate for an operating lease on the culm dump known as Packer No. 3, stating that he had secured the consent of the Lehigh Valley Coal Co. to operate the property if the Girard estate would approve of the arrangement. The judge proposed to pay the Girard estate the same royalties on various sizes of coal which were being paid by the Lehigh

Valley Coal Co. under its lease, which was executed about 13 years theretofore, when coal values were materially less than they were at the time Judge Archbald's proposition was submitted. The trustees of the Girard estate promptly declined to grant Judge Archbald the lease on the terms proposed, and the deal has never been consumated.

While these negotiations with the Lehigh Valley Coal Co. were in progress the Lehigh Valley Railroad Co. was a party litigant in two suits pending before the United States Commerce Court, known as The Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 38, and The Lehigh Valley Railroad Co. *v.* The Interstate Commerce Commission, Henry E. Meeker, intervenor, No. 49.

If Judge Archbald and his associates could have operated this culm dump at a profit, the Lehigh Valley Coal Co., by reason of its greater facilities for washing and shipping coal, could have operated the property at a larger profit, and it is the conclusion of your committee that the officers of the coal company relinquished the right to operate the said culm dump because of the influence exercised upon them through Judge Archbald's position as a member of the Commerce Court.

THE LOUISVILLE & NASHVILLE RAILROAD CASE.

[See article 4.]

In February, 1911, upon the organization of the Commerce Court, a suit known as The Louisville & Nashville Railroad Co. *v.* The Interstate Commerce Commission, which had theretofore been filed in the United States Circuit Court at Louisville, Ky., was transferred to the United States Commerce Court (Docket No. 4). The case was argued on the 2d and 3d of April, 1911, and submitted to the court for adjudication. On August 22, 1911, Judge Archbald, who afterwards delivered the majority opinion in this case, wrote to Helm Bruce, the attorney for the Louisville & Nashville Railroad Co., at Louisville, Ky., requesting him to confer with one Compton, traffic manager of the Louisville & Nashville Railroad, who had given material testimony before the Interstate Commerce Commission, and to advise the judge whether the witness intended to give an affirmative answer, as appeared from the record, or whether he intended to give a negative answer to a question propounded to him by the chairman of the commission. In pursuance of this request Bruce conferred with Compton and advised the judge that the witness intended to give a negative answer to the question referred to, which the attorney for the railroad contended was shown by the context of the testimony. The receipt of this letter was acknowledged by Judge Archbald on August 26, 1911.

On January 10, 1912, Judge Archbald again wrote to Bruce, calling attention to certain conclusions reached by another member of the court, which, it was claimed, refuted statements and contentions advanced in Bruce's original brief and sustained the action of the Interstate Commerce Commission with respect to certain features of the case. In this letter Judge Archbald asked Bruce whether he would still affirm the position taken in his brief and, if so, upon what theory it could be sustained, assuming that the conclusions of the other member of the court were correct. The judge followed this question with a number of other questions relative to the features of the case which were not then clear to the court. On January 24, 1912, Bruce sent the

judge a letter in answer to the questions which had been propounded to him, wherein he argued these special features of the case in behalf of the railroad company at considerable length. His letter was clearly in the nature of a supplemental brief submitted for the purpose of overcoming certain doubts as to the merits of the case of the railroad company which apparently had arisen in the minds of some of the members of the court.

On February 28, 1912, this case was decided by the Commerce Court in favor of the railroad company. Judge Archbald wrote the opinion of the majority, which followed the views expressed by Bruce, and Judge Mack dissented. The attorneys for the Interstate Commerce Commission and the United States were given no opportunity to examine and answer the arguments advanced by the attorney for the Louisville & Nashville Railroad Co. in his communication to Judge Archbald of January 24, 1912, nor were they informed that such correspondence had been had.

In the opinion of your committee, this conduct on the part of Judge Archbald was a misbehavior in office, and unfair and unjust to the parties defendant in this case.

NEGOTIATIONS WITH THE PHILADELPHIA & READING COAL & IRON CO. RELATIVE TO THE LINCOLN CULM DUMP NEAR LORBERRY, PA., AND THE WRONGFUL ACCEPTANCE OF A GIFT, REWARD, OR PRESENT FROM FREDERIC WARNKE, OF SCRANTON, PA.

[See Article 5.]

In 1904 Frederic Warnke, of Scranton, Pa., purchased a two-thirds interest in an operating lease on some coal land located near Lorberry Junction, Pa., and owned by the Philadelphia & Reading Coal & Iron Co. The entire capital stock of the Philadelphia & Reading Coal & Iron Co. is owned by the Reading Co., which owns the entire capital stock of the Philadelphia & Reading Railway Co., a common carrier engaged in interstate commerce. He put up a number of improvements and operated the culm dump on the property for several years, but owing to the action of the elements his operations were carried on at a loss. Warnke then applied to the Reading Co. for the mining maps of the land covered by his lease. He was informed that the lease under which he claimed had been forfeited two years before its assignment to him, and his application was therefore denied. He then made a proposition to George F. Baer, president of the Philadelphia & Reading Railway Co. and president of the Philadelphia & Reading Coal & Iron Co., to relinquish any claim that he might have in this property under his lease, provided that the Philadelphia & Reading Coal & Iron Co. would grant him an operating lease on another property owned by said corporation at Lorberry, Pa., and known as the Lincoln culm bank.

Mr. Baer referred Warnke's proposition to Mr. W. J. Richards, vice president and general manager of the Philadelphia & Reading Coal & Iron Co., for consideration and action. Richards and Baer thereafter concluded that there was no valid reason why they should make an exception to the general rule of the coal company not to lease its culm banks. Warnke then made several attempts, through attorneys and

friends, to have this decision reconsidered, and failing in this he asked Judge Archbald to intercede in his behalf with Richards.

In the latter part of November, 1911, Judge Archbald called upon Mr. Richards at his office in Pottsville, Pa., in pursuance of an appointment made by letter, and attempted to influence Richards to reconsider his refusal to accede to Warnke's proposition. Judge Archbald was informed, however, that the decision of Richards and Baer must be considered final, and the judge so advised Warnke.

In December, 1911, Warnke was considering the advisability of purchasing a certain culm fill located near Pittston, Pa., and owned by the Lacoe & Shiffer Coal Co. One John Henry Jones, of Scranton, Pa., advised him that Judge Archbald was familiar with the title to the property and the rights of way of certain railroads over it. In pursuance of this assurance from Jones, Warnke consulted the judge, who advised him that the title was clear. Warnke had but two conversations with Judge Archbald regarding this matter, not exceeding 30 minutes in length altogether, but he at that time stated to Judge Archbald that he would pay the judge $500 for the informal tion which he had received. Shortly thereafter, Warnke and severa- business associates purchased this property for a consideration of $7,500, and in the month of March, 1911, a day or so after Judge Archbald had called at the office of Warnke and his associates, Warnke drew a promissory note for $500, as president of the coal company which had purchased the fill, and caused the same to be delivered to Judge Archbald. The note was discounted in one of the banks of Scranton, but has not yet matured.

Your committee finds that Judge Archbald was guilty of misbehavior in office in attempting to use his influence as a member of the Commerce Court with the officials of the Philadelphia & Reading Coal & Iron Co. and its allied railroad corporation for the purpose of aiding Warnke to secure a lease on a certain culm bank owned by the coal and iron company, after the managing officers of said company had declined to grant the lease. Thereafter Warnke gave Judge Archbald $500 in the guise of compensation for legal advice rendered, but which, in fact, was in the nature of a reward for favors previously shown in connection with the judge's efforts to bring about the acceptance of Warnke's proposition to the Philadelphia & Reading Coal & Iron Co.

THE NEGOTIATIONS WITH THE LEHIGH VALLEY COAL CO. RELATIVE TO THE EVERHART TRACT AND THE MORRIS AND ESSEX TRACT.

[See Article 6.]

Since 1884 the Lehigh Valley Coal Co., which is a subsidiary of the Lehigh Valley Railroad Co., has owned a one-half interest in a certain tract of coal land located near Wilkes-Barre, Pa., which consists of about 800 acres. During the past few years this company has purchased about four-fifths of the remaining one-half interest in this tract. The remaining portion of the tract is leased by the coal company from certain beneficiaries of the Everhart estate. The coal company has been negotiating for several years to purchase the fee to this outstanding portion of the tract, but the owners would not accept the terms offered.

In December, 1911, or January, 1912, Judge Archbald entered into an agreement with one James R. Dainty, of Scranton, Pa., to open negotiations with the Lehigh Valley Coal Co. and the Everhart estate for the purpose of effecting the sale of this property to the coal company, on the understanding that he and Dainty should secure an operating lease on another tract of about 325 acres of coal land owned by the Lehigh Valley Coal Co., and known as the Morris and Essex tract, as a consideration in the nature of a commission for their services.

In furtherance of this agreement Judge Archbald attempted to use his official influence as a member of the Commerce Court, through telephone conversations and personal conferences, to affect the action of the general manager of the Lehigh Valley Coal Co. with respect to the purchase of this property. While these negotiations were in progress, the cases of the Lehigh Valley Railroad Co. *v.* The Interstate Commerce Commission and Henry E. Meeker, intervenor, No. 49, and the Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 38, in which the Lehigh Valley Railroad Co. was a party litigant, were pending before the Commerce Court for adjudication. The persistency with which Judge Archbald sought these business favors or property concessions from railroad companies having litigation, or likely to have litigation, before the Commerce Court indicates a well-defined plan to use his official position and influence as a member of such court for financial gain and profit.

THE DISCOUNT OF THE W. W. RISSINGER NOTE.

[See Article 7.]

In the fall of 1908, the case of The Old Plymouth Coal Company *v.* The Equitable Fire & Marine Insurance Company et al., was pending before the United States district court over which Judge Archbald presided. Mr. W. W. Rissinger, of Scranton, Pa., was the controlling stockholder of the plaintiff company. The case was predicated on certain insurance contracts between the Old Plymouth Coal Co. and the various insurance companies named as parties defendant, and the total damages sought to be recovered amounted to about $30,000. The case was on trial in November, 1908, and after the plaintiff's evidence had been presented the defendant insurance companies demurred to the sufficiency of the evidence and moved for a nonsuit. After extended argument by attorneys for both plaintiff and defendant, Judge Archbald overruled the motion and the defendant companies proceeded to introduce their evidence. Before the evidence was all in the attorneys for the insurance companies made a proposition of compromise to the attorneys for the Old Plymouth Coal Co., which was accepted on November 23, 1908. Consent judgments were entered on that day in which the plaintiff ultimately recovered about $28,000, and the defendant companies were given 15 days in which to satisfy the judgments.

Some time prior to November 28, 1908, Judge Archbald entered into a deal with Rissinger for the purchase of an interest in a gold-mining project in Honduras, which Rissinger was then promoting in Scranton. In order to finance the transaction it became neces-

sary to raise $2,500, and on November 28, 1908, or five days after the judgments in favor of the Old Plymouth Coal Co. were entered, a promissory note for that amount, to run three months, signed by Rissinger, in favor of and indorsed by Judge Archbald, and Sophia J. Hutchison, Mr. Rissinger's mother-in-law, was presented to the County Savings Bank of Scranton, Pa., for discount. The bank evidently put no reliance upon Judge Archbald's indorsement of the note, but made an extended investigation of Mrs. Hutchison's financial condition, and on December 12, 1908, discounted the note, after first filing a judgment against Mrs. Hutchison in the county court of Lackawanna County, Pa., according to the practice in that State.

Shortly after the consent judgments in favor of the Old Plymouth Coal Co. were entered on November 23, 1908, this note was also presented for discount to Mr. John T. Lenahan, one of the attorneys for Rissinger and the Old Plymouth Coal Co. in the litigation with the insurance companies, but Lenahan refused to discount the note or have the same discounted in a trust company of which he was a director. The note has never been paid, but has been renewed at the expiration of each successive period of three months by Mr. Rissinger, and the discount on the renewals have been paid by him.

The attempt to discount this note, coming but a few days after the Old Plymouth Coal Co. had prevailed in the litigation with the insurance companies tends strongly to indicate that Judge Archbald had entered into negotiations with Rissinger while such litigation was pending before the United States district court of which he was judge.

But, at all events, the action of Judge Archbald in accepting an interest in this enterprise, under the conditions, constituted misbehavior in office.

THE DISCOUNT OF THE JOHN HENRY JONES NOTE.

[See Articles 8 and 9.]

In the fall of the year 1909 the case of John W. Peale *v.* The Marian Coal Co., which involved a considerable sum of money, was pending before the United States district court at Scranton, Pa., over which Judge Archbald presided. The Marian Coal Co. was principally owned and controlled by Christopher G. Boland and William P. Boland, of Scranton, Pa., and this fact was well known to Judge Archbald. In the latter part of November or the early part of December, 1909, for the purpose of raising funds to invest in a timber project in Venezuela, which was being promoted by one John Henry Jones, of Scranton, Pa., Judge Archbald drew and indorsed a promissory note for $500, payable to himself, which note was signed by Jones as promisor.

Judge Archbald thereupon agreed and consented that Edward J. Williams should present this note to Christopher G. Boland and William P. Boland, or either of them, for discount. In pursuance of this agreement or approval of Judge Archbald, Williams did present the note to each of the Bolands for the purpose of having the same discounted, but they refused to grant the discount, on the ground that it would be highly improper for them to do so under the existing circumstances. Williams reported the refusal of the Bolands to discount the note to Judge Archbald, and thereafter took it to the

Merchants & Mechanics Bank of Scranton, but this bank also refused to discount the paper.

The note was finally discounted by John Henry Jones in the Providence Bank, a small State bank located in a suburb of Scranton. The president of this bank was one C. H. Von Storch, of Scranton, Pa., an attorney at law, who had prevailed as a party in interest in litigation before Judge Archbald's court within a year prior to the date of the discount of the note. The note was brought to Von Storch by Jones at the suggestion of Judge Archbald. Moreover, Judge Archbald advised Von Storch that he would consider it a great favor if the discount should be granted. The note has never been paid, although the bank has made at least one call for payment, and the discount on each renewal has been paid by John Henry Jones.

It is apparent that Judge Archbald's financial condition at the time the incident occurred was such that his note was not considered good bankable paper, and your committee is forced to the conclusion that he attempted to use his influence as judge to secure the loan from parties litigant before his court, and, failing in this, he did use his influence as such judge to secure the loan through an attorney who was then practicing before his court, and who had but a short while before received favorable judgment in a suit adjudicated therein.

THE WRONGFUL ACCEPTANCE OF MONEY ON THE OCCASION OF A PLEASURE TRIP TO EUROPE.

[See Articles 10 and 11.]

In the spring of 1910, Judge Archbald allowed one Henry W. Cannon, of New York City, to pay his entire expenses on a pleasure trip to Europe. Mr. Cannon was then, and still is, a stockholder and officer in various interstate railroad corporations, including the Great Northern Railroad, the Lake Erie & Western Railroad Co., the Fort Wayne, Cincinnati & Louisville Railroad Co.; the Pacific Coast Co., which owns the entire stock of the Columbia & Puget Sound Railroad Co.; the Pacific Coast Railroad Co.; and the Pacific Coast Steamship Co., together with various other corporations engaged in the business of mining and shipping coal.

It is claimed that Mr. Cannon is a distant relative of Judge Archbald's wife, but, however this may be, your committee regards it as improper for a judge to thus obligate himself to an officer of numerous corporations likely to become directly or indirectly involved in litigation before his court or before other courts over which he might be called upon to preside from time to time.

On the occasion of this same pleasure trip to Europe one Edward R. W. Searle, clerk of the United States district court at Scranton, Pa., and one J. B. Woodward, of Wilkes-Barre, Pa., jury commissioner of said court, both of whom were appointed by Judge Archbald, raised a subscription fund of money amounting to more than $500, which was presented to Judge Archbald on his departure. This fund was not raised as the result of a bar association movement, but was composed of contributions of varying amounts from certain attorneys practicing before the United States district court, some of whom had cases then pending before said court for adjudication.

Judge Archbald accepted this fund of money and acknowledged receipt of the same to the contributors whose names were submitted to him at the time that the fund was presented. Your committee regards it as improper and subversive of the confidence of the public in the judiciary for a judge to place himself in this manner under obligations to attorneys practicing before his court.

THE APPOINTMENT OF A RAILROAD ATTORNEY AS JURY COMMISSIONER.

[See Article 12.]

On March 29, 1901, Judge Archbald was appointed United States district judge for the middle district of Pennsylvania. On April 9, 1901, under the exercise of authority granted by the act of June 30, 1879 (21 Stat. 43), Judge Archbald appointed one J. B. Woodward, of Wilkes-Barre, Pa., as jury commissioner of the said district court. The said Woodward was then and has since been a general attorney for the Lehigh Valley Railroad Co.

Under the annual appropriation acts, the compensation of jury commissioners is limited to $5 per day, for not more than three days at any one term of court. It is apparent that the compensation attached to this position is so insignificant that the appointment would have no attraction for a railroad attorney except for the power it affords in the selection of juries for the trial of cases in the Federal courts.

Judge Archbald's action in appointing to this position the legal representative of a large railroad corporation, which was likely to become directly or indirectly involved in litigation before the United States district court, was misbehavior in office, calculated to bring the Federal judiciary into disrepute.

GENERAL MISBEHAVIOR OF JUDGE ARCHBALD.

(See article 13.)

The testimony in the whole case tends to support this general specification. Judge Archbald was appointed a United States district judge for the middle district of Pennsylvania on the 29th day of March, 1901, and held such office until January 31, 1911, on which last-named date he was appointed an additional United States circuit judge and on the same day was duly designated as one of the judges of the United States Commerce Court, which position he has since held and now holds.

The testimony shows that at different times while Judge Archbald was a judge of the United States district court he sought and obtained credit and in other instances sought to obtain credit from persons who had litigation pending in his said court or who had had litigation pending in his said court.

The testimony shows that after Judge Archbald had been promoted to the position of a United States circuit judge and had been duly designated as one of the judges of the United States Commerce Court, he in connection with different persons sought to obtain options on culm dumps and other coal properties from officers and agents of coal companies which were owned and controlled by railroad companies.

The testimony further shows that in order to influence the officers of the coal companies which were subsidiary to and owned by the railroad companies, Judge Archbald repeatedly sought to influence the officials of the railroads to enter into contracts with his associates for the financial benefit of himself and his said associates. In most instances the contracts were executed in the name of the person associated with the judge in the particular transaction or trade, and the judge's name was not disclosed on the face of the contract. The testimony shows, however, that he was, as a matter of fact, pecuniarily interested in such contracts and that while his interest was not known to the public it was known to the officials of the railroad companies and of the coal companies, subsidiary corporations thereof. The evidence discloses that while the judge's several associates or partners would locate properties, the judge would take up the matter of the purchase or sale of said properties with the officials of the coal companies and of the railroad companies which, as already stated, in most instances owned and controlled the coal companies. The testimony shows that while these negotiations were being conducted, and agreements were made and sought to be made, the railroad companies with whose officers Judge Archbald was making contracts and agreements and seeking to make contracts and agreements were common carriers engaged in interstate commerce and had litigation pending in the United States Commerce Court.

The testimony shows that such options, contracts, and agreements were sought and obtained and sought to be obtained by Judge Archbald to such an extent that the exposure of the judge's several transactions through the press gave rise to a public scandal.

The testimony fails to disclose any case in which Judge Archbald invested any actual money of his own in any of these several trades or deals, but shows that he used his personal influence as a judge, in consideration of which he received or was to receive his share or interest in the property or his profits in the deal.

Your committee finds that Judge Archbald by his conduct in carrying on traffic in culm dumps and coal properties owned directly or indirectly by railroads, and in using his influence to secure such contracts from coal companies which were owned and controlled by railroad companies as aforesaid, and in using his influence with high officials of said railroads to induce them to permit or direct the said coal companies to enter into contracts with him or his associates which resulted in financial profit to himself and those associated with him, grossly abused the proprieties of his said office of judge, was guilty of misbehavior and of a misdemeanor in office.

THE LAW.

CONSTITUTIONAL PROVISIONS RELATING TO JUDICIAL IMPEACHMENTS.

The provisions of the Constitution of the United States bearing upon the impeachment of judges are as follows:

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment. (Art. I, sec. 2.)

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. I, sec. 3.)

The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Art. II, sec. 2.)

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. II, sec. 4.)

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, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office. (Art. III, sec. 1.)

The trial of all crimes, except in cases of impeachment, shall be by jury. (Art. III, sec. 2.)

THE GENERAL NATURE OF IMPEACHMENTS.

The fundamental law of impeachment was stated by Richard Wooddesson, an eminent authority, in his Law Lectures delivered at Oxford in 1777, as follows (vol. 2, pp. 355, 358):

It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, became suitors for penal justice, and they can not consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form (p. 355).

* * * * * * *

Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are most proper—and have been the most usual grounds—for this kind of prosecution (p. 358).

Referring to the function of impeachments, Rawle, in his work on the Constitution (p. 211), says:

The delegation of important trusts affecting the higher interests of society, is alway from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the baser appetite for illegitimate emoluments, are sometimes productions of what are not unaptly termed "political offences" (Federalist, No. 65), which it would be difficult to take cognizance of in the ordinary course of judicial proceeding.

The involutions and varieties of vice are too many and too artful to be anticipated by positive law.

In Story on the Constitution (vol. 1, 5th ed., p. 584) the parliamentary history of impeachments is briefly stated as follows:

800. In examining the parliamentary history of impeachments, it will be found that many offenses, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty, a lord admiral to have neglected the safeguard of the sea, an ambassador to have betrayed his trust, a privy councilor to have propounded or supported pernicious and dishonorable measures, or a confidential adviser of his sovereign to have obtained exorbitant grants or incompatible employments—these have been all deemed impeachable offenses. Some of the offenses, indeed, for which persons were impeached in the early ages of British jurisprudence, would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favoritism and court intrigue. Thus persons have been impeached for giving bad counsel

to the King, advising a prejudicial peace, enticing the King to act against the advice of Parliament, purchasing offices, giving medicine to the King without advice of physicians, preventing other persons from giving counsel to the King except in their presence, and procuring exorbitant personal grants from the King. But others, again, were founded in the most salutary public justice, such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad. One can not but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the polity of the state, and of sufficient dignity to maintain the independence and reputation of worthy public officers.

IMPEACHABLE OFFENSES UNDER THE CONSTITUTION.

The provision in Article II, section 4, of the Constitution of the United States defining impeachable offenses as "treason, bribery, or other high crimes and misdemeanors" was taken from the British parliamentary law, established and prevailing at the time of the formation of our Government. It must, therefore, be interpreted by the light of time-honored parliamentary usage, as contradistinguished from the common municipal law of England.

Our fathers, mindful of the flagrant persecution of the subjects of England in the guise of prosecutions for treason against the Crown, specifically defined the elements of the offense of treason against the United States in Article III, section 3, of our organic law.

The offense of bribery had a fixed status in the parliamentary law as well as the criminal law of England when our Constitution was adopted, and there is little difficulty in determining its nature and extent in the application of the law of impeachments in this country.

In addition to the specific offenses of treason and bribery, all offenses falling within the classification of "high crimes and misdemeanors," which were subjects of impeachment by the British Parliament, were made impeachable offenses under the Constitution of the United States, subject to the limitations prescribed by that instrument.

In a footnote to 4 Blackstone (p. 5, Lewis's Ed.) Christian says:

The word "crime" has no technical meaning in the law of England. It seems, when it has a reference to positive law, to comprehend those acts which subject the offender to punishment. When the words "high crimes and misdemeanors" are used in prosecutions by impeachment, the words "high crimes" have no definite signification, but are used merely to give greater solemnity to the charge.

The term "misdemeanor" has a twofold legal significance. Under the common law it signifies a criminal offense, not amounting to felony, which is punishable by indictment or other special criminal proceeding. As applied to civil officers, in the sense of the lex parliamentaria, it signifies maladministration or misbehavior in office, irrespective of whether such conduct is or is not indictable.

It is well established by the authorities that impeachable offenses under the British constitution and under our Constitution are not limited to statutable crimes and misdemeanors, or to offenses indictable under the common law and triable in the courts of ordinary jurisdiction.

In his commentaries on the Constitution, John Randolph Tucker defines impeachable offenses as follows (vol. 1, sec. 200):

What are impeachable offenses?

(a) *Treason*. This is defined by the Constitution.

(b) *Bribery*, which needs no special comment. For its definition resort may be had to its meaning in Criminal Procedure.

(c) High crimes and misdemeanors. What is the meaning of these terms? Much controversy has arisen out of this question. Do these words refer only to offenses for which the party may be indicted under the authority of the United States? Do they mean offenses by the common law? Do they include offenses against the laws of the States, or do they mean offenses for which there is no indictment in the ordinary courts of justice? Or do they include mal-administration, unconstitutional action of an officer willful or mistaken, or illegal action willful or mistaken?

(d) Up to September 8, 1787, the clause in reference to the impeachable offenses only included treason and bribery. On that day Mr. Mason moved to add the words "or mal-administration." Mr. Madison objected to the vagueness of this term, whereupon Mr. Mason withdrew the word "mal-administration," and substituted "other high crimes and misdemeanors against the United States," and the clause was then agreed to by a vote of ten States to one. As the word "other" is inserted before the words "high crimes and misdemeanors," these last words may be interpreted by the nature of the crimes "treason and bribery." Why should an officer be impeached for treason? Obviously, because an officer guilty of treason against the United States would be disqualified personally from being an officer of a government to which he was a traitor. How could a President properly command an army of the United States when he was engaged in levying war against them, or adhering to their enemies? The utter inconsistency of this double position made it a proper offense for the jurisdiction of impeachment. The same objection would apply to any other officer of the United States. To be employed in the service of the United States, against which he was levying war, or adhering to their enemies, was a total personal disqualification.

(e) So in respect to bribery. Bribery corrupts public duty. The difference between treason and bribery is that the first is a crime defined by the Constitution, as to which Congress has no power except to declare its punishment. Bribery is not a constitutional crime, and was not made a crime against the United States by statute until April, 1790. These two cases, therefore, show that the words "high crimes and misdemeanors" can not be confined to crimes created and defined by a statute of the United States; for if Congress had ever failed to have fixed a punishment for the constitutional crime of treason, or had failed to pass an act in reference to the crime of bribery, as it did fail for more than a year after the Constitution went into operation, it would result that no officer would be impeachable for either crime, because Congress had failed to pass the needful statutes defining crime in the case of bribery, and prescribing the punishment in the case of treason as well as bribery. It can hardly be supposed that the Constitution intended to make impeachment for these two flagrant crimes depend upon the action of Congress. The conclusion from this would seem to be inevitable, that treason and bribery, and other high crimes and misdemeanors, in respect to which Congress had failed to legislate, would still be within the jurisdiction of the process of impeachment.

(f) The word "maladministration," which Mr. Mason originally proposed, and which he displaced because of its vagueness for the words "other high crimes and misdemeanors," was intended to embrace all official delinquency or maladministration by an officer of the Government where it was criminal; that is, where the act done was done with willful purpose to violate public duty. There can be no crime in an act where it is done through inadvertence or mistake, or from misjudgment. Where it is a willful and purposed violation of duty it is criminal.

(g) This construction is aided by the fact that judges hold their offices during "good behavior." These words do not mean that a judge shall decide rightly, but that he shall decide conscientiously. He is not amenable to impeachment for a wrong decision, else when an inferior judge is reversed he would be impeachable; or, in the Supreme Court, a dissenting judge might be held impeachable because a large majority of the court affirmed the law to be otherwise. But if he decides unconscientiously—if he decides contrary to his honest conviction from corrupt partiality—this can not be good behavior, and he is impeachable. Again, if the judge is drunken on the bench, this is ill behavior, for which he is impeachable. And all of these are generally criminal, or misdemeanor—for misdemeanor is a synonym for misbehavior. So, if he omits a judicial duty, as well as when he commits a violation of duty, he is guilty of crime or misdemeanor; for, says Blackstone, "crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it."

To confine the impeachable offenses to those which are made crimes or misdemeanors by statute or other specific law would too much constrict the jurisdiction to meet the obvious purpose of the Constitution, which was, by impeachment, to deprive of office those who by any act of omission or commission showed clear and flagrant disqualification to hold it. On the other hand, to hold that all departures from, or failures in, duty, which were not willful, but due to mistake, inadvertence, or misjudgment, and to let in all offenses at common law, which, by the decisions of the

Supreme Court, are not within Federal authority at all, would be to extend the jurisdiction by impeachment far beyond what was obviously the purpose and design of its creation. It must be criminal misbehavior—a purposed defiance of official duty—to disqualify the man from holding office—or disable him from ever after holding office, which constitute the penalty upon conviction under the impeachment process. The punishment, upon conviction, indicates the character of the crime or misdemeanor for which impeachment is constitutional. If the crime or misdemeanor for which the impeachment is made be not such as to justify the punishment inflicted, we may well conclude it was within the purpose of the Constitution in using the impeachment procedure.

In Cooley's Principles of Constitutional Law it is said (p. 178):

The offenses for which the President or any other officer may be impeached are any such as in the opinion of the House are deserving of punishment under that process. They are not necessarily offenses against the general laws. In the history of England where the like proceeding obtains, the offenses have often been political, and in some cases for gross betrayal of public interests punishment has very justly been inflicted on cabinet officers. It is often found that offenses of a very serious nature by high officers are not offenses against the criminal code, but consist in abuses or betrayals of trust, or inexcusable neglects of duty, which are dangerous and criminal because of the immense interests involved, and the greatness of the trust which has not been kept. Such cases must be left to be dealt with on their own facts, and judged according to their apparent deserts (p. 178).

In his work on the Constitutional History of the United States, George Ticknor Curtis says (vol. 1, pp. 481–482):

Among the separate functions assigned by the Constitution to the Houses of Congress are those of presenting and trying impeachments. An impeachment, in the report of the committee of detail, was treated as an ordinary judicial proceeding and was placed within the jurisdiction of the Supreme Court. That this was not in all respects a suitable provision will appear from the following considerations: Although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for crime, nor is there any necessity, in the case of crimes committed by public officers, for the institution of any special proceeding for the infliction of the punishment prescribed by the laws, since they, like all other persons, are amenable to the ordinary jurisdiction of the courts of justice in respect of offenses against positive law. The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that either in the discharge of his office or aside from its functions he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist where no offense against positive law has been committed, as where the individual has, from immorality or imbecility or maladministration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer. (Vol. 1, pp. 481–482.)

In Watson on the Constitution (vol. 2, p. 1034, published in 1910) it is said:

A misdemeanor comprehends all indictable offenses which do not amount to a felony, as perjury, battery, libels, conspiracies, attempts and solicitations to commit felonies, etc. These seem to be the definitions of these terms at common law, but it would be strange if a civil officer could be impeached for only such offenses as are embraced within the common-law definition of "other high crimes and misdemeanors." There is a parliamentary definition of the term "misdemeanor," and a modern writer on the Constitution has said: "The term 'high crimes and misdemeanors' has no significance in the common law concerning crimes subject to indictment. It can only be found in the law of Parliament and is the technical term which was used by the Commons at the Bar of the Lords for centuries before the existence of the United States." Synonymous with the term "misdemeanor" are the terms misdeed, misconduct, misbehavior, fault, transgression.

In Story on the Constitution (5th ed., vol. 1, secs. 796, 799) it is said:

Is the silence of the statute book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offenses which

shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked, the power of impeachment, except as to the two expressed cases, is a complete nullity, and the party is wholly dispunishable however enormous may be his corruption and criminality. (Sec. 796.)

Congress has unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanors. (Sec. 799.)

Foster, in his work on the Constitution (sec. 93), says:

The term "high crimes and misdemeanors" has no significance in the common law concerning crimes subject to indictment. It can be found only in the law of Parliament and is the technical term which has been used by the Commons at the bar of the Lords for centuries before the existence of the United States.

* * * * * * *

Impeachable offenses are those which were the subject of impeachment by the practice in Parliament before the Declaration of Independence, except in so far as that practice is repugnant to the language of the Constitution and the spirit of American institutions. An examination of the English precedents will show that, although private citizens as well as public officers have been impeached, no article has been presented or sustained which did not charge either misconduct in office or some offense which was injurious to the welfare of the State at large.

In this class of cases, which rest so much in the discretion of the Senate, the writer would be rash who were to attempt to prescribe the limits of its jurisdiction in this respect.

An impeachable offense may consist of treason, bribery, or a breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness, when habitual or in the performance of official duties, gross indecency, and profanity, obscenity, or other language, used in the discharge of an official function, which tends to bring the office into disrepute, or an abuse or reckless exercise of a discretionary power, as well as a breach or omission of an official duty imposed by statute or common law; or a public speech when off duty which encourages insurrection. It does not consist in an error in judgment made in good faith in the decision of a doubtful question of law, except perhaps in the case of a violation of the Constitution.

In the American and English Enclycopedia of Law, second edition (vol. 15, pp. 1066–1068), it is said:

The Constitution of the United States provides that 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. If impeachment in England be regarded merely as a mode of trial for the punishment of common-law or statutory crimes, and if the Constitution has adopted it only as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law, then, as it is well settled that in regard to the National Government there are no common-law crimes, it would seem necessarily to follow that impeachment can be instituted only for crimes specifically named in the Constitution or for offenses declared to be crimes by Federal statute. This view has been maintained by very eminent authority, but the cases of impeachment that have been brought under the Constitution would seem to give to the remedy a much wider scope than the above rule would indicate. In each of the only two cases of impeachment tried by the Senate in which a conviction resulted the defendant was found guilty of offenses not indictable either at common law or under any Federal statute, and in almost every case brought offenses were charged in the articles of impeachment which were not indictable under any Federal statute and in several cases they were such as constituted neither a statutory nor a common-law crime. The impeachability of the offenses charged in the articles was in most of the cases not denied. In one case, however, counsel for the defendant insisted that impeachment would not lie for any but an indictable offense; but after exhaustive argument on both sides this defense was practically abandoned. The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes, that the phrase "high crimes and misdemeanors" is to be taken not in its common-law but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruption, maladministration, or neglect of duty involving moral

turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of State, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute. Additional weight is added to this interpretation of the Constitution by the opinions of eminent writers on constitutional and parliamentary law and by the fact that some of the most distinguished members of the convention that framed it have thus interpreted it.

It will thus be seen that the common law of crimes and the parliamentary law of impeachments have no direct connection, although the principles of the one may be invoked in the application of the other. They represent two distinct branches in our scheme of jurisprudence and they should be so treated in the consideration of the case which is here presented.

THE TENURE OF FEDERAL JUDGES LIMITED TO "DURING GOOD BEHAVIOR."

The provision in Article III, section 1, of our Constitution that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior," which was also borrowed from the English laws, should be considered in pari materia with Article IV, section 2, providing that all civil officers of the United States shall be removed from office upon "impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

Good behavior is thus made the essential condition on which the tenure to the judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office. The Constitution provides no method whereby a civil officer of the United States can be removed from office save by impeachment. It follows, therefore, that the framers of our Constitution must have intended that Federal judges, who are civil officers, should be removable from office by impeachment for misbehavior, which is the antithesis of good behavior. Otherwise the constitutional provision limiting the tenure of the judicial office to "during good behavior" would be without force and effect.

In his work on the Constitution, Foster says (p. 586):

> The Constitution provides that—
>
> "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior."
>
> This necessarily implies that they may be removed in case of bad behavior. But no means except impeachment is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law.

In Watson on the Constitution, the proposition is stated as follows (vol. 2, pp. 1036–1037):

> A civil officer may so behave in public as to bring disgrace upon himself and shame upon his country, and he may continue to do this until his name would become a national stench, and yet he would not be subject to indictment by any law of the United States, but he certainly could be impeached. What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute do with the constitutional provision relative to judges which says, "Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior"? This means that as long as they behave themselves their tenure of office is fixed, and they can not be disturbed. But suppose they cease to behave themselves? When the Constitution says, "A judge shall hold his office during good behavior," it means that he shall not hold it when it ceases to be good. Suppose he should refuse to sit upon the bench and discharge the duties which the Constitution and the law enjoin upon him, or should become a notoriously corrupt character, and live a notoriously corrupt and debauched life? He could not be indicted or such conduct, and he could not be removed except by impeachment. Would it be claimed that impeachment would not be the proper remedy in such a case?

IMPEACHMENTS NOT CONFINED TO OFFENSES COMMITTED IN AN OFFICIAL CAPACITY.

It is not essential that an offense should be committed in an official capacity in order that it may come within the purview of the constitutional provisions relating to impeachments.

Black, in his work on Constitutional Law, says (2d ed., pp. 121–122):

> Treason and bribery are well-defined crimes. But the phrase "other high crimes and misdemeanors" is so very indefinite that practically it is not susceptible of exact definition or limitation, but the power of impeachment may be brought to bear on any offense against the Constitution or the laws which, in the judgment of the House, is deserving of punishment by this means or is of such a character as to render the party accused unfit to hold and exercise his office. It is, of course, primarily directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not restricted to political crimes alone. The Constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, except that it shows a character or motives inconsistent with the due administration of his office, would render him liable to impeachment. It will be perceived that the power to determine what crimes are impeachable rests very much with Congress. For the House, before preferring articles of impeachment, will decide whether the acts or conduct complained of constitute a "high crime or misdemeanor." And the Senate, in trying the case, will also have to consider the same question. If, in the judgment of the Senate, the offense charged is not impeachable, they will acquit; otherwise, upon sufficient proof and the concurrence of the necessay majority, they will convict. And in either case, there is no other power which can review or reverse their decision.

In 1862 West H. Humphreys, United States district judge for the district of Tennessee, was impeached on several specifications, one of which was based on his action in making a speech at a public meeting, while off the bench, inciting revolt and rebellion against the Constitution and Government of the United States. The evidence clearly showed that he was in nowise acting in a judicial capacity, yet he was convicted on this charge.

A number of the impeachments of judges of the several States of the Union have been predicated on various acts of debauchery entirely separate from the performance of their official duties.

Any conduct on the part of a judge which reflects on his integrity as a man or his fitness to perform the judicial functions should be sufficient to sustain his impeachment. It would be both absurd and monstrous to hold that an impeachable offense must needs be committed in an official capacity. If such an atrocious doctrine should receive the sanction of the Congressional authority there is no limit to the variety and the viciousness of the offenses which a Federal judge might commit with perfect immunity from effective impeachment.

IMPEACHMENT FOR OFFENSES COMMITTED IN ANOTHER JUDICIAL OFFICE.

Certain of the proposed articles of impeachment against Judge Archbald are based on offenses committed while he held the office of United States district judge for the middle district of Pennsylvania, whereas he now holds the office of circuit judge of the United States for the third judicial circuit, and is assigned to serve for a period of four years in the Commerce Court. In this respect the case here presented seems to be unique in the annals of impeachment proceedings under our Constitution.

By virtue of the provisions of section 609 of the Revised Statutes, which were then in force, Judge Archbald, while holding the office of United States district judge, was duly clothed with authority to sit or preside in the United States circuit court, and he was actually presiding over such circuit court at Scranton, Pa., during the time that some or all of the offenses charged in these articles were committed.

Since his elevation to a circuit judgeship the United States circuit courts have been abolished by the act of March 3, 1911 (36 Stat., 1087), entitled "An act to codify, revise, and amend the laws relating to the judiciary," but the provisions relative to the interchangeability of district and circuit judges remain substantially the same. Section 18 of this act provides that—

> Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge or Associate Justice or Chief Justice shall designate and appoint any circuit judge of the circuit to hold said district court.

Thus it appears that Judge Archbald now holds a 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 charged in the said articles, and that, under the existing law, he may be called upon at any time to perform precisely the same functions that he performed as United States district judge.

In State *v.* Hill (37 Nebr., 80) the Legislature of Nebraska had impeached certain ex-officers of the State for offenses alleged to have been committed during their respective terms of office. The Supreme Court of Nebraska held that inasmuch as they had ceased to be civil officers of the State they were not subject to impeachment. In the course of the decision the court said (pp. 88–89):

> Judge Barnard was impeached in the State of New York during his second term for acts committed in his previous term of office. His plea that he was not liable to impeachment for offenses occurring in the first term was overruled. Precisely the same question was raised in the impeachment proceedings against Judge Hubbel, of Wisconsin, and on the trial of Gov. Butler, of this State, and in each of which the ruling was the same as in the Barnard case. There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offense occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired and he is no longer in office, that object is attained and the reason for his impeachment no longer exists. But if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office.

In the cases discussed there was a constructive breach in the tenure of the offices held by the defendants between the time of the commission of the offenses charged and the adoption of the articles of impeachment. Even though the offices held by the defendants at the time of their impeachment had not been the same offices which they held at the time of the commission of the alleged offenses, it might well have been decided, on principle, that impeachment would lie if in fact the prescribed functions of such offices were of the same general nature and susceptible to the same malversations and abuse.

It is indeed anomalous if this 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.

CONCLUSION.

Judges "shall hold their offices during good behavior." Thus says the Constitution. The framers of that instrument were desirous of having an independent and incorruptible judiciary, but they never intended to provide that any judge should hold his office upon nonforfeitable life tenure. Those who formulated the organic law sought to protect the people against the malfeasance and misfeasance of unjust and corrupt judges. Therefore, they wisely limited the tenure of office to "during good behavior" and provided the remedy for misbehavior to be forfeiture of office and the removal therefrom by impeachment.

The conduct of this judge has been exceedingly reprehensible and in marked contrast with the high sense of judicial ethics and probity that generally characterize the Federal judiciary. Be it said to the credit of the wisdom of our fathers and in behalf of our American institutions that the judges have, as a rule, deported themselves in such manner as to merit and keep the confidence of the people. The public respect for the judicial branch of our Government has almost amounted to reverence. This confidence has been deserved and let us hope that it will continue to be deserved to the end that an upright and independent judiciary may be maintained for the perpetuation of our government of law.

A judge should be the personification of integrity, of honor and of uprightness in his daily walk and conversation. He should hold his exalted office and the administration of justice above the sordid desire to accumulate wealth by trading or trafficking with actual or probable litigants in his court. He should be free and unaffected by any bias born of avarice and unhampered by pecuniary or other improper obligations.

Your committee is of opinion that Judge Archbald's sense of moral responsibility has become deadened. He has prostituted his high office for personal profit. He has attempted by various transactions to commercialize his potentiality as judge. He has shown an overweening desire to make gainful bargains with parties having cases before him or likely to have cases before him. To accomplish this purpose he has not hesitated to use his official power and influence. He has degraded his high office and has destroyed the confidence of the public in his judicial integrity. He has forfeited the condition upon which he holds his commission and should be removed from office by impeachment.

RECOMMENDATION.

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge Robert W. Archbald, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said Robert W. Archbald, United States circuit judge designated as a member of the Commerce Court:

RESOLUTION.

Resolved, That Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U. S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the Committee on the Judiciary under House resolution 524 sustains 13 articles of impeachment which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

ARTICLES OF IMPEACHMENT

Of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U. S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court:

ARTICLE 1.

That the said Robert W. Archbald, at Scranton, in the State of Pennsylvania, being a United States circuit judge, and having been duly designated as one of the judges of the United States Commerce Court, and being then and there a judge of the said court, on March 31, 1911, entered into an agreement with one Edward J. Williams whereby the said Robert W. Archbald and the said Edward J. Williams agreed to become partners in the purchase of a certain culm dump, commonly known as the Katydid culm dump, near Moosic, Pa., owned by the Hillside Coal & Iron Co., a corporation, and one John M. Robertson, for the purpose of disposing of said property at a profit. That pursuant to said agreement, and in furtherance thereof, the said Robert W. Archbald, on the 31st day of March, 1911, and at divers other times and at different places, did undertake, by correspondence, by personal conferences, and otherwise, to induce and influence, and did induce and influence, the officers of the said Hillside Coal & Iron Co. and of the Erie Railroad Co., a corporation, which owned all of the stock of said coal company, to enter into an agreement with the said Robert W. Archbald and the said Edward J. Williams to sell the interest of the said Hillside Coal & Iron Co. in the Katydid culm dump for a consideration of $4,500. That during the period covering the several negotiations and transactions leading up to the aforesaid agreement the said Robert W. Archbald was a judge of the United States Commerce Court, duly designated and acting as such judge; and at the time aforesaid and during the time the aforesaid negotiations were in progress the said Erie Railroad Co. was a common carrier engaged in interstate commerce and was a party litigant in certain suits, to wit, the Baltimore

& Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 38, and the Baltimore & Ohio Railroad Co. et al. *v.* The Interstate Commerce Commission, No. 39, then pending in the United States Commerce Court; and the said Robert W. Archbald, judge as aforesaid, well knowing these facts, willfully, unlawfully, and corruptly took advantage of his official position as such judge to induce and influence the officials of the said Erie Railroad Co. and the said Hillside Coal & Iron Co., a subsidiary corporation thereof, to enter into a contract with him and the said Edward J. Williams, as aforesaid, for profit to themselves, and that the said Robert W. Archbald, then and there, through the influence exerted by reason of his position as such judge, willfully, unlawfully, and corruptly did induce the officers of said Erie Railroad Co. and of the said Hillside Coal & Iron Co. to enter into said contract for the consideration aforesaid.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a high crime and misdemeanor in office.

ARTICLE 2.

That the said Robert W. Archbald, on the 1st day of August, 1911, was a United States circuit judge, and, having been duly designated as one of the judges of the United States Commerce Court, was then and there a judge of said court.

That at the time aforesaid the Marian Coal Co., a corporation, was the owner of a certain culm bank at Taylor, Pa., and was then and there engaged in the business of washing and shipping coal; that prior to that time the said Marian Coal Co. had filed before the Interstate Commerce Commission a complaint against the Delaware, Lackawanna & Western Railroad Co. and five other railroad companies as defendants, charging said defendants with discrimination in rates and with excessive charges for the transportation of coal shipped by the said Marian Coal Co. over their respective lines of road; that all of the said defendant companies were common carriers engaged in interstate commerce. That the decision of the said case by the Interstate Commerce Commission at the instance of either party thereto was subject to review, under the law, by the United States Commerce Court; that one Christopher G. Boland and one William P. Boland were then the principal stockholders of the said Marian Coal Co. and controlled the operation of the same, and they, the said Christopher G. Boland and the said William P. Boland, employed one George M. Watson as an attorney to settle the case then pending as aforesaid in the Interstate Commerce Commission and to sell to the Delaware, Lackawanna & Western Railroad Co. two-thirds of the stock of the said Marian Coal Co.; and at the time aforesaid there was pending in the United States Commerce Court a certain suit entitled the Baltimore & Ohio Railroad Co. et al. *v.* the Interstate Commerce Commission, No. 38, to which suit the said Delaware, Lackawanna & Western Railroad Co. was a party litigant.

That the said Robert W. Archbald, being judge as aforesaid and well knowing these facts, did then and there engage, for a consideration, to assist the said George M. Watson to settle the aforesaid case then pending before the Interstate Commerce Commission and to sell to the said Delaware, Lackawanna & Western Railroad Co. the said two-thirds of the stock of the said Marian Coal Co., and in pursuance of said engagement the said Robert W. Archbald, on or

about the 10th day of August, 1911, and at divers other times and at different places, did undertake, by correspondence, by personal conferences, and otherwise, to induce and influence the officers of the Delaware, Lackawanna & Western Railroad Co. to enter into an agreement with the said George M. Watson for the settlement of the aforesaid case and the sale of said stock of the Marian Coal Co.; and the said Robert W. Archbald thereby willfully, unlawfully, and corruptly did use his influence as such judge in the attempt to settle said case and to sell said stock of the said Marian Coal Co. to the Delaware, Lackawanna & Western Railroad Co.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a high crime and misdemeanor in office.

ARTICLE 3.

That the said Robert W. Archbald, being a United States circuit judge and a judge of the United States Commerce Court, on or about October 1, 1911, did secure from the Lehigh Valley Coal Co., a corporation, which coal company was then and there owned by the Lehigh Valley Railroad Co., a common carrier engaged in interstate commerce, and which railroad company was at that time a party litigant in certain suits then pending in the United States Commerce Court, to wit, The Baltimore & Ohio Railroad Co. et al. *v.* Interstate Commerce Commission et al., No. 38, and The Lehigh Valley Railroad Co. *v.* Interstate Commerce Commission et al., No. 49, all of which was well known to said Robert W. Archbald, an agreement which permitted said Robert W. Archbald and his associates to lease a culm dump, known as Packer No. 3, near Shenandoah, in the State of Pennsylvania, which said culm dump contained a large amount of coal, to wit, 472,670 tons, and which said culm dump the said Robert W. Archbald and his associates agreed to operate and to ship the product of the same exclusively over the lines of the Lehigh Valley Railroad Co.; and that the said Robert W. Archbald unlawfully and corruptly did use his official position and influence as such judge to secure from the said coal company the said agreement.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of a misdemeanor in such office.

ARTICLE 4.

That the said Robert W. Archbald, while holding the office of United States circuit judge and being a member of the United States Commerce Court, was and is guilty of gross and improper conduct, and was and is guilty of a misdemeanor as said circuit judge and as a member of said Commerce Court in manner and form as follows, to wit: Prior to and on the 4th day of April, 1911, there was pending in said United States Commerce Court the suit of Louisville & Nashville Railroad Co. *v.* The Interstate Commerce Commission. Said suit was argued and submitted to said United States Commerce Court on the 4th day of April, 1911; that afterwards, to wit, on the 22d day of August, 1911, while said suit was still pending in said court, and before the same had been decided, the said Robert W. Archbald, as a member of said United States Commerce Court, secretly, wrongfully, and unlawfully did write a letter to the attorney for the said Louisville & Nashville Railroad Co. requesting said attorney to see one of the witnesses who had testified in said suit on

behalf of said company and to get his explanation and interpretation of certain testimony that the said witness had given in said suit, and communicate the same to .e said Robert W. Archbald, which request was complied with by said attorney; that afterwards, to wit, on the 10th day of January, 1912, while said suit was still pending, and before the same had been decided by said court, the said Robert W. Archbald, as judge of said court, secretly, wrongfully, and unlawfully again did write to the said attorney that other members of said United States Commerce Court had discovered evidence on file in said suit detrimental to the said railroad company and contrary to the statements and contentions made by the said attorney, and the said Robert W. Archbald, judge of said United States Commerce Court as aforesaid, in said letter requested the said attorney to make to him, the said Robert W. Archbald, an explanation and an answer thereto; and he, the said Robert W. Archbald, as a member of said United States Commerce Court aforesaid, did then and there request and solicit the said attorney for the said railroad company to make and deliver to the said Robert W. Archbald a further argument in support of the contentions of the said attorney so representing the said railroad company, which request was complied with by said attorney, all of which on the part of said Robert W. Archbald was done secretly, wrongfully, and unlawfully, and which was without the knowledge or consent of the said Interstate Commerce Commission or its attorneys.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 5.

That in the year 1904 one Frederick Warnke, of Scranton, Pa., purchased a two-thirds interest in a lease on certain coal lands owned by the Philadelphia & Reading Coal & Iron Co., located near Lorberry Junction, in said State, and put up a number of improvements thereon and operated a culm dump located on said property for several years thereafter; that operations were carried on at a loss; that said Frederick Warnke thereupon applied to the Philadelphia & Reading Coal & Iron Co. for the mining maps of the said land covered by the said lease, and was informed that the lease under which he claimed had been forfeited two years before it was assigned to him, and his application for said maps was therefore denied; that said Frederick Warnke then made a proposition to George F. Baer, president of the Philadelphia & Reading Railroad Co. and president of the Philadelphia & Reading Coal & Iron Co., to relinquish any claim that he might have in this property under the said lease, provided that the Philadelphia & Reading Coal & Iron Co. would give him an operating lease on what was known as the Lincoln culm bank located near Lorberry; that said George F. Baer referred said proposition to one W. J. Richards, vice president and general manager of the Philadelphia & Reading Coal & Iron Co., for consideration and action; that the general policy of the said coal company being adverse to the lease of any of its culm banks, the said George F. Baer and the said W. J. Richards declined to make the lease, and the said Frederick Warnke was so advised; that the said Frederick Warnke then made several attempts, through his attorneys and friends, to have the said George F. Baer and the

said W. J. Richards reconsider their decision in the premises, but without avail; that on or about November 1, 1911, the said Frederick Warnke called upon Robert W. Archbald, who was then and now is a United States circuit judge, having been duly designated as one of the judges of the United States Commerce Court, and asked him, the said Robert W. Archbald, to intercede in his behalf with the said W. J. Richards; that on November 24, 1911, the said Robert W. Archbald, judge, as aforesaid, pursuant to said request, did write a letter to the said W. J. Richards, requesting an appointment with the said W. J. Richards; that several days thereafter the said Robert W. Archbald called at the office of the said W. J. Richards to intercede for the said Frederick Warnke; that the said W. J. Richards then and there informed the said Robert W. Archbald that the decision which he had given to the said Warnke must be considered as final, and the said Archbald so informed the said Warnke; that the entire capital stock of the Philadelphia & Reading Coal & Iron Co. is owned by the Reading Co., which also owns the entire capital stock of the Philadelphia & Reading Railroad Co., which last-named company is a common carrier engaged in interstate commerce.

That the said Robert W. Archbald, judge as aforesaid, well knowing all the aforesaid facts, did wrongfully attempt to use his influence as such judge to aid and assist the said Frederick Warnke to secure an operating lease of the said Lincoln culm dump owned by the Philadelphia & Reading Coal & Iron Co., as aforesaid, which lease the officials of the said Philadelphia & Reading Coal & Iron Co. had theretofore refused to grant, which said fact was also well known to the said Robert W. Archbald.

That the said Robert W. Archbald, judge as aforesaid, shortly after the conclusion of his attempted negotiations with the officers of the Philadelphia & Reading Railroad Co. and of the Philadelphia & Reading Coal & Iron Co., aforesaid, in behalf of the said Frederick Warnke, and on or about the 31st day of March, 1912, willfully, unlawfully, and corruptly did accept, as a gift, reward, or present, from the said Frederick Warnke, tendered in consideration of favors shown him by said judge in his efforts to secure a settlement and agreement with the said railroad company and the said coal company, and for other favors shown by said judge to the said Frederick Warnke, a certain promissory note for $500 executed by the firm of Warnke & Co., of which the said Frederick Warnke was a member.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as a judge and high crimes and misdemeanor in office.

ARTICLE 6.

That the said Robert W. Archbald, being a United States circuit judge and a judge of the United States Commerce Court, on or about the 1st day of December, 1911, did unlawfully, improperly, and corruptly attempt to use his influence as such judge with the Lehigh Valley Coal Co. and the Lehigh Valley Railway Co. to induce the officers of said companies to purchase a certain interest in a tract of coal land containing 800 acres, which interest at said time belonged to certain persons known as the Everhardt heirs.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 7.

That during the months of October and November, A. D. 1908, there was pending in the United States district court, in the city of Scranton, State of Pennsylvania, over which court Robert W. Archbald was then presiding as the duly appointed judge thereof, a suit or action at law, wherein the old Plymouth Coal Co. was plaintiff and the Equitable Fire & Marine Insurance Co. was defendant. That the said coal company was principally owned and entirely controlled by one W. W. Rissinger, which fact was well known to said Robert W. Archbald; that on or about November 1, 1908, and while said suit was pending, the said Robert W. Archbald and the said W. W. Rissinger wrongfully and corruptly agreed together to purchase stock in a gold-mining scheme in Honduras, Central America, for the purpose of speculation and profit; that in order to secure the money with which to purchase said stock the said Rissinger executed his promissory note in the sum of $2,500, payable to Robert W. Archbald and Sophia J. Hutchison, which said note was indorsed then and there by the said Robert W. Archbald, for the purpose of having same discounted for cash; that one of the attorneys for said Rissinger in the trial of said suit was one John T. Lenahan; that on the 23d day of November, 1908, said suit came on for trial before said Robert W. Archbald, judge presiding, and a jury, and after the plaintiff's evidence was presented the defendant insurance company demurred to the sufficiency of said evidence and moved for a nonsuit, and after extended argument by attorneys for both plaintiff and defendant the said Robert W. Archbald ruled against the defendant and in favor of the plaintiff, and thereupon the defendant proceeded to introduce evidence, before the conclusion of which the jury was dismissed and a consent judgment rendered in favor of the plaintiff for $2,500, to be discharged upon the payment of $2,129.63 and if paid within 15 days from November 23, 1908, and on the same day judgments were entered in a number of other like suits against different insurance companies, which resulted in the recovery of about $28,000 by the Old Plymouth Coal Co.; that before the expiration of said 15 days the said Rissinger, with the knowledge and consent of said Robert W. Archbald, presented said note to the said John T. Lenahan for discount, which was refused and which was later discounted by a bank and has never been paid.

All of which acts on the part of the said Robert W. Archbald were improper, unbecoming, and constituted misbehavior in his said office as judge, and render him guilty of a misdemeanor.

ARTICLE 8.

That during the summer and fall of the year 1909 there was pending in the United States District Court for the Middle District of Pennsylvania, in the city of Scranton, over which court the said Robert W. Archbald was then and there presiding as the duly appointed judge thereof, a civil action wherein the Marian Coal Co. was defendant, which action involved a large sum of money, and which defendant coal company was principally owned and controlled by one Christopher G. Boland and one William P. Boland, all of which was well known to said Robert W. Archbald; and while said suit was so pending the said Robert W. Archbald drew a note for $500, payable to himself, and which note was signed by one John

Henry Jones and indorsed by said Robert W. Archbald, and then and there during the pendency of said suit as aforesaid the said Robert W. Archbald wrongfully agreed and consented that the said note should be presented to the said Christopher G. Boland and the said William P. Boland, or one of them, for the purpose of having the said note discounted, corruptly intending that his name on said note would coerce and induce the said Christopher G. Boland and the said William P. Boland, or one of them, to discount the same because of the said Robert W. Archbald's position as judge, and because the said Bolands were at that time litigants in his said court.

Wherefore the said Robert W. Archbald was and is guilty of gross misconduct in his office as judge, and was and is guilty of a misdemeanor in his said office as judge.

ARTICLE 9.

That the said Robert W. Archbald, of the city of Scranton and State of Pennsylvania, on or about November 1, 1909, being then and there a United States district judge in and for the middle district of Pennsylvania, in the city of Scranton and State aforesaid, did draw a note in his own proper handwriting, payable to himself, in the sum of $500, which said note was signed by one John Henry Jones, which said note the said Robert W. Archbald indorsed for the purpose of securing the sum of $500, and the said Robert W. Archbald, well knowing that his indorsement would not secure money in the usual commercial channels, then and there wrongfully did permit the said John Henry Jones to present said note for discount, at his law office, to one C. H. Von Storch, attorney at law and practitioner in said district court, which said Von Storch, a short time prior thereto, was a party defendant in a suit in the said district court presided over by said Robert W. Archbald, which said suit was decided in favor of the said Von Storch upon a ruling by the said Robert W. Archbald; and when the said note was presented to the said Von Storch for discount, as aforesaid, the said Robert W. Archbald wrongfully and improperly used his influence as such judge to induce the said Von Storch to discount same; that the said note was then and there discounted by the said Von Storch, and the same has never been paid, but is still due and owing.

Wherefore the said Robert W. Archbald was and is guilty of gross misconduct in his said office, and was and is guilty of a misdemeanor in his said office as judge.

ARTICLE 10.

That the said Robert W. Archbald, while holding the office of United States district judge, in and for the middle district of the State of Pennsylvania, on or about the 1st day of May, 1910, wrongfully and unlawfully did accept and receive a large sum of money, the exact amount of which is unknown to the House of Representatives, from one Henry W. Cannon; that said money so given by the said Henry W. Cannon and so unlawfully and wrongfully received and accepted by the said Robert W. Archbald, judge as aforesaid, was for the purpose of defraying the expenses of a pleasure trip of the said Robert W. Archbald to Europe; that the said Henry W. Cannon, at the time of the giving of said money and the receipt thereof by the said Robert W. Archbald, was a stockholder and officer in various and divers interstate railway corporations, to wit: A director in the Great Northern Railway, a director in the Lake

Erie & Western Railroad Co., and a director in the Fort Wayne, Cincinnati & Louisville Railroad Co.; that the said Henry W. Cannon was president and chairman of the board of directors of the Pacific Coast Co., a corporation which owned the entire capital stock of the Columbia & Puget Sound Railroad Co., the Pacific Coast Railway Co., the Pacific Coast Steamship Co., and various other corporations engaged in the mining of coal and in the development of agricultural and timber land in various parts of the United States; that the acceptance by the said Robert W. Archbald, while holding said office of United States district judge, of said favors from an officer and official of the said corporations, any of which in the due course of business was liable to be interested in litigation pending in the said court over which he presided as such judge, was improper and had a tendency to and did bring his said office of district judge into disrepute.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 11.

That the said Robert W. Archbald, while holding the office of United States district judge in and for the middle district of the State of Pennsylvania, did, on or about the 1st day of May, 1910, wrongfully and unlawfully accept and receive a sum of money in excess of $500, which sum of money was contributed and given to the said Robert W. Archbald by various attorneys who were practitioners in the said court presided over by the said Robert W. Archbald; that said money was raised by subscription and solicitation from said attorneys by two of the officers of said court, to wit, Edward R. W. Searle, clerk of said court, and J. B. Woodward, jury commissioner of said court, both the said Edward R. W. Searle and the said J. B. Woodward having been appointed to the said positions by the said Robert W. Archbald, judge aforesaid.

Wherefore said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 12.

That on the 9th day of April, 1901, and for a long time prior thereto, one J. B. Woodward was a general attorney for the Lehigh Valley Railroad Co., a corporation and common carrier doing a general railroad business; that on said day the said Robert W. Archbald, being then and there a United States district judge in and for the middle district of Pennsylvania, and while acting as such judge, did appoint the said J. B. Woodward as a jury commissioner in and for said judicial district, and the said J. B. Woodward, by virtue of said appointment and with the continued consent and approval of the said Robert W. Archbald, held such office and performed all the duties pertaining thereto during all the time that the said Robert W. Archbald held said office of United States district judge, and that during all of said time the said J. B. Woodward continued to act as a general attorney for the said Lehigh Valley Railroad Co.; all of which was at all times well known to the said Robert W. Archbald.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior in office, and was and is guilty of a misdemeanor.

ARTICLE 13.

That Robert W. Archbald, on the 29th day of March, 1901, was duly appointed United States district judge for the middle district of Pennsylvania and held such office until the 31st day of January, 1911, on which last-named date he was duly appointed a United States circuit judge and designated as a judge of the United States Commerce Court.

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, the said Robert W. Archbald, at divers times and places, has sought wrongfully to obtain credit from and through certain persons who were interested in the result 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 the said Robert W. Archbald is 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, at Scranton, in the State of Pennsylvania, on the 31st day of March, 1911, and at divers other times and places, did undertake to carry on a general business for speculation and profit in the purchase and sale of culm dumps, coal lands, and other coal properties, and for a valuable consideration to compromise litigation pending before the Interstate Commerce Commission, and, in the furtherance of his efforts to compromise such litigation and of his speculations in coal properties, willfully, unlawfully, and corruptly did use his influence as a judge of the said United States Commerce Court to induce the officers of the Erie Railroad Co., the Delaware, Lackawanna & Western Railroad Co., the Lackawanna & Wyoming Valley Railroad Co., and other railroad companies engaged in interstate commerce, respectively, to enter into various and divers contracts and agreements in which he was then and there financially interested with divers persons, to wit, Edward J. Williams, John Henry Jones, Thomas H. Jones, George M. Watson, and others, without disclosing his said interest therein on the face of the contract, but which interest was well known to the officers and agents of said railroad companies.

That the said Robert W. Archbald did not invest any money or other thing of value in consideration of any interest acquired or sought to be acquired by him in securing or in attempting to secure such contracts or agreements or properties as aforesaid, but used his influence as such judge with the contracting parties thereto, and received an interest in said contracts, agreements, and properties in consideration of such influence in aiding and assisting in securing same.

That the said several railroad companies were and are engaged in interstate commerce, and at the time of the execution of the several contracts and agreements aforesaid and of entering into negotiations looking to such agreements had divers suits pending in the United States Commerce Court, and that the conduct and efforts of the said Robert W. Archbald in endeavoring to secure and in securing such contracts and agreements from said railroad companies was continuous and persistent from the said 31st day of March, 1911, to about the 15th day of April, 1912.

Wherefore the said Robert W. Archbald was and is guilty of misbehavior as such judge and of misdemeanors in office.

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58TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1905.

JUDGE CHARLES SWAYNE.

MARCH 25, 1904.—Referred to the House Calendar and ordered to be printed.

Mr. PALMER, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. Res. No. 274.]

On the 10th day of December, 1903, the House passed the following resolution:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Charles Swayne, judge of the United States district court for the northern district of Florida, and say whether said judge has held terms of his court as required by law; whether he has continuously or persistently absented himself from the said State, and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that district of the benefits of the court therein to amount to a denial of justice; whether the said judge has been guilty of corrupt conduct in office, and whether his administration of his office has resulted in injury and wrong to litigants of his court.

And in reference to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary, to send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. And the said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant-at-arms, by himself or deputy, who shall serve the processes of said committee and subcommittee and execute its orders, and shall attend the sittings of the same as ordered and directed thereby. And that the expense of such investigation shall be paid out of the contingent fund of the House.

Testimony was taken in Pensacola, Tallahassee, and Jacksonville, Fla., and in the city of Washington upon several days. At all the hearings the Hon. Charles Swayne was present himself and by counsel, except at the last hearings in Washington, when he appeared in propria persona and argued his case before the subcommittee. All the witnesses asked for by the complainants and the respondent were sworn. Their evidence was reduced to writing and is presented with this report.

Specifications of the particular matters covered by the general charges were furnished the committee by the complainants. They were as follows:

Specification 1.—That the said Charles Swayne, judge of the United States court in and for the northern district of Florida, for ten years, while he has been such judge,

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was a nonresident of the State of Florida, and resided in the State of Delaware. That he never pretended to reside in Florida until May, 1903. That during said time of his nonresidence, by such nonresidence, he has caused great inconvenience, annoyance, injury, and expense to litigants in his court, not so much by failure to hold terms of court as by failing to be in reach for the disposition of admiralty and chancery matters and other matters arising between terms of court needing disposition.

Specification 2.—That said Charles Swayne, as such judge, appointed one B. C. Tunison as United States commissioner; that it was charged that it was an improper appointment, and that testimony was offered to such effect before said appointment.

Specification 3.—That the said Charles Swayne, as such judge, appointed and maintains one John Thomas Porter as United States commissioner at Marianna, but that said Porter does not reside at Marianna, but at Grand Ridge, 16 miles away, and is never at Marianna or at his office except when notified of an arrest, necessitating people having business with the United States commissioner, often at expense and inconvenience, to go to Grand Ridge, and necessitating the holding of prisoners often for a day or two, at their inconvenience, and in imprisonment at the expense of the Government, until said Porter sees fit to come to Marianna.

The said Swayne, although there is great necessity for a commissioner at Marianna, has refused to appoint such.

Specification 4.—That said Swayne, in the administration of his court, has been guilty of great partiality and favoritism to one B. C. Tunison, mentioned in specification No. 2, and a practicing attorney in said court. That so great and well known has this partiality and favoritism become that it has created the general impression that to succeed in that court before the said Swayne it is necessary to retain the said Tunison.

Specification 5.—That said Swayne has been guilty of oppression and tyranny in his office, incorrectly and oppressively and without just cause imprisoning one W. C. O'Neal, one E. T. Davis, and one Simeon Belding upon feigned, fictitious, and false charges of contempt of his said court.

Specification 6.—That said Charles Swayne has willfully, negligently, and corruptly maladministered bankruptcy cases in his court, to the extent that the assets of bankrupts have, in all or nearly all cases, been squandered and dissipated in paying extraordinary fees and expenses, and never paying any dividends to creditors.

Specification 7.—That said Charles Swayne was guilty of oppression and tyranny in his office to one Charles Hoskins, upon an alleged contempt resulting in the suicide of the said Hoskins, and said alleged contempt proceedings being brought for the purpose of breaking down and injuring one W. R. Hoskins, who was charged in said court with involuntary bankruptcy, but who was defending and resisting such charge.

Specification 8.—That said Swayne corruptly purchased a house and lot in the city of Pensacola while the said house and lot was in litigation in his court.

Specification 9.—Ignorance and incompetency to hold said position. Under this specification many illustrations could be given, among them a case in which he took jurisdiction in admiralty in violation of the treaty between the United States and Sweden and Norway; and in one case, that of Sweet *v.* Owl Commercial Company, in which he charged the jury to exactly and diametrically conflicting theories of law.

Specification 11.—That said Swayne, by reason of his absence from the State, failed to hold the term of court which should have been held at Tallahassee in the fall of the year 1902, during the months of November or December.

Specification 12.—That the said Charles Swayne has been guilty of conduct unbecoming an upright judge, in that he has procured as indorsers on his note, for the purpose of borrowing money, attorneys and litigants having cases pending in his court.

Specification 13.—That the said Charles Swayne has been guilty of maladministration in the affairs of the conduct of his office; that he has discharged people convicted of crime in his court. Illustration, case of Alonzo Love, convicted in the year of 1902, of perjury.

FINDINGS OF FACT AND LAW.

The facts proved by the testimony bearing upon the several specifications are found to be as follows:

First, as to the evidence of Judge Swayne's residence in his district.—Judge Charles Swayne was appointed district judge of the United States for the northern district of Florida in 1890. At that time the boundaries of the district included St. Augustine, where he resided. In the year 1894 the boundaries of the district were changed by an act

of Congress and St. Augustine and Jacksonville were included in the southern district, leaving Pensacola and Tallahassee as the only places at which a United States court was held in the northern district.

From the time the boundaries of the northern district were changed until the year 1903 Judge Charles Swayne boarded at hotels or boarding houses in Pensacola and Tallahassee during the times his court was in session, except a portion of the year 1900, about two or three months, when he lived with his family in Pensacola, in a house rented by his wife. The testimony establishes the fact that substantially he was not in the district at any other time except when his court was in session. From 1896 to 1904 his court was open for business four hundred and ninety-two days, being the average of sixty-one and one-half days per annum for eight years. No testimony was offered to show how many days the court was open or closed during the years 1894 and 1895.

In the year 1903 his wife purchased a house in Pensacola. There is no evidence that he has occupied it, or that he has ever been registered, paid taxes, or voted in the northern district of Florida since the boundaries of the district ere changed, or that his family has been there, except a part of one winter.

Upon the part of Judge Swayne, a witness testified that he had, at the request of Judge Swayne, endeavored at different times between 1894 and 1903 to find a suitable house in Pensacola which he could purchase, and at one time endeavored to get a house built for him, but that he had not succeeded in either effort.

Judge Swayne testified that when he first went to Pensacola he asked a man connected with a bank to have his name placed on the registry. It was not done. Judge Swayne admitted that he never was registered in the northern district of Florida, never paid a tax, voted, or in any manner exercised the rights of citizenship. After making the request of a person not connected with the registration of voters, he never inquired to find if it had been done. He stated to at least one person that his home was at Guyencourt, Del.; that was the place where he went when court was not in session in Florida, or when he was not holding court in other States.

From the testimony in the case your committee find that Judge Swayne has never acquired a legal residence in the northern district of Florida, nor has he actually resided there, within the meaning of the act of Congress, which is as follows:

> A district judge shall be appointed for each district, except in the cases hereinafter provided. Every such judge shall reside in the district for which he is appointed, and for offending against this provision shall be guilty of a high misdemeanor.

This act needs no interpretation. Its purpose is plain. A nonresident judge can not perform the duties of his office properly or rightfully administer justice to the people of his district. Whether he can or not, the law requires him to live there, and makes him guilty of a high misdemeanor if he does not obey it. There is sufficient evidence, if evidence were needed, to satisfy your committee that the continued absence of Judge Swayne subjected lawyers and suitors to inconvenience, delay, and expense, and in some cases amounted to a denial of justice. Let it be granted that there is not; let us suppose that no one suffered harm. We do not find that Judge Swayne is therefore to be excused from obeying the law. No exception is contained in the act; we can not write one in for his benefit.

Judge Swayne does not claim that he had a residence in his district

from 1894 to 1903. His testimony is rather in the nature of a series of excuses for not having it. He says he authorized his clerk to look for a house in Pensacola; that he spoke to a bank cashier about being registered; that he was always ready to go back to his district when needed; that he was called to hold court elsewhere; that other southern judges go north in the summer season. All this does not excuse Judge Swayne for noncompliance with a highly penal statute. It ill becomes a judge to set up excuses for disobeying the law. After the Florida legislature had acted and passed the condemnatory resolution, upon which this proceeding is founded, he apparently awoke to the fact that his plain duty in respect to residing in the district had been neglected. His wife purchased a house in Pensacola. The evidence does not show that he ever even lived in that house. This statute is as binding upon Judge Swayne as any other law upon the statute book. If he may violate this act with impunity he ought to be allowed exemption from obedience to all laws.

It may be conceded that residence is ordinarily a question of intention. A man's legal residence is, doubtless, where, after having gained a residence, he intends to reside. But in order to comply with this statute we submit that there must be something more than an intention on the part of a judge to reside in his district. There must be an actual as well as a legal residence. One may establish and have a legal residence in the United States and remain continuously abroad any number of consecutive years without losing it; but such a constructive or legal residence certainly would not answer the purpose of this statute which clearly was to secure the bodily presence of the judge within his district where the people who had need of his official services could have them.

It has been said that the word residence is an elastic term of which an exhaustive definition can not be given, but that it must be construed in every case in accordance with the object and intent of the statute in which it occurs. (Eng. and Am. Enc. p. 696.)

It may happen that one may have two places of residence, in one of which he resides during one portion of the year, in the other during the remaining portion. In such case the place where he happens to be constitutes his residence so long as he is there, and ceases to be such as soon as he leaves for the other place. (Ibid., 699. Walcott *v.* Belfield, 1 Kay, 534; 18 Jurist, 570; Stout *v.* Leonard, 37 N. J. L., 492.)

In the case of The People *v.* Owen, 29 Colorado, 535, it was held that when a statute requires a district judge to reside in his district the residence contemplated was an actual as distinguished from a legal or constructive residence.

Judge Swayne offered himself as a witness upon this question after the committee came to Washington after visiting Florida. He was sworn, and his testimony was as follows:

Mr. PALMER. Judge Swayne will proceed and will make his statement to the stenographer.

Judge SWAYNE. I was born in 1842 in Delaware, and resided there with my parents. I read law in Philadelphia and was admitted to the bar and took my degree of B. A. in the Pennsylvania Law School. I practiced law there, with the exception of one year, until 1885, when I removed with my family to Sanford, Fla. I practiced law there until 1887, when I was burned out, when I removed with my family to the county seat, where I was residing when appointed to the bench on May 17, 1889. I took the oath of office June 1, 1889.

Mr. PALMER. That was a recess appointment, was it not?

Judge SWAYNE. Yes, sir; I can not tell positively what date I was confirmed. The confirmation came up before Congress the following December, and in consequence of the election trials, which had taken place in the meantime, the confirmation did

not occur until April 1, 1890. I addressed the Senate on the subject, which can be seen by the Congressional Record of the first session of the Fifty-first Congress, volume 21, February 21, 1890, and which was a very interesting debate, showing exactly what the questions were. In the summer of 1890 I moved to St. Augustine. I think we arrived there the 1st of October, having been North on a vacation, as was the custom of most of the Federal judges, perhaps of all of them, to take such vacations.

I resided in St. Augustine with my family, and, about the time when the bill making the change in the district which has been spoken of received President Cleveland's signature, after a consultation with my friends in Jacksonville and vicinity they urged me not to move my furniture nor my family, saying that the next Congress would be Republican and the district would be placed back in its usual form. My furniture was allowed to remain, and I went at once to Pensacola. I found a leading Democratic friend there, and I stated to him that I had concluded not to move my furniture there, and it was all well understood by the people there. I was there for a considerable period, sometimes early in October and sometimes a little later, and I was there all the time I was needed unless holding court somewhere else. By special assignment for five months I was in the court at Dallas. In 1890, in July I went with my family to Europe. In the spring, in 1900, I was holding court at Birmingham, where I had a great many friends, and after that I went to Pensacola and rented a house.

Mr. GILLETT. Was that in 1890?

Judge SWAYNE. That was in 1900. I think I moved there early in October. I then went North with my wife and son to spend Christmas week in Wilmington. On the 12th of the following January I was in Tyler, Tex., and two days later I got a telegram about the breaking down of my son's health, but I stayed on until February and finished the case and then came back, as his condition was very critical and serious, and, after a week or two, perhaps, I returned and held court and finished what I had to do and got back to Delaware that spring. In February, 1903, I was again in Tyler, Tex., and went early to Wilmington. In the spring we bought the property that had been formerly occupied by Judge A. C. Blount, in Pensacola, and moved in it the 1st of October.

I never was a registered voter and I have not voted in fourteen years. When I left Delaware I moved my domicile, and have taken no part in political questions arising in the State of Delaware or Florida. Mr. Turner, whom Mr. Laney said he did not know, was an attorney for my matters for four years. My father died in 1889 and left property to my mother for life. She is still living, and the property comes to me and my sister as a residuary legatee at the time of her death. But that has never been my home, but I have spent my summers there mostly, arriving sometimes in June and sometimes in July, and from that point I could always reach Pensacola in thirty-six hours, and the record will show I have always been there to attend to anything of a serious nature.

My recollection is that no one has ever suffered because of my absence, and I can offer testimony which will entirely clear up that proposition. My recollection is that, from the testimony taken, the most the committee has on this point before them is that counsel may have been sometimes inconvenienced in the summer time during my absence on vacation. As near as I can recollect, these are the facts which cover the period since I have been on the bench.

Mr. GILLETT. Did the business of the court suffer because of your absence?

Judge SWAYNE. I never heard of it.

Mr. GILLETT. The summer time was the time usually taken for vacations?

Judge SWAYNE. Yes; I so understand it. Another suggestion was that the only way to get rid of me would be to do away with the district entirely. But I do not suppose the parties care very much whether the office is abolished or not, just so long as they can get the individual.

Bearing in mind that Judge Swayne is presumed to be learned in the law, and that he is fully aware of what is needful to enable a man to gain a legal residence and also to maintain an actual residence in a given place, it is apparent that he does not claim that, prior to 1903, he had either gained a legal or maintained an actual residence in the northern district of Florida. His testimony is prolific of reasons why he did not do so.

Apparently he had an actual and legal residence in St. Augustine, which was in his district before the boundaries were changed. After that event he broke up housekeeping and stored his furniture; then

being advised, as he states, by some of his friends that the next or some succeeding Congress would be Republican and that the boundaries of his district would be extended. After that he attended the session of his court at Pensacola and Tallahassee, living at different boarding houses or hotels, being present substantially at no time except when court was in session. When he left Florida he states that he always left directions with his clerk that he would come back if needed. Correspondence was addressed to him at Guyencourt, Del.; that place he spoke of as his home. To that place he returned when his labors in his district were ended or after he concluded terms of court in other States. He had live stock and personal property at Guyencourt in Delaware. His family generally lived there; sometimes abroad. In the year 1900 his wife rented a house in Pensacola and lived there with her husband a portion of the winter, going North with him about the holidays. Rent was paid for the house a year or more, but it was not again occupied by him or his family. He spoke to a bank cashier about being registered, but the bank cashier had nothing to do with the registration; that was an act which, under the law, must be attended to personally.

Judge Swayne never was registered. When there did he gain even a legal residence in the northern district of Florida? Has he ever gained such a residence? His actual residence was measured by about sixty days in each year. Did he gain a legal residence when he broke up housekeeping and stored his furniture awaiting the time when a Republican Congress would change the boundaries of his district, so that he would not need to move away from St. Augustine? Did he gain a legal residence when he asked the bank cashier about being put on the register of voters? Asking his clerk to find a suitable home for him to rent or purchase evidenced an intention to reside in Pensacola when such a house was found. It did not gain a residence for him while the fruitless search progressed. It may be gathered from Judge Swayne's testimony that he intended to reside in Pensacola sometime when he could buy or build a house.

There was no place in the northern district of Florida where legal service of process could have been made on Judge Swayne during the ten months of each year when he was absent from the State. The fact that Judge Swayne held court in other States, being assigned to do so by the circuit judge, does not tend to show that he had or had not a residence in his district. If to be present in the district during the time necessarily spent in holding the terms of court fixed by law, in March and November of each year, was to reside in the northern district of Florida, within the meaning of the act that requires a judge to reside in his district under penalty of being guilty of a high misdemeanor if he does not, then Judge Swayne has complied with the law and is not subject to be charged on that ground. If he has persistently and continuously evaded and refused to obey this law, according to its plain intent, as the committee find from the testimony, then he should be impeached and sent before the triers.

Your committee can see no reason for overlooking or excusing his default. The law itself measures the grade of Judge Swayne's offense. It is a high misdemeanor. For that, by the express words of the Constitution, he is impeachable. It is not for the House of Representatives to seek for excuses exonerating a judge for a plain violation of statutory law, but to charge him before the tribunal fixed

for the trial and let him abide the consequences of his act. If the Senate chooses to regard his excuses and exempt him from just punishment, the House will have done its duty to the people, and responsibility for miscarriage of justice will rest elsewhere.

THE CASE OF E. T. DAVIS AND SIMEON BELDEN.

Second.—The facts of the case, as set forth by the testimony, are as follows:

In the year 1901 an action of ejectment was pending in the circuit court of the United States at Pensacola in which Florida McGuire was plaintiff, and the Pensacola City Company and numerous individuals, among them W. A. Blount and W. Fisher, attorneys at law, were defendants for a tract of land called the Rivas or Chavaux tract. The plaintiff's lawyers were Louis Paquet and Simeon Belden, of New Orleans. In the month of October, in the year 1901, Paquet and Belden joined in a letter to Judge Swayne which they addressed to him at the place where he resided when not holding court in his district or elsewhere, viz., Guyencourt, in the State of Delaware, stating that they had been informed that he, the said Charles Swayne, had purchased a portion of the land in controversy in the said ejectment suit, viz., Block 91, in the business part of the city of Pensacola, and requesting him to recuse himself and arrange for some other judge to preside at the trial of the case. To this letter no answer was returned by Judge Swayne.

At the term of court which convened at Pensacola in November Judge Swayne announced on the 5th of November that a relative of his had purchased the land, but later in the week he volunteered from the bench that the relative was his wife, and that she had purchased the land with money obtained from her father's estate. That the bargain had not been concluded for the reason that the owner, Mr. Edgar, offered a quitclaim deed. The evidence shows that the agents of Edgar, with whom Judge Swayne negotiated the purchase of block 91, and also of another lot, wrote him stating that Edgar would not give a general warranty because the land was part of a tract which was in dispute. Swayne answered saying that they might drop out block 91 without stating a reason. The agents had pending in October, when the letter to Swayne was written, a suit in the State court against Edgar for commission on the sale to Swayne. The agents had taken Judge Swayne over the tract, and had agreed upon the terms and had sold block 91 to him.

The custom in Judge Swayne's court was to dispose of the criminal calendar first, and when that was concluded to call the civil list, and set the cases for trial at convenient times in the future. The criminal cases were not concluded at the November, 1901, session until about 5 o'clock Saturday night. Judge Swayne then took up the civil list, upon which the case of Florida McGuire appeared, and made a further statement that the member of his family who had contracted through him for block 91 was his wife, and that she was purchasing with money derived from her father's estate. He declined to recuse himself, and stated that the case would be heard on the Monday following unless legal ground for continuance was laid.

The plaintiff's lawyer, Paquet, asked that the case should be set down for Thursday of the following week, averring that it was too

late to summon witnesses that night; that Sunday they could not be summoned, and therefore the case could not be ready on Monday. This request was refused by Judge Swayne, who insisted that the case should go on on Monday. At about 5.30 or 6 o'clock the court adjourned. Neither Simeon Belden nor E. T. Davis was present in court at any time when Judge Swayne made announcement concerning his connection with the purchase of block 91, Belden being ill with facial paralysis and confined to his bed at the hotel in Pensacola. E. T. Davis was not of counsel in the case and had no connection with it up to the time that court adjourned on Saturday, November 9, at 6 o'clock. During the evening Paquet drew up the necessary papers to commence an action of ejectment in the county court of Escambia County, Fla., against Judge Swayne for this block 91, upon the theory that he had contracted for the land with Edgar, who claimed to own it, and who had admitted that he was in possession and that the contract was subsisting between them, and that the title of the alleged owner could be tried out in the State court, where the parties would get better justice, Swayne standing in the shoes of Edgar. They took the liberty of believing, from all the evidence, that Judge Swayne was the real purchaser, though he had said that the title was to be taken by his wife.

The papers were taken to Simeon Belden at his hotel, where he was ill, and he signed them. E. T. Davis was employed to bring this suit. At the same time it was agreed that the suit of Florida McGuire in Judge Swayne's court should be dismissed on Monday. Davis was engaged to do it, Paquet having been called to New Orleans by sickness in his family. The suit against Judge Swayne was brought that Saturday night and the process served on him. On Monday, at the opening of the court, Mr. E. T. Davis asked for and obtained from Judge Swayne an order dismissing the suit of Florida McGuire. Immediately, Mr. W. A. Blount, esq., one of the defendants, and also attorney for defendants, arose and suggested that Paquet and Belden, attorneys for Florida McGuire, and Davis, who appeared to ask for a dismissal of the suit, had been guilty of contempt of court for bringing suit against Judge Swayne in the county court of Escambia County. This action was in pursuance of a previous conference between Blount and Swayne held before court convened, when it was agreed upon. Judge Swayne ordered a rule to show cause upon an unsworn statement prepared by Blount, which was served on Davis and Belden, Paquet being absent. The next day (Tuesday) Davis and Belden appeared and submitted an answer purging themselves of the contempt and averring their right, as counsel, to bring the suit.

Some testimony was taken to show that the suit against Judge Swayne had been brought and process served on him Saturday night about 8 o'clock; that was all. Whereupon Judge Swayne proceeded to adjudge Belden and Davis guilty of the "charges which were in violation of the dignity and good order of the said court and a contempt thereof," and after some abusive remarks sentenced them to be disbarred for the term of two years, to pay a fine of $100 each, and to undergo an imprisonment for the period of ten days in the county jail.

They were duly committed and remained confined three days, when they were released pending a habeas corpus allowed by Judge Pardee, of the circuit court. That habeas corpus case resulted in a decision that Judge Swayne had jurisdiction of Belden and Davis in a contempt

proceeding, as the averment in the paper filed by Blount was that they were officers of the court, and therefore the circuit court could not question his decision, his findings of fact, or the correctness of his judgment that they had committed a contempt, except in so far as he had exceeded his jurisdiction by imposing both fine *and* imprisonment, the statutes providing in certain cases for fine *or* imprisonment as a punishment for contempt. To that extent the decision of Judge Swayne was reversed and the culprits allowed to choose which they would suffer, fine *or* imprisonment. Belden, who was a very sick man, about 70 years of age, chose to serve out his sentence in prison; Davis paid the fine of $100.

Your committee are of opinion that Judge Swayne was guilty of gross abuse of judicial power and misbehavior in office in this case. They believe that he had no authority or right to adjudge Simon Belden and E. F. Davis guilty of a contempt of court under the circumstances of the case.

Second. That if authority can be found in the law for holding the action of these attorneys a contempt, that in the absence of evidence of intent to commit a contempt other than that to be gathered from the fact that the suit was brought Saturday night and the process served the same night, and in the face of their answer that no contempt was thought of or intended, to adjuge them guilty was a gross abuse of power.

Third. That the sentence imposed by Judge Swayne was unauthorized and unlawful. It can be accounted for only on the theory that the judge imposing it was ignorant or vindictive.

The statute conferring power upon the court of the United States is as follows:

> The said courts shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempt shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions and the disobedience or resistance by any such officer or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said court.

In his address to the subcommittee Judge Swayne was asked to point out the part of the statute which conferred the authority for his action. He said, "'The words 'the misbehavior of any of the officers of the said courts in their official transactions.'"

At the time he sentenced Davis and Belden Judge Swayne declared that the contempt did not consist in bringing the suit in the State court; that the attorneys had a perfect right to sue him there, but that his belief was that the suit was brought to force him to recuse himself in the case of Florida McGuire.

It must be remembered that at the time the sentence was pronounced, indeed, before the contempt proceeding was commenced, the case of Florida McGuire had been ended by the consent of Judge Swayne, upon motion of E. T. Davis, for the plaintiff, and that the agreement to end the case had been reached by the lawyers, Paquet, Davis, and Belden, before the suit was instituted against Swayne in the State court on Saturday. How, then, could their action in bringing that suit be construed into an attempt to force Judge Swayne to recuse himself in the case of Florida McGuire? Such a pretense was idle, especially in view of the fact that the purpose to arrest and punish

these men for contempt of court had been formed and agreed upon between Blount and Swayne in the morning before court met and before either could know that the Florida McGuire case was to be dismissed by the plaintiffs. The accused lawyers had a right to bring the suit. Their motive could not have been to affect in any way the disposition of the Florida McGuire case in Judge Swayne's court, because that case being ended could not be affected or the conduct of the judge influenced thereby.

There was no testimony before the court from which a conclusion as to the motives of the accused could be judged except the fact that the suit had been brought in the State court Saturday night and the process served that night. The fact, viz, that the process was served Saturday night, was, in Judge Swayne's eyes, according to his statement before the committee, the chief gravamen of the offense. From that fact he concluded that the motive of the accused was to "insult the dignity and disturb the good order of his court." The committee is of opinion that there was no evidence before Judge Swayne from which such a motive could be inferred, certainly not from the facts in evidence before him.

The words under which he claims the right to condemn have been quoted, but they do not fit the case. They are the "misbehavior of any of the officers of the said courts in their official transactions." The act complained of was not done by these men as officers of the district court of the United States. They were acting as officers of the court of Escambia County, Fla., in bringing the suit. Therefore the action was not susceptible of being construed as a contempt of the district court. It was not an official transaction in any sense by officers of the United States court. Their character as officers or attorneys of that court gave them no power to do the act complained of. It was only because they were attorneys of the court in which the suit was brought that they could do it.

If it was an "official transaction" it was an official transaction in the county court of Escambia County, not in the district court of the United States. Certainly no one will contend that Judge Swayne could punish them for an official transaction in another court, no matter how offensive it might be to his dignity or humiliating to his pride or disgracing to his character; certainly such an act could not offend against the "dignity or good order of his court."

If, then, they could not be properly fined and imprisoned for bringing the suit, what offense did they commit that warranted such severe and disgracing punishment?

But it may be contended no judge can be held responsible for a mistake of law. All judges make mistakes. For an error of judgment or wrong exercise of discretion a judge ought not to be and can not be punished. Let this contention be granted. At the same time, none can dispute that for a misbehavior in office a judge may be impeached.

All the cases that have been tried may be cited as proof of that proposition.

Judge Pickering was impeached by the House and convicted by the Senate for releasing the ship *Eliza* to her owner without taking a bond after she had been seized for violating the excise law, and for appearing upon the bench when drunk, and for using profane language.

Judge Addison was impeached and removed from office for refusing to allow an associate judge to address a grand jury and a petit jury.

Judge Chase was impeached for refusing to allow counsel to address the court and jury upon a point of law that had already been decided.

Judge Peck was impeached for disbarring and imprisoning a lawyer who wrote and published a criticism of one of his opinions.

In all these cases the defense was stoutly made that they were mere mistakes of law, not indictable, and therefore not subject for impeachment. It did not avail to prevent the House from preferring charges. If this reason is good, then no judge can be called to answer for a misbehavior in office which is not also an indictable offense. This is not the law nor the practice.

In imposing sentence upon Davis and Belden Judge Swayne exceeded his authority by imposing both fine and imprisonment. This error was set right by Judge Pardee, the circuit judge, but not until both had served three days in the common jail.

The animus and evil intent of the judge was mainfest by his action and speech. So eager was he to punish that he disbarred these lawyers for a term of two years. If his amicus curia, Blount, had not warned him, that unlawful sentence would have remained. His speech when imposing sentence is described by the witness.

SIMEON BELDEN testifies:

Q. Now I will ask you what was the manner of Judge Swayne when he was inflicting this penalty.—A. Well, it was gross and offensive; he entered with a slanderous attack on the attorneys.

Q. Very slanderous?—A. Yes.

Q. Tell what he said.—A. I don't recollect his words exactly; it was published in the newspapers here.

Q. It was harsh and offensive?—A. Very, indeed. (P. 264-265.)

E. T. DAVIS, page 284:

Q. At the time of imposing this sentence what was Judge Swayne's manner?—A. Very abusive.

Q. Can you state what he said?—A. I don't know that I can state it in so many words. He called us ignorant, said our action was a stench in the nostrils of the people, and a good many other things I can not repeat.

Q. His manner was very harsh and abusive?—A. Extremely so.

For a constructive or indirect contempt it is the law that one charged may purge himself, and that he can not thereafter be punished. In this case Judge Swayne listened to no excuse. He found an evil motive for a lawful action without evidence and against the oath of the accused. The excessive and unlawful character of the sentence and the grossly offensive manner in which it was pronounced leave no room for doubt that Judge Swayne was not animated by a desire to protect the dignity and good order of his court, but to punish what he considered a personal affront to himself. This constituted an arbitrary, unlawful, and oppressive abuse of his judicial power, and a high misdemeanor in office.

The fact can not be disputed that Judge Swayne imposed a punishment on Davis and Belden which the law did not warrant. The only question in the case, then, is whether he is to be excused and go unpunished on the ground that he made an innocent mistake of law. No one doubts the proposition that a judge can not and ought not to be held responsible for innocent mistakes of law. Neither can anyone justly contend that a judge should not be punished according to law for knowingly and willfully imposing an illegal sentence. Whether his motive be revenge or mere wanton disposition to exercise arbitrary power or an intention to punish for a personal insult, in either case he can not be held guiltless or excused on the plea that he innocently erred.

The great question, then, in every case that arises must be, Why did he do it? What motive prompted? What intent animated? Being a human being and not divine or infallible, the actions of a judge are to be interpreted by the same rules that apply to the actions of other men. It is not to be supposed that a judge who evilly intends to do an unlawful act will declare his intention or publish his purpose. The motive and intention of a judge must therefore be sought and generally will be made plain by the circumstances surrounding the particular case. If a judge has no personal interest or feeling in a matter under consideration, if coolly, calmly, and with deliberation he reasons himself into giving a wrong judgment, a wrong motive is never or rarely ever attributed to him. On the other hand, if the case involves a question of insulted dignity, a personal affront, or, if with heat and passion, if with vituperation and denunciation a judge imposes a harsh and unlawful sentence upon a prisoner, his motive is not a matter of doubt. His motive is as plain as that of a man who assaults with a deadly weapon. Such a man is held responsible for the natural and reasonable consequence of his act. He can not be heard to say, I made a mistake; I thought I had a right to strike with a club a blow which produced death. The law pronounces a layman and a judge who knowingly does an unlawful act conclusively guilty of an unlawful intent.

Apply these principles to the case in hand. Judge Swayne knew that the act of 1831 limited the powers of United States courts over contempt to the special cases named in the act. He knew it, because the Supreme Court of the United States has many times decided the very point, notably in 19 Wallace, 511, where it is said:

> The act of 1831 is therefore to them (the district courts) the law specifying the cases in which summary punishments for contempt may be inflicted. It limits the power of these courts in this respect to three classes of cases—
>
> First. Where there has been misbehaviour of a person in the presence of the court, or so near thereto as to obstruct the administration of justice;
>
> Second. Where there has been misbehavior of any officer of the court in his official transaction; and,
>
> Third. Where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful process, order, rule, decree, or command of the courts. And thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgment, and processes.

Presuming that Judge Swayne knew the law he knew that proceeding for a contempt not committed in the presence of the court must be founded on an affidavit setting forth the facts and circumstances constituting the alleged contempt, sworn to by the aggrieved party or some other person who witnessed the offense. Unless such affidavit be presented process will not be granted. (Burke *v.* The State, 47 Ind., 528; Batchelder *v.* Moore, 42 Cal., 412; Rapalje on Contempts, p. 122.)

> The most common and, in the United States, the almost universal practice in this matter is to present to the court an affidavit setting forth the facts and circumstances constituting the alleged contempt, sworn to by the aggrieved party or some other person who witnessed the offense. Unless such affidavit be presented process will not be granted. (Burke *v.* State, 47 Ind., 528; Re Judson, 3 Blatch., U. S. 148; Batchelder *v.* Moore, 42 Cal., 412; Whittem *v.* State, 36 Ind., 196.)

Judge Swayne knew that issuing of proofs without filing the proper affidavit was erroneous, and that the error is not cured by a subsequent

filing thereof. (Wilson *v.* The Territory, 1 Wyo., 155; Whittem *v.* The State, 36 Ind., 196; McConnell *v.* The State, 46 Ind., 298.)

He knew that in a rule to show cause why a person shall not be punished for contempt the actual intention of the respondent is material, in which respect it differs from an indictment for the like offense. Therefore, when the respondent meets the words of the rule by disavowing, upon oath, any intention of committing in contempt of court the rule must be discharged. (63 N. C., 397.) He knew that the practice in the courts of the United States. as well as in the State courts, was:

If the party purge himself on oath the court will not hear collateral evidence for the purpose of impeaching his testimony and proceeding against him for contempt, but if perjury appear the party will be recognized to answer. (U. S. *v.* Dodge, 2 Gall., 313 Circuit Court U. S, 1st Circuit, Mass.; in the matter of John I. Pitman, 1 Curtis, 189, contempt proceedings.)

The master did not treat the answer of the clerk as evidence. This was erroneous, as will plainly appear when we consider what this proceeding is. * * *

Now, one of the most important privileges accorded by the law to one proceeded against as for a contempt is the right to purge himself if he can by his own oath. So rigid is the common law as to this that it does not allow the sworn answers of the respondent to be controverted as to matter of fact by any other evidence. (U. S. *v.* Dodge, 2 Gall., 313.)

The rule was the same at common law:

If any party can clear himself upon his oath he is discharged. (4 Bl. Com., 286, 287; Burke *v.* The State, 214 Ind., 528.)

When the answer to a rule to show cause why one should not be attached for contempt negatives under oath any intentional disrespect to the court of purpose to obstruct its process the rule should be discharged. (In re Wilson Walker, 82 N. C., 95.)

Knowing the law, Judge Swayne issued a rule to show cause why Davis and Belden should not be committed for contempt upon an unsworn statement of Mr. W. A. Blount. He put upon the record another statement of his own presumptively as evidence or as a justification of his act—an unsworn statement of alleged facts, some of which were true and some untrue.

He ignored the sworn denial of the accused that they had committed or had intended to commit a contempt and without any evidence whatever to establish the fact, except that they had brought a suit against him in the State court and served him with process Saturday night. He condemned them to be disbarred for two years, to be fined, and cast into prison. The charge against them and of which they were convicted was a contempt of the "dignity and good order" of the district court of the United States. The offense consisted, as stated by Judge Swayne, not in the act, but in the intent with which it was done, viz, to force him to recuse himself in the case of Florida McGuire.

Suppose, for the sake of argument, that such was their intention, viz, to force the judge to recuse himself. The intent was never carried out. No one was harmed. The judge was not forced to recuse himself. The suit against him in the State did not exercise any influence on him in that direction, for the very good reason that the suit in his court was disposed at the request of the plaintiff, with his consent, at the opening of the court on the first secular day after the suit was brought against him in the State court. The law does not punish guilty intentions. One may intend to slander, steal from, or even kill his neighbor. If the intent is never carried out no human law exists to punish.

All these plain and common principles Judge Swayne must be presumed to have known. Therefore he knowingly and unlawfully held these attorneys guilty of a contempt when none had been committed, when none could have been committed which were punishable under the act of Congress, and he did it in violation of the well-established law of procedure in such cases.

We are seeking for the motive which actuated Judge Swayne in the light of the circumstances. He must have known that he had no right to impose a fine and also an imprisonment upon these officers of his court. The act of Congress is very plain. A wayfaring man, though a fool, need not err there. It provides fine or imprisonment, not fine and imprisonment. The Supreme Court, with whose decisions Judge Swayne will not plead that he was not familiar, has also settled that point. (See 131 U. S., 267.)

Again, still in search of the motive of Judge Swayne in imposing this unlawful punishment, attention is called to the fact that he sentenced these lawyers to disbarment for two years; in other words, to ruin. To forbid a lawyer the right to practice his profession for two years is, standing alone, a severe sentence. Such a sentence will scatter a lawyer's practice; seriously damage, if not irretrievably ruin, his reputation, and generally destroy his usefulness and earning power. Ought Judge Swayne be heard to say that he knew no better? Evidently if he might it would be true, because when his amicus curia stepped up to the bench and suggested to him that he had exceeded his authority he remitted that part of the sentence. He ought not to be heard to plead his ignorance, because the highest court decided (19 Wallace, 512) that punishment by disbarment could not be imposed under the act of 1831. The fact that he found it in his heart to impose such an unlawful sentence is helpful in ascertaining the true intent that actuated him in the whole transaction.

The last evidence that Judge Swayne was actuated by an evil intent to punish a personal affront by a clear violation of the law and an arbitrary abuse of judicial power is found in his vituperation and abuse of the respondents at the time he sentenced them. The facts, as stated by them, are not denied by the judge or his amicus curia, who both testified in the case. His manner was "offensive and insulting." He denounced these lawyers as "ignorant." He vituperated them as a "stench in the nostrils of the people." From these circumstances the fact is found that Judge Swayne had something in his heart besides an honest intent to vindicate the dignity of his court, and that that something was an intent to punish these unfortunate persons who had fallen into his power, not for offending against the dignity and good order of the court, but for what he conceived to be a personal affront.

Doubtless an argument may and will be made that Judge Swayne believed that the lawyers, Paquet, Belden, and Davis, brought an unfounded action against him for the purpose of influencing his action in the Florida McGuire case, and also that their conduct in bringing the suit after dark Saturday night and procuring the service of process upon him that night was intended as a personal affront, and that he also believed they caused to be published in the papers next morning notice of the suit (which was not proved), and therefore he was properly and righteously indignant and should be leniently dealt with,

because what he did was done under provocation and in the heat of his displeasure.

The answer is that if he had observed the common rules of administering justice and had decided the case as the law requires, he would never have thought for a moment of punishing a constructive contempt after the accused had purged themselves under oath.

Certainly no hurt feelings, no offended dignity, even no legitimate desire to punish a punishable contempt, could justify or excuse the grossly unlawful and excessive punishment imposed in this case.

If the independence of the judiciary and their power to protect their own dignity and honor are indispensable to a free government, the right of the great body of earnest, learned, and faithful men who practice at the bar to be exempt from cruel, unusual, and unlawful punishments at the hands of judges for imaginary or real offenses is no less sacred.

For such a high misdemeanor in office no judge should be allowed to escape just punishment on the plea that he made a mistake of law. If allowed, there is no arbitrary abuse of discretion, no disobedience of law, no oppression or outrage upon the rights of liberty or property that could not go unwhipt of justice.

HOSKINS CASE.

Third.—The case of W. H. Hoskins is one of peculiar hardship. This man was advanced in years and was unable to read or write. He was engaged in the business of producing turpentine, growing cotton, and general merchandising. He had accumulated property worth about $40,000, and owed debts amounting to about $10,000. A part of this indebtedness was of the firm of Hoskins & Hilton, of which he had been a partner. He had sold out his interest in the firm under an agreement that the purchaser would pay the indebtedness of the firm. This agreement was not kept, and some suits were brought against Hoskins, in which he was defended by a lawyer named J. N. Calhoun, on the ground that the suit should have been brought against the person who had agreed to pay the debts. Of course, the defense failed and Hoskins paid.

This was the beginning of trouble. The evidence is full and convincing that a lawyer named Boone conspired with Calhoun to put Hoskins in bankruptcy in order to plunder his estate. Some claims came into their hands for collection. Hoskins paid promptly on demand, and notified Boone, through his counsel, Judge Liddon, that he was prepared to pay everything he owed. Boone secured claims to the amount of $500, and without authority of his clients commenced proceedings involving bankruptcy against Hoskins, swearing to the petition himself. Certified checks were sent to all the creditors; some took them and withdrew; others were deterred by Boone's action. He told them that they would subject themselves to large costs and fees if they took their money.

Judge Swayne, against objection, gave time to Boone to obtain a proper verification of the complaint; then to get more creditors to sign the petition in place of those withdrawn. This he did at least twice. Hoskins filed a denial of insolvency and demanded a trial. Meantime one Tunison, United States commissioner and next friend of Swayne, was taken into the conspiracy. Hoskins was adjudged

bankrupt, a receiver was appointed, all his property seized, his store closed, his men intimidated, and ruin stared him in the face, as his business of producing turpentine needed daily care. He went to Boone with the money to pay all his debts. Boone told him he would be in contempt of court if he attempted to pay money to the creditors, and demanded $1,000 for himself, and $1,000 for Tunison, and all costs. Hoskins refused.

Calhoun, as receiver, sent a man named Richardson to seize Hoskins's books of account at one of his branch stores. He found a book belonging to the firm of Hoskins & Bro., which had been left there for a bookkeeper to make up. On his return he met C. H. Hoskins, a son of W. H. Hoskins, one of the firm of Hoskins & Bro., who demanded the book, stating that it did not belong to his father and contained nothing pertaining to his business. Richardson refused to give it up; a fight ensued, and young Hoskins took the book by force. The next step of the conspirators was to commence proceedings for contempt of court against young Hoskins. The motive is fully explained by a letter from Boone to Tunison.

[Robt. J. Boone, attorney and counselor.]

MARIANNA, FLA., *March 13, 1902.*

GENTLEMEN: In re W. H. Hoskins, involuntary bankruptcy.

I beg to inclose you herewith another claim to be added to the amended petition, to the amount of $200, which you will please have the court to include. I have just received telegram from Calhoun stating that the petition had not yet arrived. I have wired for same three times in the last two days and trust same will reach you to-night. This additional claim of $200 is a stunner to them I presume.

I trust you all will be able to handle the matter all right. *I feel sure that we have them coming our way now, and if we can have C. D. Hoskins attached for contempt it will break the old man down sure.*

Please advise me in the premises as early as possible and oblige,

Very truly, yours,

ROBT. J. BOONE.

Messrs. TUNISON & LOFTIN, *Pensacola, Fla.*

(Inclosures.)

W. H. Hoskins, finding that he was not allowed to pay everything, averred his solvency, and demanded a trial on that question. Judge Swayne refused to proceed with the case until the book taken by young Hoskins was produced.

The following motion was made by Mr. Tunison on behalf of petitioning creditors:

On account of the forcible taking away of certain books belonging to the estate of the alleged bankrupt, by the son of the bankrupt, from the possession of the receiver herein, as fully set forth in the petition and affidavit of J. M. Calhoun, receiver, heretofore filed, which books are essential to the ascertainment of the true condition of the estate, and the continued withholding of the books from the custody of the receiver, petitioning creditors ask for a postponement for such a time as will enable them to secure the information believed to be contained in those books.

By Mr. Eagan, representing intervening creditors; also by Judge B. S. Liddon and W. H. Price, representing W. H. Hoskins, respondent.

Now, your honor, we desire to oppose the action for a postponement and continuance on the grounds stated, for the reason that the said C. H. Hoskins alleged to have the books in question is not a party to the record of these proceedings; for the further reason that those books are not under the control of the intervening creditors or respondent, W. H. Hoskins; on the further ground that it is not true that the books contain any matter, items, or accounts, or any business transactions of any kind or in connection with the business of W. H. Hoskins, who is the respondent, or of

any firm with which he was ever connected, or of which he was a member, and we are ready now to submit to your honor proof of these facts by W. H. Hoskins, W. H. Price, who has recently examined these books, and also by T. A. Jennings, vice-president of the J. P. Williams Company, Savannah, Ga., that he has recently examined these books—that is, since the beginning of these proceedings—and that the same did not contain any accounts or business transactions of any kind of the business of W. H. Hoskins or in connection with these proceedings.

We also proffer to prove the same things by W. H. Hoskins, who also knows the books and what they contain.

We offer to prove that the books in question are the books of a firm called Hoskins Brothers, composed of J. P. and C. D. Hoskins, and have reference solely to the matters of said firm, and that W. H. Hoskins was never in any manner a partner or in any way connected with said firm; and further, that the books are not absent by the consent or advice of counsel or any of the intervening creditors herein, or of the said W. H. Hoskins, and that none of them know the whereabouts of the said books, or have seen them since the absconding of the said C. D. Hoskins.

By the court: The court, in answer to the motion, states that it believes from the showing and circumstances, the only showing before the court was an affidavit by Calhoun, who had never seen the book, that he believed it contained something important; that the bankrupt in this case is in a measure responsible for the absence of the books in question, and under these circumstances can not permit the bankrupt nor his friends to testify to their contents in their absence until some better showing is made or tendered as to their whereabouts.

W. H. Hoskins was present in court with his counsel and offered testimony of several disinterested persons who knew the facts that the books to which Judge Swayne alluded had been taken by one C. D. Hoskins, to whom, as one of the firm of Hoskins & Bros., they belonged; that W. H. Hoskins, the alleged bankrupt, had no interest in said firm; that the said books were not in the possession of W. H. Hoskins or under his control; that they contained no written items or accounts of any business transacted of any kind connected with the business of W. H. Hoskins, or of any firm of which he was ever a member, and that he had nothing whatever to do with the taking or any knowledge of their whereabouts.

Notwithstanding, the said Charles Swayne, in the absence of any evidence to the contrary save an affidavit of one Calhoun, who had never seen the books, but swore he believed they contained something of importance in the case, refused to proceed with the case, stating that he "would not believe the evidence offered if sworn to by his brother," and continued the hearing of the same without day, to the great injury of the said W. H. Hoskins.

Young Hoskins had been hiding out to escape arrest, of which he was so fearful that he said he would rather die than go to jail. His uncle, one Rhodus, went to Tunison, who had instituted the contempt proceeding, and paid him $50 and agreed to give $50 more if Tunison would intercede with Judge Swayne to let young Hoskins off with a fine without imprisonment. Tunison took the money, but Swayne insisted upon going on with this case against young Hoskins, who finally put an end to Swayne's persecution by taking his own life.

W. H. Hoskins, despairing of getting justice or a hearing, paid the creditors in full and such costs as Calhoun demanded.

The whole disgraceful perversion of law and justice was made possible by the complaisancy, stupidity, or worse, of Judge Swayne, who lent himself to a conspiracy to ruin an honest man by aiding the conspirators in every way in his power. He had no right to refuse a hearing to Hoskins on the ground that a book taken out of the custody of the receiver's clerk by any other person must first be produced. It was a denial of justice. It was an arbitrary and oppressive abuse of

power. There was no sufficient testimony before the judge that the book had any relevancy to the case; nothing but the affidavit of the receiver, who had never seen the book, that he believed it contained something necessary to the determining of the question of Hoskins's solvency. In the face of an offer to prove the fact by disinterested and competent testimony, among others that of a person who had examined it, the judge refused to believe anything, saying that he would not believe his own brother if he would swear to it. In his argument before the subcommittee, Judge Swayne was asked why he refused to hear Hoskins's witnesses to prove that the book was that of Hoskins Brothers, and contained nothing whatever pertaining to the business of W. H. Hoskins. His answer was because he would not believe the witnesses.

Being interrogated by the subcommittee as to why he refused to hear Hoskins's witnesses, Judge Swayne testified as follows:

Mr. PALMER. Did not you state it was unnecessary for Hoskins to submit any proof about these books? Does not the record show that?

Judge SWAYNE. There was a witness upon the stand who testified as to Mr. Hoskins's ability to pay his debts.

Mr. PALMER. But what had that to do with the proof submitted by the witness Jennings?

Judge SWAYNE. Well, that requires a further answer. And there was, I believe, some evidence by a man they called Price, on this subject, but that man's name was not Price, although he went by that name. He was designated as Price, but his name was really something else, which I do not now recall.

Mr. PALMER. Then you mean to say in substance that you did not have any confidence in that witness?

Judge SWAYNE. I certainly did not.

Mr. PALMER. Well, do you think a judge has the right to take that view of a witness in the administration of justice?

Judge SWAYNE. Yes, sir.

Mr. PALMER. At the time you made that ruling was there any proof that Hoskins had ordered his son to take the books back?

Judge SWAYNE. Well, I wanted to have the books in court when the trial came on or show that they could not be had.

Mr. PALMER. That is just the point; and you refused to hear anything on the point, and would not hear the witness or hear the testimony?

Judge SWAYNE. I did not see how I could.

Mr. PALMER. That is correct, is it?

Judge SWAYNE. Yes, sir.

This action of the judge presents at least an entirely new feature in the administration of justice. A suitor is denied the right to offer evidence in support of his case because the judge has made up his mind in advance that the witnesses offered are not worthy of belief.

In this case Mr. Price, one of the witnesses, was a practicing attorney of the courts of Florida, and, presumptively, a perfectly worthy man. Mr. Jennings was one of the largest producers of turpentine in the State, a substantial business man, personally known to at least one member of the committee to be of irreproachable character and standing. W. H. Hoskins was at least competent to testify that the book was not his and was not used in his business.

To refuse to hear these witnesses was an unwarranted and unheard-of proceeding. To continue the case of Hoskins without day, under the circumstances, was an unparalleled abuse of discretion on the part of the judge which amounted to a denial of justice.

O'NEAL CASE.

Fourth.—The facts in the case of W. C. O'Neal are as follows:

One Greenhut had been appointed trustee in bankruptcy of one Scarritt Moreno. Greenhut brought an action in the county court of Escambia County for the purpose of having certain land, the title to which was in the bankrupt's wife, brought into the bankrupt's estate, and also to relieve the said land of a certain mortgage of $13,000, which appeared to be a lien upon it, which had been given the National Bank of Pensacola and by them assigned to the bank. Greenhut was a director and O'Neal was president. Greenhut was also indorser on Moreno's paper in the bank for $1,500.

On the 20th day of October O'Neal was passing along the street in front of Greenhut's store. Greenhut was in conversation with another man. O'Neal spoke to him and said when he was at leisure he wished to speak with him. Greenhut said he could speak at once and invited him to enter his store. O'Neal reproved Greenhut for including the bank in the suit which he had brought. He stated to Greenhut that he, Greenhut, was aware of the fact that the $13,000 mortgage was genuine; that the bank had advanced the money and had parted with it for a valuable consideration; also that he, Greenhut, had often promised to pay the indorsed paper upon which he was liable to the bank, but had not done so. But words passed, when O'Neal passed out of the store, followed by Greenhut to the sidewalk, where an affray occurred in which Greenhut was stabbed by O'Neal with a pocket knife and seriously injured. O'Neal swore that Greenhut assaulted him and that, being a much weaker man physically, he defended himself with a small pocketknife.

A proceeding for contempt of the district court of the United States was commenced, in which B. C. Tunison appeared for the receiver, Greenhut.

At the time of the affray the district court was not in session. The difficulty took place at a considerable distance from the court-house on a public street. Judge Swayne was not at the time in the district.

The charge for contempt proceeded upon the theory that the assault having been made upon a receiver in bankruptcy appointed by the district court, for some matter growing out of his actions as receiver, that a contempt of the district court had been committed. O'Neal had been arrested in the State court for his offense against the law. When the rule to show cause why he should not be committed for contempt was served, he employed counsel and made answer, denying any intent to commit a contempt of court.

The testimony of Greenhut and O'Neal was taken; none of the bystanders were sworn, nor was any other person sworn. O'Neal denied the contempt and explained that the quarrel grew out of the relations of Greenhut to the bank, and what he claimed to be his dishonesty in including the bank in the suit. Greenhut contended that he was an officer of the court, and that he had been assaulted on account of his official acts, and, as a consequence, had been laid up for a period of time and rendered unable to perform his duty as receiver.

Judge Swayne sentenced O'Neal to be imprisoned in the county jail for a period of sixty days.

The act of Congress defining the power of the United States courts to punish contempt is as follows:

The said courts shall have the power to impose and administer all necessary oaths and to punish by fine or imprisonment, at the discretion of the court, contempt of their authority: *Provided*, That such power to punish contempt shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said court in their official transactions, and the disobedience or resistance by any such officer or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said court.

Manifestly the case of O'Neal was not within the act. The offense was not committed.

(*a*) In the presence of the court.

(*b*) Or so near thereto as to obstruct the administration of justice.

(*c*) It was not a misbehavior of an officer of the court in an official transaction.

(*d*) Was not resistance of any lawful act, order, rule, decree, or command of said court by any person.

This act was passed after an unsuccessful attempt to impeach Judge Peck for striking the name of an attorney from the roll for an alleged contempt of court committed by him in publishing a criticism of a published opinion of the judge in a case in which the attorney had appeared and which had been appealed.

The impeachment proceedings provoked long discussion as to the common-law power of United States courts to punish contempt not committed in the presence of the court. To set doubts at rest and to define the powers of such courts this salutary act was passed. It bounds and limits the rights and powers of these courts and its transgression ought not to be regarded lightly in cases involving the liberty of citizens of the Republic.

The action of Judge Swayne was, to say the least, arbitrary, unjust, and unlawful. It could have proceeded only from either willful disregard of the law or from ignorance of its provisions, an excuse which he will not be likely to set up.

If an unlawful act is committed by judge or layman the law conclusively presumes an evil intent.

The theory upon which O'Neal was held guilty of contempt of court was:

(*a*) That Greenhut was an officer of the court.

(*b*) That he was assaulted for performing an official act in the line of duty.

(*c*) That he was disabled by the assault from performing his duties as receiver for about two weeks.

Suppose all the allegations to have been proved, before the assailant of Greenhut could be held guilty of contempt of court some proof should have been produced to show that O'Neal's purpose in committing the assault was to punish Greenhut for his official action and to disable him from performing his duty as receiver.

If his purpose was to rebuke Greenhut for his bad faith as a bank director, or if the quarrel between the men which resulted in the fight had its origin in a dispute about Greenhut's knowledge that the mortgage was genuine or that Greenhut was endeavoring to escape liability upon his indorsement to the bank of Moreno's paper, and if he had no thought of the court or intention to interfere with its operations, then certainly he was not guilty of a contempt. O'Neal did not assault

Greenhut because Greenhut had sued the bank, but because he had sued the bank knowing that his contention was false. That was the occasion of O'Neal's remonstrance which led to the fight.

Whatever his purpose, the assault was not committed in resistance of any order, decree, rule, or command of the court. No one pretends that it was. The only claim is that the court has power and should protect a receiver in bankruptcy by punishing anyone who quarrels with him on account of anything he does in the line of his duty as receiver. If it has such power, it is not conferred by the statute. And as the district court has no other authority to punish for contempt except that which is conferred by the statute, the conclusion is that in this case a citizen of the United States was unlawfully condemned to prison.

The answer of O'Neal purged the contempt, and it was error to punish him for it.

CASE OF YOUNG HOSKINS.

The contempt proceeding against young Hoskins was instituted by Brown Calhoun and Tunison to "break the old man down" in furtherance of their nefarious scheme to force him into bankruptcy to the end that they might plunder his estates. It was based upon the theory that Hoskins had resisted an order of the court—not a special order but the general authority of the receiver in bankruptcy, to possess himself of the property of the bankrupt. If the book did not belong to the elder Hoskins, and contained nothing pertaining to his business, then the receiver had no right to take it. If he had no right to take the book, then young Hoskins could not be lawfully adjudged guilty of contempt in resisting.

The law upon this point is settled to numerous cases as follows:

Disobedience to unauthorized requirement is not a contempt. An order punishing is void when the court had no authority to make the order disregarded. (104 U. S., 612.)

The court could not lawfully order the receiver of W. H. Hoskins, the father, to seize and carry away the property of C. H. Hoskins, the son. If such an order had been made it might have been lawfully resisted, but no such order was made. The receiver was acting under his general power which certainly gave him no right to take and carry away the book in question if it did not belong to the bankrupt. Hence the important and only question was, Whose book was it? Upon this question Judge Swayne refused to hear testimony. He had no evidence before him bearing upon the question of the ownership of the book but the affidavit of Calhoun, the receiver, who had never seen it and swore only to his belief that it was the book of the elder Hoskins.

Young Hoskins hid in the woods for some weeks to avoid arrest. He had a mortal dread of going to jail, and said he would die first; and die he did. Judge Swayne refused the request of Tunison, the receiver's counsel, to let Hoskins off with a fine without imprisonment if he would plead guilty, although the bankrupt business had all been settled, and the production of the book was no longer of the least consequence. Judge Swayne refused to hear evidence on the subject of the ownership of the book on the ground, as before stated, that he would not believe the witness, and that he would not believe his own brother if he swore that the book did not belong to old Hoskins.

When the news of the failure of the effort to procure his discharge reached young Hoskins, he committed suicide. These facts need no comment.

TUNISON CASE.

Fifth.—The evidence established the fact that Judge Swayne reappointed B. C. Tunison commissioner of the United States after a trial in his court in which Tunison, as prosecutor, had been successfully impeached as a witness.

The evidence also establishes that the members of the bar at Pensacola, Fla., and elsewhere in the district, and suitors in the United States court are of opinion that Tunison has the power to exercise undue influence over Judge Swayne and that he does exercise such influence. To such an extent does this belief prevail that lawyers advise their clients to employ Tunison in their business as the best and only way to succeed in Judge Swayne's court.

No special acts of favoritism were shown. Neither was it proved that Tunison won an undue proportion of cases in the United States court. Nevertheless, the opinion stated is widely entertained. Tunison was shown to be very friendly with Judge Swayne—so friendly that he declined to pursue a habeas corpus case in which he had received a fee of $100, averring that he did it because Judge Swayne was his friend. The case referred to is that of Davis and Belden, committed by Judge Swayne for contempt of court. It may be remarked that Tunison neglected to return the retainer. The testimony satisfies the committee that Tunison is a dishonest man; also that he is indorser on a note of Judge Swayne that has been renewed for seven successive years in the Pensacola Bank.

The charges and specifications not covered by the foregoing findings were not proved by sufficient evidence to warrant action upon them.

Upon the whole case it is plain that Judge Swayne has forfeited the respect and confidence of the bar of his court and of the people of his district who do business there. He has so conducted himself as to earn the reputation of being susceptible to the malign influence of a man of notoriously bad character. He has shown himself to be harsh, tyrannical, and oppressive, unmindful of the common rule of a just and upright judge. He has continuously and persistently violated the plain words of a statute of the United States, and subjected himself to punishment for the commission of a high misdemeanor. He has fined and imprisoned members of his bar for a constructive contempt without the authority of law and without a decent show of reason, either through inexcusable ignorance, a malicious intent to injure, or a wanton disposition to exercise arbitrary power. He has condemned to a term of imprisonment in the county jail a reputable citizen of the State of Florida over whom he had no jurisdiction, who was guilty of no thought of a contempt of his court, for no offense against him or in the presence of the court, or "in obstruction of any order, rule, command, or decree," and after the accused had purged himself on oath.

For all those reasons Charles Swayne has been guilty of misbehavior in his office of judge and grossly violated the condition upon which he holds this honorable appointment. The honor of the judiciary, the orderly and decent administration of public justice, and the welfare of

the people of the United States demand his impeachment and removal from the high place which his conduct has degraded.

It is vitally necessary to maintain the confidence of the people in the judiciary. A weak executive or an inefficient or even dishonest legislative branch may exist, for a time at least, without serious injury to the perpetuity of our free institutions, but if the people lose faith in the judicial branch, if they become convinced that justice can not be had at the hands of the judges, the next step will be to take the administration of the law into their own hands and do justice according to the rule of the mob, which is anarchy, with which freedom can not coexist.

The Committee on the Judiciary recommend the adoption of the following resolution:

"*Resolved*, That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high misdemeanor."

O

58TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REP'T 1905, Part 2.

JUDGE CHARLES SWAYNE.

APRIL 1, 1904.—Referred to the House Calendar and ordered to be printed.

Mr. GILLETT, of California, from the Committee on the Judiciary, submitted the following

VIEWS OF THE MINORITY.

[To accompany H. Res. No. 274.]

On the 10th day of December, 1903, the House passed a resolution, a copy of which is as follows:

[House Resolution No. 86, Fifty-eighth Congress, second session.]

Mr. Lamar, of Florida, submitted the following resolution:

Whereas the following joint resolution was adopted by the legislature of the State of Florida:

"SENATE JOINT RESOLUTION in reference to Charles Swayne, judge of the United States court for the northern district of Florida.

"*Be it resolved by the legislature of the State of Florida:* Whereas Charles Swayne, United States district judge of the northern district of Florida, has so conducted himself and his court as to cause the people of the State to doubt his integrity and to believe that his official actions as judge are susceptible to corrupt influences and have been so corruptly influenced;

"Whereas it also appears that the said Charles Swayne is guilty of a violation of section five hundred and fifty-one of the Revised Statutes of the United States in that he does not reside in the district for which he was appointed and of which he is judge, but resides out of the State of Florida and in the State of Delaware or State of Pennsylvania, in open and defiant violation of said statute, and has not resided in the northern district of Florida, for which he was appointed, in ten years, and is constantly absent from said district, only making temporary visits for a pretense of discharging his official duties;

"Whereas the reputation of Charles Swayne as a corrupt judge is very injurious to the interests of the entire State of Florida, and his constant absence from his supposed district causes great sacrifice of their rights and annoyance and expense to litigants in his court;

"Whereas it also appears that the said Charles Swayne is not only a corrupt judge, but that he is ignorant and incompetent and that his judicial opinions do not command the respect or confidence of the people;

"Whereas the administration of the United States bankruptcy act in the court of said Charles Swayne and by his appointed referee has resulted in every instance in the waste of the assets of the alleged bankrupt by being absorbed in unnecessary costs, expenses, and allowances, to the great wrong and injury of creditors and others, until such administration is in effect legalized robbery and a stench in the nostrils of all good people;

"*Be it resolved by the house of representatives of the State of Florida, the senate concurring,* That our Senators and Representatives in the United States Congress be, and

they are hereby, requested to cause to be instituted in the Congress of the United States proper proceedings for the investigation of the proceedings of the United States circuit and district courts for the northern district of Florida by Charles Swayne as United States judge for the northern district of Florida, and of his acts and doings as such judge, to the end that he may be impeached and removed from such office.

"*Resolved further*, That the secretary of state of the State of Florida be, and is hereby, instructed to certify to each Senator and Representative in the Congress of the United States, under the great seal of the State of Florida, a copy of this resolution and its unanimous adoption by the legislature of the State of Florida.

"THE STATE OF FLORIDA,
"OFFICE OF THE SECRETARY OF STATE.

"UNITED STATES OF AMERICA, *State of Florida, ss:*

"I, H. Clay Crawford, secretary of state of the State of Florida, do hereby certify that the foregoing is a true and exact copy of senate joint resolution in reference to Charles Swayne, judge of the United States court for the northern district of Florida, passed by the legistature of Florida, session of nineteen hundred and three, and on file in this office.

"Given under my hand and the great seal of the State of Florida, at Tallahassee, the capital, this the seventh day of September, anno Domini nineteen hundred and three.

[SEAL.] "H. CLAY CRAWFORD,
"*Secretary of State.*"

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Charles Swayne, judge of the United States district court for the northern district of Florida, and say whether said judge has held terms of his court as required by law, whether he has continuously and persistently absented himself from the said State, and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that district of the benefits of the court therein to amount to a denial of justice; whether the said judge has been guilty of corrupt conduct in office, and whether his administration of his office has resulted in injury and wrong to litigants of his court.

And in reference to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary; to send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. And the said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant-at-arms, by himself or deputy, who shall serve the processes of said committee and subcommittee and execute its orders, and shall attend the sittings of the same as ordered and directed thereby. And that the expense of such investigation shall be paid out of the contingent fund of the House.

The author of said resolution, Representative Lamar, was requested by the subcommittee appointed to investigate said charges contained in said resolution, to submit to it a statement setting forth specifically the charges referred to in a general way in said resolution. In compliance with this request, Mr. Lamar presented to said subcommittee the following, to wit:

In re Charles Swayne, United States district judge in and for the northern district of Florida: Specifications of matters to be presented for investigation before the investigating committee of the House of Representatives, United States Congress:

Specification 1.—That the said Charles Swayne, judge of the United States court in and for the northern district of Florida, for ten years, while he has been such judge, was a nonresident of the State of Florida, and resided in the State of Delaware; that he never pretended to reside in Florida until May, 1903; that during said time of his nonresidence, by such nonresidence, he has caused great inconvenience, annoyance, injury, and expense to litigants in his court, not so much by failure to hold terms of court as by failure to be in reach for the disposition of admiralty and chancery matters and other matters arising between terms of court needing disposition.

Specification 2.—That said Charles Swayne, as such judge, appointed one B. C. Tunison as United States commissioner; that it was charged that it was an improper appointment, and that testimony was offered to such effect before said appointment.

Specification 3.—That the said Charles Swayne, as such judge, appointed and maintains one John Thomas Porter as United States commissioner at Marianna, but that said Porter does not reside at Marianna, but at Grand Ridge, 16 miles away, and is never at Marianna or at his office except when notified of an arrest, necessitating people having business with United States commissioner, often at expense and inconvenience, to go to Grand Ridge, and necessitating the holding of prisoners often for a day or two, at their inconvenience and in imprisonment at the expense of the Government until said Porter sees fit to come to Marianna.

The said Swayne, although there is great necessity for a commissioner at Marianna, has refused to appoint such.

Specification 4.—That said Swayne, in the administration of his court, has been guilty of great partiality and favoritism to one B. C. Tunison, mentioned in specification No. 2, and a practicing attorney in said court; that so great and well known has this partiality and favoritism become that it has created the general impression that to succeed in that court before the said Swayne it is necessary to retain the said Tunison.

Specification 5.—That said Swayne has been guilty of oppression and tyranny in his office, incorrectly and oppressively and without just cause imprisoning one W. C. O'Neal, one E. T. Davis, and one Simeon Belding, upon feigned, fictitious, and false charges of contempt of his said court.

Specification 6.—That said Charles Swayne has willfully, negligently, and corruptly maladministered bankruptcy cases in his court, to the extent that the assets of bankrupts have, in all or nearly all cases, been squandered and dissipated in paying extraordinary fees and expenses and never paying any dividends to creditors.

Specification 7.—That said Charles Swayne was guilty of oppression and tyranny in his office to one Charles Hoskins upon an alleged contempt, resulting in the suicide of the said Hoskins, and said alleged contempt proceedings being brought for the purpose of breaking down and injuring one W. R. Hoskins, who was charged in said court with involuntary bankruptcy, but who was defending and resisting such charge.

Specification 8.—That said Swayne corruptly purchased a house and lot in the city of Pensacola while the said house and lot was in litigation in his court.

Specification 9.—Ignorance and incompetency to hold said position. Under this specification many illustrations could be given. Among them a case in which he took jurisdiction in admiralty in violation of the treaty between the United States and Sweden and Norway, and in one case, that of Sweet *v.* Owl Commercial Company, in which he charged the jury to exactly and diametrically conflicting theories of law.

Specification 11.—That said Swayne, by reason of his absence from the State, failed to hold the term of court which should have been held at Tallahassee in the fall of the year 1902, during the months of November or December.

Specification 12.—That the said Charles Swayne has been guilty of conduct unbecoming an upright judge in that he has procured as indorsers on his note, for the purpose of borrowing money, attorneys and litigants having cases pending in his court.

Specification 13.—That the said Charles Swayne has been guilty of maladministration in the affairs of the conduct of his office; that he has discharged people convicted of crime in his court. Illustration, case of Alonzo Love, convicted in the year of 1902, of perjury.

The committee, on February 10, 1904, proceeded to Florida to take testimony in support of said charges, and examined many witnesses and received a large amount of documentary evidence. After receiving all the evidence and hearing arguments for and against the matters set forth in said specifications, your committee met to consider the same and we all agreed that specifications numbered 2, 3, 6, 7, 8, 9, 11, 12, and 13 were not proven or were not of sufficient gravity to warrant impeachment charges being made.

The majority of the committee were of the opinion that specifications 1, 4, and 5 had been proven; that Judge Swayne also had wrongfully granted a continuance in the case of W. H. Hoskins, a bankrupt, when he desired to go to trial, and refused to hear his witnesses, and

that charges of impeachment against him on these grounds should be preferred.

From this I dissented, because I did not believe that the evidence and the law warranted such a conclusion. I looked upon the impeachment of a Federal judge as a very serious matter, the proceeding being a quasi criminal one, and felt that before charges should be preferred, that the mind should be satisfied beyond a reasonable doubt and to a moral certainty of the truth of the matters alleged, and that said matters should be of a most serious character, if not a high crime or misdemeanor, of such a willful and intentional misbehavior in office as to amount to a denial of justice to litigants or to cast discredit upon the court and to cause a loss of confidence in the honesty, integrity, and morality of the judge. I could not persuade myself to believe that every error made by the court, or every mistake made by him in the discharge of his high duties should be considered sufficient grounds to impeach him. I realized that even the judge of a court is liable to err, both as to law and facts, that his decisions are not always correct, that his judgments are likely to be wrong and oppressive, and that he may exercise his discretion in such a manner as to defeat justice.

If a judge were to be impeached for every error which he committed that inflicted injury upon others, Congress would have to remain in constant session, and it would be the busiest court in the world. If every judge who has wrongfully found a person guilty of contempt should be cited to appear before the bar of the Senate to answer charges of impeachment, the business of that body would be blocked for many a day. How long would the authority of our courts and their decrees be respected if every dissatisfied litigant and every person found guilty of contempt could come to Congress, introduce a resolution with a great flourish of trumpets charging the judge with ignorance, corruption, tyranny, incompetency, and dishonesty, and thereupon the judge be investigated and brought before the bar of the Senate? The dignity of the courts must be maintained, and their judgments and decrees must be respected. Therefore Congress should be very guarded and careful in preferring charges of impeachment. The case, to warrant such charges, should be a very strong one, and before Congress acts there should remain no reasonable doubt that the judge against whom complaint has been made has willfully, knowingly, and intentionally been guilty of serious misbehavior in office, or has been guilty of some high crime or misdemeanor.

With this rule in my mind, I have carefully considered all of the evidence submitted, and I can not say that I feel satisfied therefrom that Judge Swayne has misbehaved in office; that he has been guilty of any high crime or misdemeanor; that he has been corrupt, tyrannical, or oppressive, or that his conduct is unbecoming a judge. Neither am I prepared to say that in the matters charged against him by the majority that he has committed any error of law, or that he acted in a tyrannical, vindictive, or oppressive manner. Neither do I believe that the evidence in the case warrants the action taken by the majority or is sufficient to cause the House of Representatives to prefer charges of impeachment, and to substantiate this belief I shall now consider the evidence in connection with charges preferred by the majority and the rules of law governing the same.

NONRESIDENCE.

First, as to the charge of nonresidence and the inconvenience, annoyance, injury, and expense to litigants in his court by reason thereof:

The evidence shows that in the year 1885 Judge Swayne moved from Pennsylvania to the State of Florida to practice law. In the year 1890 he was appointed district judge of the northern district of Florida, and shortly thereafter he moved to St. Augustine, which was in his district. In June, 1894, the boundaries of the district were changed, and St. Augustine became a part of the southern district of Florida. After this Judge Swayne ceased keeping house in St. Augustine and stored his furniture. He went to Pensacola, Fla., then the largest city in his district, and requested a friend to place his name on the register of voters. This was not done. From 1895 until 1900 Judge Swayne did not own or rent any house in Pensacola, or in his district, but boarded when there in hotels and with private families.

When he went to Pensacola first he directed Mr. Marsh, the clerk of his court, to find him a suitable house. Mr. Marsh testifies that he tried to find a house from October, 1895, to October, 1897, but could not get a suitable one. After that he tried to buy a house for him, and sought to purchase the Wright house, the Piagio house, and the Chipley house, but failed to get either. Captain Northrup testified that when Judge Swayne first came to Pensacola he asked him to get for him a suitable house and that he took Judge Swayne in his buggy and drove him about to find a house but failed.

In 1900 he rented a house from Thomas C. Watson & Co., put his household furniture in it, and paid rent and insurance until May, 1903, when he moved into a house purchased by his wife and where he now lives. There is no direct and positive evidence or any evidence at all that from the year 1895 down to May, 1903, Judge Swayne had a home anywhere in the United States excepting in Florida. During a part of this time his family were in Europe. They lived with him for a short period in Pensacola, and his son came and lived with him for a while.

In the resolution it is charged that during this time he resided in Delaware or Pennsylvania, but no evidence of this kind was offered, and it is very evident if Judge Swayne resided in either State and made his home there that it would have been a very easy matter to have established that fact by an abundance of proof. A list of witnesses to prove that he resided in Delaware was furnished the committee, but none were called, and the prosecution rested without offering to call any of them, hence it is reasonable to suppose that it could not be proven that Judge Swayne resided in that State. In fact, he says he left Delaware in 1867 and has never since that date made his home there. Judge Swayne must have a residence somewhere. He established a residence in Florida in 1885, and there is no proof that he ever left that State to make his home elsewhere, or that he intended to do so.

The fact that he went north every summer to spend his vacation, or be with his aged mother, does not prove that he changed his residence, because this is a practice followed by some of the Federal judges in the South. The heat of that country becoming intolerable, they go north during the summer months. In 1900 he moved his furniture

into a house in Pensacola rented from Thomas C. Watson & Co., and for three years paid the rent. He boarded at times in the Escambia Hotel, and part of the time in private boarding houses during the time he was in Pensacola. The records of the court show that he averaged about two months each year in his district in the actual trial of cases; that he usually came to Pensacola a day or two before the term of court, and after the term was over would depart. It also appears in evidence that he would return to Pensacola also at times when the court was not in session and between terms.

Now, then, it being charged that he was a nonresident of the district and therefore guilty under the statute of a crime, to wit, a high misdemeanor, it falls upon the prosecution to prove beyond a reasonable doubt that Judge Swayne did not reside within the district but maintained a resident elsewhere, and I submit that absenting himself any length of time from the district does not alone prove that he is a nonresident of it. The prosecution have not shown where his residence is if it is not in his district. Between 1895 and 1899 Judge Swayne requested parties in Pensacola—W. H. Northrup and Fred March—to find for him a suitable residence, and they testified that no suitable place could be found. He also attempted to purchase a house and also took some steps toward building one. This clearly shows the intent on the part of Judge Swayne to reside in his district, and surely a man's intent always controls on a question of residence. Residence is clearly a question of intent. A man chooses his own residence and that residence remains until he decides to have another. There is no evidence that Judge Swayne had no intent to establish his residence in Florida and in his district, or that he had any intent to establish it somewhere else. That he paid no taxes or did not vote is not conclusive that he did not reside in his district. Neither are necessary to establish residence.

But it is said he was absent from his district nearly ten months during each year. But this, as said before, does not prove his residence was not there. Well, it is said, it is a strong circumstance and it proves that he was neglecting his business; that he was not discharging the duties of his office, and from this fact he should be impeached. Let us see. It is true that Judge Swayne was absent from his district, and for months; but it is not true that litigants in his court suffered great or any inconvenience thereby, or that they suffered any loss. Judge Swayne tells us the reason why he was away, and where he was. He was on duty. He was not on a vacation, enjoying the quiet and rest of Guyencourt, Del., or idling away his time in seeking pleasures, but he was on duty most of the time. Under the law the circuit judge of a district may order a district judge to go into other districts and hold court, and also to sit on the circuit court of appeals.

The records in this case show that Judge Pardee and Judge McCormick ordered Judge Swayne to hold court in Alabama, Texas, and Louisiana at different times, and also to sit on the circuit court of appeals, and that he obeyed this order, as it was his duty to do. The certificates of the clerks of different courts in the States just named show when Judge Swayne held court therein, and here follows the record, not giving the States and courts, which can be obtained, but the number of months in which he held court in each year in said States and out of his district commencing with 1895:

1895.—April, May, November, and December, four months.
1896.—January, February, March, April, May, June, November, and December, eight months.
1897.—January, February, March, April, May, June, and July, seven months.
1898.—January, February, March, April, May, November, and December, seven months.
1899.—January, February, March, April, May, June, October, and November, eight months.
1900.—January, May, June, September, October, December, six months.
1901.—September.
1903.—January and February.

Holding court for two months on an average in his own district would make him holding court on an average of about nine months each year. And this, it must be admitted, is a good record for holding court in the Southern States. A large part of the other three months, no doubt, were used by the court in preparing decisions and taking a vacation, unless he decided all of his cases from the bench, which is not likely. The record also shows that not only did he hold court in other districts seven and eight months during the year, but when the time for holding court in his own district arrived that he went there and dispatched all of the business and kept his docket clear. What does the majority want to impeach him for? Because he was absent from his district under orders; because he only worked nine and ten months a year holding court; because he kept his docket clear; because he did not work hard enough? No; certainly these can not be the reasons. Then what are they? If litigants were subjected to "inconvenience, annoyance, injury, and expense," as stated in the specifications, during the time he was absent from his district under orders from Judges Pardee and McCormick, then whose fault was it? And what right have parties to make this the basis for charges of impeachment, and what just reason can this committee give to accept the same as sufficient for preferring charges?

Now, the presumption of law is that Judge Swayne is a resident of his district. As long as a party retains an office which he holds during good behavior he is presumed to continue his domicile in the place where he is to exercise his functions. (Oakey *v.* Eastin, 4 La., 69.) This presumption, as already stated, must be overcome by evidence sufficiently strong to satisfy the mind beyond a reasonable doubt, because under the statute it is made a high misdemeanor not to reside in the district. It can not be overcome by hearsay evidence or by opinions of parties, as sought to be done in this case, but by satisfactory evidence which is competent and relevant. One may be considered as dwelling and having his home in a certain town, though he has no particular choice there as the place of his fixed abode. (2 Me. Repts., 411.) A man is not prevented from obtaining a residence in a place where he goes to permanently make his home by the fact that his wife and children remain in his old home. (1 Bond, 578.)

Neither does absence from a man's place of business for a reasonable time cause him to lose or forfeit his residence there. Of course the judge's residence must be a legal one as distinguished from a constructive one, and his intent, coupled with his acts, go to make up this residence; that he pays no taxes or does not vote is not evidence sufficient to rebut the presumption of his residence. He may not have any property to pay taxes on, and may not, under under some circumstances, care to vote. When a judge goes to a place avowedly for the

purpose of making it his home, requests others to try and rent him a suitable house in which to live, endeavors to purchase a suitable place when he learns he can not rent one, contemplates building a home when he can not buy, and finally succeeds in renting a house which he moves into and pays rent thereon for three years, and finally occupies, with his family, a house purchased by his wife, surely must have established the fact that it was his intent in good faith to make his home in that place, and in the absence of a very strong showing it must be conceded that he has established a residence there.

Having established this residence he can not lose it, because his duties as a judge required him to hold court in other States within the circuit in which his district is for seven and eight months a year, or by spending a vacation during the hot months of July and August with his aged mother in Delaware. Under all these facts it can not be said that Judge Swayne has violated the statute, and neither has he made any excuses for his nonresidence. He explained his absence from the district, as above stated, and surely this can not be urged as a sufficient ground for his impeachment.

This brings me to the other question stated in the first specification, to wit:

> That during said time of his nonresidence, by such nonresidence he has caused great inconvenience, annoyance, injury, and expense to litigants in his court, not so much by failure to hold terms of court as by failing to be in reach for the disposition of admiralty and chancery matters, and other matters arising between terms of court needing disposition.

Of course, if, as has just been stated, he was absent under orders holding court elsewhere, he is to be excused. But what are the facts on this question? J. E. Wolfe, a United States district attorney from 1895 to 1898, and for two years thereafter assistant district attorney, speaking of the loss and inconvenience to litigants caused by the absence of Judge Swayne from the district, says:

> I do not know of any case in which there has been an embarrassment on account of Judge Swayne's absence, and I do not know of any civil proceeding in which litigants were damaged or injured by the absence of the judge.

Mr. Marsh, the clerk of the court, was asked this question (237 of record):

> Q. Do you know of any loss to litigants by any inconvenience resulting by reason of the absence of Judge Swayne?—A. Never a complaint, except in one instance, and that was the signing of a bill of exceptions * * * when Judge Swayne was holding a term of court in Waco, Tex. I shipped the bill to him and it was signed and returned in time.

W. A. Blount, one of the leading lawyers of Florida, says:

> Whether, as a matter of fact, his absence has resulted in injury or expense, I do not know. I can not say now if any cases have been delayed by his absence.

B. S. Liddon, one of the attorneys for the prosecution, attempted to show that he had a case which he was forced to settle because the judge was absent, and that he had a good defense to it. He said the action was commenced in the summer, and that Judge Swayne would not return until November. The facts are, as finally admitted by the witness when confronted with the record, that the suit was commenced on January 25, 1897, after the court had adjourned on January 9; that it was settled in February, and that the court returned from Texas where he had been ordered to hold court, and held a term of court in Pensacola on March 6.

Another lawyer for the prosecution, Mr. Davis, was put on the stand to testify to inconvenience caused litigants by the judge's absence. He complained that he could not get a bill of exceptions signed readily because the court was absent in Delaware. It appears from the evidence that the delay was caused by the fault of Mr. Davis by not incorporating into the bill certain documentary evidence which the court directed to be included in it, but even then the bill was signed in time and no loss followed to anyone. One Marshall was sworn as a witness to prove that he was forced to settle a bankruptcy case owing to the fact that he could not get a hearing. A short time after the matter was commenced the judge was holding a term of court and Marshall never asked to be heard. I have cited the only three instances shown by the prosecution to substantiate this charge. All amounted to nothing; and it is quite evident, with the great industry of the gentlemen behind this movement, that if there was anything to support the charge they would have found it.

CONTEMPT OF O'NEAL.

Second. The majority contend that Judge Swayne should be impeached because he found W. C. O'Neal guilty of contempt and sentenced him to jail; that there is no law authorizing such a judgment, and that the judge acted arbitrarily and oppressively. I can not agree with the majority either as to their construction of the law or as to the facts. They have stated the strongest case possible in this matter against Judge Swayne without inquiring if the record does not contain facts to justify his conduct and to uphold his judgment. The facts are these:

On the 29th day of August, 1902, one Scarritt Moreno filed in the district court for the northern district of Florida his petition in bankruptcy. On September 15, 1902, one Adolph Greenhut was appointed trustee of the estate of said bankrupt. That the said Greenhut, as such trustee, in carrying out the implied orders of the court appointing him, and in the discharge of his duties to collect and recover the assets of the bankrupt, commenced an action in equity for the purpose of having a certain deed of property purchased by said bankrupt in the name of his wife, and to have certain mortgages thereon declared null and void.

The American National Bank of Pensacola was made a party defendant in this action, W. C. O'Neal was the president of the bank. The action was commenced Saturday afternoon, October 18, 1902. On the following Monday morning the said W. C. O'Neal, when passing the office of the said Greenhut, where were kept the papers of said estate and the business thereof transacted, stopped and said to Greenhut that he wished to speak to him, and Greenhut replied, "I will see you right now," and both gentlemen stepped into Mr. Greenhut's office. What transpired in that office was only seen by Greenhut and O'Neal, and their statements are conflicting, O'Neal testifying that he went in there to reproach Greenhut for commencing the action, that hot words passed between them, and that Greenhut threatened to do him up; that as he started to leave the office he turned around and told Greenhut that he had lied about the Moreno acceptance, and that Greenhut then struck him and he pushed him away, and as he rushed upon him again he drew his pocket knife and cut Greenhut in self defense.

Greenhut, in his affidavit, says that O'Neal went in his office with him, where he kept and had the custody of the papers, books, etc., relating to and connected with the books of said Moreno, bankrupt; that he asked him, Greenhut, why he had commenced the action against the American National Bank, and made the remark that he would settle with him, or will settle the matter, and that O'Neal then started to walk out, and that Greenhut not knowing of his purpose followed. That when at the doorway O'Neal, without any provocation, turned and wheeled suddenly about with his knife in his hand and struck at his, Greenhut's throat, cutting him at a point behind the left ear, cutting through a portion of it, thence across the left cheek to the corner of the mouth, stabbed him four times, inflicting serious injuries upon him which prevented him from attending to his duties as a trustee. Seventeen or eighteen days after this assault the said Greenhut filed in Judge Swayne's court an affidavit of which the following is a copy:

UNITED STATES OF AMERICA,
Northern District of Florida, City of Pensacola, ss:

Adolph Greenhut, of the city of Pensacola, in the district aforesaid, being duly sworn according to law, on his oath doth depose and say:

That theretofore, to wit, on the 29th day of August, 1902, one Scarritt Moreno filed in the honorable the district court of the United States in and for the northern district of Florida, at Pensacola, his petition to be adjudicated a bankrupt and to obtain the benefits of the acts of Congress of the United States relating to bankruptcy. That thereafter such proceedings were had upon said petition in said United States district court that on September 15, 1902, affiant was duly appointed trustee of the estate of the above-named Scarritt Moreno, bankrupt, which said appointment of deponent as trustee was then and there approved by the said court.

That thereafter, to wit, on the day and year last aforesaid, affiant accepted said appointment and filed his bond as such trustee, which said bond was duly approved by E. K. Nichols, esq., referee in bankruptcy, and at the same time deponent took the oath of office as required by law, and thereupon he became charged with the duties and clothed with the authority appertaining to a trustee in bankruptcy under the laws of the United States, and from thence hitherto has occupied and is now occupying said trusteeship, amenable to and subject to the orders of the said the honorable district court of the United States in and for the northern district of Florida.

That affiant was, by his counsel, advised that it was his duty as trustee of the estate of said Scarritt Moreno as aforesaid to institute a certain suit or action in equity for the purpose of having certain property purchased by the said Scarritt Moreno, bankrupt, the title to which was taken by the said Scarritt Moreno in the name of his wife, brought into the said United States district court as a part of the estate of said bankrupt, to be there administered as required by law, and for the further purpose of having certain mortgages on said property decreed and declared to be null, void, and of no effect. That thereupon in the afternoon of Saturday, the 18th day of October, 1902, through his counsel, he, as trustee as aforesaid, and in the performance of his duty as aforesaid as an officer of the said United States district court, caused to be filed in the circuit court of Escambia County, State of Florida, his certain bill of complaint, therein and thereby, among other things asking the relief above referred to.

That by the advice of his counsel, Scarritt Moreno, Susie R. Moreno, his wife, the American National Bank of Pensacola, the Citizens' National Bank of Pensacola, and others, were made parties defendant in and to said bill of complaint, and that upon the filing of the said bill of complaint suit was commenced against the defendants named in said bill of complaint. That all of the proceedings above referred to were taken and had by affiant as an officer of the district court of the United States, in and for the northern district of Florida, and in the due, proper, and faithful performance of his duty as such officer, and were necessarily had and taken under the law and his oath of office.

That on Monday, the 20th day of October, A. D. 1902, between the hours of 9 and 10 o'clock a. m., affiant was standing in the door of the office of the store owned and conducted by him, situated at No. —— East Government street, in the city of Pensacola aforesaid, which said office was occupied by deponent, among other things, for the purpose of performing the duties devolving upon him as trustee as aforesaid, and in which said office this deponent kept and had the custody of the papers, books,

etc., relating to and connected with the estate of said Scarritt Moreno, bankrupt, in deponent's hands as trustee as aforesaid; that at the said time deponent was engaged in conversation with one Alex Lischkoff, when one W. C. O'Neal, who was at the said time president of said American National Bank of Pensacola, one of the defendants in the action or suit heretofore referred to, approached to where affiant was standing and conversing as aforesaid, and stated to affiant that as soon as he, affiant, was at liberty, he, said O'Neal, desired to speak to him. Thereupon affiant stated in effect that said O'Neal could speak to him then, and affiant entered his said office and stood alongside of a standing desk about 5 feet from the door of said office.

Said O'Neal followed affiant into said office and stood opposite to affiant, and distant only a few feet. That thereupon said O'Neal in effect asked this affiant why he, affiant, had brought the name of his, the American National Bank, into the Moreno suit (meaning thereby the suit above referred to, brought by affiant, as trustee, against Scarritt Moreno and others); that affiant replied that he, O'Neal, could see his, affiant's, attorneys in relation thereto; that said O'Neal made some remark to the effect that he would not do so, and stated to affiant that he, affiant, was no gentleman; that affiant thereupon said that he, affiant, was as much of a gentleman as he, the said O'Neal; that thereupon said O'Neal said we'll settle the matter, and turned about as if he intended to leave the premises of deponent, walking toward the door of said office and out upon the sidewalk; that affiant had no thought, idea, or suspicion that said O'Neal intended any personal violence toward him, and quietly started forward from where he was so standing as aforesaid toward the door of said office leading into the street.

That affiant barely reached the doorway of said office when said O'Neal, without any provocation, without any notice to deponent of his murderous intention, turned and wheeled suddenly about with his knife in his hand, and, with intent to kill and murder deponent, struck at his, deponent's, throat with said knife, and cut deponent at a point behind the left ear, cutting through the lower portion of said left ear, then across the left cheek, ending at left corner of mouth; and immediately thereafter said O'Neal cut and stabbed deponent four further times: (1) On left side over lower ribs, (2) upon left hip, (3) on left elbow, and (4) on right hand. That the cuts, wounds, and stabs so inflicted by said O'Neal upon deponent were of a serious and dangerous character, and from said time to the present deponent has been unable to attend to and perform his duties as trustee as aforesaid, and has been confined to his home, except for a few hours on two or three different days; and has ever since been and is now under the care and treatment of a physician who is attending to said wounds.

That said assault and attempt to murder was committed by said O'Neal as aforesaid solely because and for the reason that affiant, as an officer of the United States district court in and for the northern district of Florida, had instituted the suit above set forth against the said American National Bank and others, and to interfere with and prevent deponent from executing and performing his duties as such officer of said court; and the said O'Neal did, by the said murderous assault, interfere with the management of the said trust by deponent as an officer of the said court, and did for a long period of time, to wit, from the said 20th day of October, 1902, up to the present time, by reason of the injuries inflicted by him upon deponent as aforesaid, prevent and deter deponent from performing the duties incumbent upon him, deponent, as such officer, and did thereby interfere with the management by deponent as such officer of the estate of the said Scarritt Moreno, bankrupt.

A. GREENHUT.

Sworn to and subscribed before me this 7th day of November, A. D. 1902.

E. K. NICHOLS, *Referee in Bankruptcy.*

To this affidavit O'Neal filed an answer, a copy of which is as follows:

And thereafter, and in the said day, to wit, on the 22d day of November, A. D. 1902, the following answer was filed in the said cause by the respondent therein, to wit:

In United States district court, northern district of Florida, at Pensacola. In re rule upon W. C. O'Neal to show cause why he should not be punished for contempt upon the statement set forth in the rule and the affidavit of A. Greenhut, thereto attached.

Respondent, for answer to the rule and to the said affidavit, says:

1. That he knows in part and presumes in part that the allegations of the first paragraph of the said affidavit are true.

2. That he knows in part and presumes in part that the allegations of the second paragraph of the said affidavit are true.

3. That the statements in the third paragraph of said affidavit are in part true and in part untrue, and that the following statement of the facts leading up to, accompanying, and surrounding the affray between himself and the said Greenhut on October 20, 1902, are true:

That the said Greenhut had been, from the organization of the American National Bank, of Pensacola, in October, 1900, a stockholder and director thereof; that while he was such stockholder and director the said bank received from the said Scarritt Moreno a certain mortgage for the sum of $13,000, to secure certain indebtedness due or to become due by the said Moreno to the said bank; that the said transaction was an honest and bona fide transaction, and that the said Scarritt Moreno was and became indebted to the said bank in a large sum of money secured by the said mortgage; that the said Greenhut was cognizant of the whole of said transaction and knew of its bona fides and honesty, as he did of the subsequent bona fide transfer thereof to Alex McGowan, S. J. Foshee, and H. L. Covington for a large consideration paid by them to the said bank, and that the bill filed by the said Greenhut as trustee as aforesaid, was filed to declare the said mortgage and transfer null and void, although the said Greenhut knew them to have been entirely honest, straight, and valid transactions.

That prior to the said 20th of October said A. Greenhut became indorser upon certain negotiable paper of the said Scarritt Moreno to the said bank to an amount of about $1,500; that the said Greenhut refused to make good his said indorsement or to pay to the said bank the money due upon said paper at its maturity or thereafter, and before the said 20th day of October the said bank had been compelled to sue him in the circuit court of Escambia County, Fla., upon said paper, and that in the said suit the said Greenhut interposed a defense which this respondent believed and believes to be untrue and known to the said Greenhut to be untrue.

That on the morning of the 20th of October, 1902, respondent was proceeding from his residence to his office in the said bank, in the direct and usual path pursued by him, and he saw the said Greenhut standing at the door of his said store office upon the said path of respondent, and it suddenly occurred to respondent to reproach the said Greenhut with having brought the suit mentioned in his affidavit against the said bank, when he, the said Greenhut, knew as aforesaid, that there was no foundation therefor; and thereupon the respondent stated to the said Greenhut that he wished to speak to him as soon as he was at liberty, he then being engaged in a conversation with one A. Lischkoff. The said Greenhut answered that respondent could speak to him then, and both he and respondent stepped to the rear of the said Greenhut's office, when the respondent reproached the said Greenhut with his attitude toward the bank, of which he had been a stockholder and director, both in his refusal to pay the negotiable paper hereinbefore mentioned, and in the bringing of an unfounded suit against it; the conversation, however, concerning chiefly the bringing of the said suit against the said bank. Hot words passed between the said respondent and said Greenhut, during which the said Greenhut said that he would "do respondent up," to which respondent answered that he did not come to have a disturbance and would not fight in his office except in self-defense, but that if he had to fight he would do so if the said Greenhut would come out upon the street.

When the respondent turned to leave the office and when he had nearly reached the door, he turned and said to the said Greenhut, "Well, you know how you lied about the Moreno acceptance, for you said that you would pay it," the Moreno acceptance being the negotiable paper hereinbefore mentioned. As respondent turned, saying this, he noticed that the said Greenhut was following him, and as he said it the said Greenhut, who was short, stout, heavily built, and apparently much more muscular than respondent, struck the respondent, who is thin and feeble, and forced him against the railing in the said office. The respondent shoved the said Greenhut a little away from him, but he, the said Greenhut, instantly recovered and rushed at respondent with his arm uplifted to strike, when respondent drew from his pocket a small pocketknife and opened it, in order to protect himself, and upon said Greenhut rushing upon him, cut him therewith, while the said Greenhut was still following and endeavoring to strike him.

That it is not true that the respondent at any time said to the said Greenhut that he, respondent, would settle the matter, but the facts are as hereinbefore stated; that respondent does not know how many or where located were all the wounds inflicted with said knife and hence he is unable to admit or deny the allegations of the said affidavit relating thereto; that it is not true that the use of the said knife was with the intent to kill and murder the said Greenhut or to do him any bodily harm, but respondent avers that it was entirely from the instinctive desire of respondent to defend himself from the attack of a larger and more powerful man.

That it is not true that the assault charged in the said affidavit was committed by the respondent solely because and for the reason that the said Greenhut had instituted the suit aforesaid against the said American National Bank, or to interfere with and prevent him, the said Greenhut, from exercising and performing his duties as an officer of this court; that in truth the respondent never contemplated at any time any interference with the said Greenhut as trustee as aforesaid, or contemplated any affray with the said Greenhut, or any personal conflict with him until he saw the threatening attitude of the said Greenhut toward him, the respondent, as hereinbefore set forth, and that so far as respondent can determine from the actions of the said Greenhut, who was the aggressor as aforesaid, the cause of the said affray was the remark of respondent to the said Greenhut concerning the said Greenhut's action in repudiating his obligation to pay the said acceptance.

And respondent disclaims the existence on his part at any time of any intent to interfere with, prevent, impede, or delay the said Greenhut in the prosecution of the said suit against the said bank, or to interfere with or impede or prevent him in any wise in the execution or performance of any of his duties as such trustee, and specially disclaim any intent to do any act which might savor in the slightest degree of contempt of this honorable court.

W. C. O'NEAL.

W. C. O'Neal, being duly sworn, says that he has read the foregoing answer and that the statements therein made are true.

W. C. O'NEAL.

Sworn and subscribed before me this 18th day of November, A. D. 1902.

[SEAL.] JNO. PFEIFFER, *Notary Public.*

On the 9th day of December the matter came on for trial, and the court, after hearing all of the evidence and all of the witnesses, rendered the following judgment:

And afterwards, to wit, on the 9th day of December, A. D. 1902, the following proceedings were had in open court, to wit:

In the matter of the rule upon W. C. O'Neal to show cause why he should not be punished for contempt of this court as to the matters and things set forth in the affidavit of Adolph Greenhut.

This cause coming on to be heard at this time on the affidavit of Adolph Greenhut, in the matter of the bankruptcy proceedings in the estate of Scarritt Moreno, and upon the rule to show cause why he should not be punished for contempt of this court issued thereon by this court against W. C. O'Neal, and upon the answer of the said respondent, W. C. O'Neal, to the said rule and affidavit, and the court having heard the testimony and the witnesses for the prosecution and for the respondent, and after argument of counsel and consideration by the court, and the court being advised in the premises, the court doth find as follows:

That the affidavit of Adolph Greenhut, upon which this rule was granted, is true, and that the respondent is guilty of the acts and things set forth therein, in the manner and form therein alleged, and that the same constitute and are a substantial contempt of this court; and it is therefore

Ordered, adjudged, and directed that the said respondent, W. C. O'Neal, be taken hence to the county jail of Escambia County, at Pensacola, in the State of Florida, and there confined for and during the period of sixty days, and that he stand committed until the term of this sentence be complied with or until he be discharged by due process of law.

And the said respondent, W. C. O'Neal, at this time having sued out his writ of error to the Supreme Court of the United States, and made and entered into a bond and undertaking, conditioned as required by law, and duly approved by this court, it is therefore ordered that the said writ of error be and operate as a supersedeas to the judgment heretofore rendered in this cause.

There is no evidence that Judge Swayne acted arbitrarily in the matter, that he was oppressive, or that he wrongfully and willfully in defiance of law tried the action and pronounced judgment. The majority of the committee contend that there is no law to warrant the decision of the court; that no contempt had been committed; that the judge was in error; and for these reasons and because he made a mistake in the law, because he rendered an erroneous judgment he should be impeached.

The judge certainly had the right to pass on the credibility of the witnesses and certainly had the right to believe Greenhut's statement in preference to that of O'Neal's, and if the evidence supported the allegations of Greenhut's affidavit—and the judge found that it did—then he had the right under the law, in my judgment, to find O'Neal guilty of contempt.

A trustee in bankruptcy, under the bankrupt act, is made an officer of the court. It is his duty, under an order of the court appointing him, to commence any actions necessary to recover property belonging to the bankrupt, and when he commenced such an action he is acting as an officer of the court and under its orders, or he would have no right to commence and prosecute the action at all. And any interference with him, either in the commencement of the action or in its prosecution, is a resistance by a party to a lawful order of the court and clearly falls within the express language and meaning of section 725 of the Revised Statutes. The action of O'Neal was not only to reproach Greenhut, but to frighten and terrorize him and to interfere with him in the lawful discharge of his duties as trustee and as an officer of the court.

Is it possible that the court may direct its trustees and officer to commence an action to recover assets to be distributed by the court to creditors and can not punish for contempt a party who stands in the street blocks away from the court-house and by force of threats intimidates the trustee so that he, through fear of personal violence, dare not commence his action? Surely such can not be the law, and such is not the law. What are the decisions on this question?

In the case of the United States *v.* Anonymous, reported in Vol. 21, Federal Reporter, p. 761, it is held that—

> it is a contempt of court to interrupt and violently break up the examination of a witness before an examiner by persisting in the claim to dictate, prompt, and control the answers of the witness. It is also a contempt to insult the examiner by use of violent and abusive language to him after he has left the office and is upon the street. Nothing in the Revised Statutes, section 725, has taken away the power of the court to punish such contempts.

The court, on page 771, uses this very strong language, which applies with great force to the O'Neal case. It says:

> The privilege of protection to all engaged in and about the business of the court from all manner of obstruction to that business, from violence, insult, threats, and disturbance of every character is a very high one, and extends to protect the persons engaged from arrests in civil suits, etc. It arises out of the authority and dignity of the court and may be enforced by a writ of protection, as well as by punishing the offender for contempt.

The court further on says if the misbehavior was not in the presence of the court, or so near thereto as to obstruct the administration of justice, it was nevertheless the disobedience or resistance by a party to a lawful order, decree, or command of the court.

In the case of In re Higgins, reported in volume 27, Federal Reporter, page 443, it is held that receivers are sworn officers of the court, and their agents and servants in operating the railway are pro hac vice the officers of the court, and that it is well settled that who unlawfully interferes with property in the possession of the court is guilty of contempt of that court, and it is equally well settled that whoever unlawfully interferes with officers and agents of the court in the full and complete possession and management of property in the custody of the court is guilty of a contempt of the court, and it is immaterial

whether this unlawful interference comes in the way of actual violence or by intimidation and threats. To the same effect are the cases of In re Acker (66 Fed. Rep., 290), and In re Tyler (149 U. S., 181).

One of the most interesting decisions on this question of the power of the court to punish for contempt is by Judge Jones, of Alabama, and reported in volume 120, Federal Reporter, page 130, ex parte McLeod. This case discusses the causes that led up to the enactment of section 725, Revised Statutes. The court holds that—

> An assault upon a United States commissioner because of past discharge of duty is a contempt of the authority of the court, whose officer the commissioner is, in the administration of criminal laws, although no proceeding against the offender was then pending and the commissioner at the time was not in the performance of any duty.

This must be so. The court must have its officers to enforce and carry out its decrees, to enforce and protect the rights of litigants, to preserve peace and good order, and to assist it in the performance of those duties which are imposed upon it by law. The judge himself is only an officer of the court, and, indeed, the court would be weak that had no power to punish a party for contempt who interfered with one of its officers for the purpose of preventing him from discharging his duty as an officer of the court, as trustees, or receivers. If trustees, commissioners, and other officers of the court are to be deterred in the performance of their duties by reason of violence or threats, if they may be assaulted and stabbed because they are carrying out the mandates of the law, then we will have no law, no order, no security, no protection of person or property.

It is necessary for the peace and good order of the law and of society that a trustee in bankruptcy may, without fear, commence actions in the courts to recover property which belongs to creditors. It is also necessary that after the action has been commenced that he shall not be terrorized to the extent that he dare not prosecute further. His duties are, among other things, to collect and reduce to money the property of the estate for which he is a trustee, under the direction of the court, and there is vested in him title to all of the property belonging to the bankrupt, including property transferred by the bankrupt in fraud of creditors. In trying to declare the deed of Moreno to his wife and the mortgages therein as void in the suit which he commenced, Greenhut was "acting, under the direction of the court," or, in other words, under its order, as its officer; and when Mr. O'Neal went into his office to reproach him for commencing this suit and used violence upon him he was resisting and interfering with an officer of the court in the performance of an order of the court, and was guilty of a contempt. Being guilty of a contempt, Judge Swayne's duty was to punish him therefor, and he would not have been mindful of the peace and good order of his court and the due administration of justice therein if he had not done so.

But the majority contend that "the answer of O'Neal purged the contempt, and it was error to punish him for it," and therefore the judge should be impeached. We can not agree to this for two reasons: First, the answer does not purge the contempt, and, second, growing out of an equity proceeding, the court had the right to inquire into and pass upon the merits.

In proceedings for criminal contempt the answer of the respondent in so far as it contains statements of fact must be taken as true. If

false, the Government is remitted to a prosecution for perjury. This is the common-law rule. But the answer must be credible and consistent with itself, and if the respondent states facts which are inconsistent with his avowed purpose and intent the court will be at liberty to draw its own inferences from the facts stated. (In re May, 1 Fed., 737; in re Crossley, 6 Term R.; ex parte Nowlan, 6 Term R.; U. S. *v.* Sweeny, 95 Fed., 447; in re Debs, 64 Fed., 724.)

Disclaimer of intentional disrespect or design to embarrass the due administration of justice is, as a rule, no excuse, especially where the facts constituting the contempt are admitted or where a contempt is clearly apparent from the circumstances surrounding the commission of the act. (Cyclopedia of L. & P., vol. 9, 25.)

Courts may make inquiry as to the truth of the facts notwithstanding the answer denies fully the allegations of the affidavit, statement, or petition and disclaims any intention to do any act in contempt of the court. (Territory *v.* Murray, 7 Montana, 251; Crow *v.* State, 24 Tex., 12; State *v.* Harper Bridge Co., 16 W. Va., 864; U. S. *v.* Debs, 64 Fed., 724; In re Snyder 103 N. Y., 178; 48 Conn., 175; 19 Fed., 678.)

The law as above stated is clearly applicable to the answer filed by O'Neal.

He admits that he knew that Greenhut had been appointed trustee. He admits that he knew that Greenhut as such trustee had commenced an action to recover assets which it was alleged belonged to the bankrupt and which he was endeavoring to cover up by fraud. He admits that the bank of which he was president was a party defendant in this action, and he admits that "it suddenly occurred to him to reproach the said Greenhut with having brought the suit against the said bank." He also admits that when he entered Greenhut's office he reproached the said Greenhut for bringing an unfounded suit against the bank; "the conversation, however, concerning chiefly the bringing of the said suit against the said bank," and that hot words passed between them and that he invited Greenhut into the street to fight. He says—

that it is not true that the assault charged in the said affidavit was committed by respondent solely because and for the reason that the said Greenhut had instituted the suit against the said American National Bank, or to interfere with or prevent him, the said Greenhut, from exercising and performing his duties as an officer of this court.

He says that the assault was not made solely for that reason, but he does not deny that that was one of the reasons, and thereby admits that it was.

Having made an affidavit in which he admits so much, the court could well find that it was inconsistent with his claim that he had no intent to commit any contempt or to interfere with Greenhut in discharging his duties as trustee. In fact, nowhere does it appear that O'Neal ever asked to be dismissed, because he had fully purged himself of contempt by his answer.

But the action commenced by Greenhut, being an equitable action, and his duties as trustee being more as an officer in equity than one at law, the court had the right to inquire into the merits even if O'Neal filed an affidavit fully and completely purging himself of the contempt charged, a different rule obtaining in equity than at law. (Buck *v.* Buck, 60 Ill., 105; 114 Mass., 230; 37 N. H., 450; 48 Conn., 175.)

When O'Neal was found guilty of contempt he took a writ of error to the Supreme Court of the United States and the cause was dismissed. Then he sued out a writ of habeas corpus before Judge Pardee, and on the 10th of November last the court, Judges McCormick and

Shelby concurring, dismissed the writ. This decision is reported in volume 125, Federal Reporter, page 967.

The court says:

The charge of contempt against the relator is based upon the fact that he unlawfully assaulted and resisted an officer of the district court in the execution of orders of the court and in the performance of the duties of his office. Under such orders, and in that respect, it would seem to be immaterial whether at the time of the resistance the court was actually in session with a judge present in the district, or whether the place of resistance was 40 or 400 feet from the actual place where the court was actually held, so long as it was not in the actual presence of the court, nor so near thereto as to embarrass the administration of justice.

Under the bankruptcy act of 1889, section 2, the district courts of the United States, sitting in bankruptcy are continuously open; and, under section 33, and others of the same act, a trustee in bankruptcy is an officer of the court. The question before the district court in the contempt proceedings was whether or not an assault upon an officer of the court, to wit, a trustee in bankruptcy for an account of and in resistance of the performance of the duties of such trustee, had been committed by the relator, and, if so, was it under the facts proven a contempt of the court whose officer the trustee was. Unquestionably the district court had jurisdiction summarily to try and determine these questions, and having such jurisdiction, said court was fully authorized to hear and decide and adjudge upon the merits.

If O'Neal was guilty of the matters charged against him, and there was sufficient proof of that fact as shown both by Greenhut's affidavit and his own, then there is no doubt that he was guilty of contempt.

Judge Swayne having been fearless enough on the proof of these facts to find a banker and an influential citizen guilty of contempt the majority in their report say, on page 20, that—

Judge Swayne's action was, to say the least, arbitrary, unjust, and unlawful. It could have proceeded only from either willful disregard of the law or from ignorance of its provisions.

If the court has no power to punish those for contempt who beat, assault, and intimidate its officers when discharging their duty, then what protection have they, and how will the law be enforced? If a sheriff can not serve a process without being beaten, if a clerk can not file a paper without being threatened, if a juror can not proceed to hear a case without interference, and if a trustee can not commence an action without being stabbed, and neither have any right to appeal to the court for protection, then men will not be found who will discharge their duties; and if a judge dare to punish for contempt for the doing of any of these things he lays himself subject to impeachment and to be charged with tyranny, oppression, and ignorance, and his acts characterized as being "arbitrary, unjust, and unlawful."

But the majority in their report in this matter give their whole case away. They say, on pages 20 and 21—

O'Neal did not assault Greenhut because Greenhut had sued the bank, but because he had sued the bank knowing that his contention was false.

Here is an admission that O'Neal did assault the trustee, and that the assault grew out of the action that Greenhut commenced against O'Neal's bank, but the assault is sought to be justified because O'Neal claimed that the suit was an unfounded one and Greenhut knew it. The question of whether or not a suit is well founded is always a question for the court before whom the action is pending. If a defendant has the right to walk into the office of a receiver, trustee, executor, or administrator, and stab him and try to cut his throat, and

justify his action by claiming that a suit brought against him by such officer is unfounded, then how can the court protect its officers in the discharge of their duties? Happily no such right as this exists under the laws of this or any other civilized nation.

In punishing O'Neal Judge Swayne did his duty. Out of this trouble grew this impeachment proceeding. O'Neal at once started in to get even on the court and the evidence shows that he employed lawyers to go to Tallahassee and lobby through the resolution passed by the legislature of the State of Florida. The two most prominent lawyers now prosecuting this matter, Mr. Liddon and Mr. Laney, admit that they were employed by O'Neal to lobby this resolution through.

There is considerable feeling of prejudice and malice in this proceeding and it is well to be careful and not be influenced by it to the end that no mistakes are made and no injustice done.

BELDEN AND DAVIS.

Third. The majority are of the opinion that Judge Swayne should be impeached because he found one Davis and one Belden guilty of contempt. With this we can not agree; neither can we agree with the statement of facts set forth in Mr. Palmer's report, as important matters are omitted which put a very different phase to the transaction.

The trouble grew out of the following facts: In February, 1901, Florida McGuire commenced an action in Judge Swayne's court to recover about 200 acres of land known as the Rivas tract. This tract of land is described as one body, though it is divided into lots and blocks and owned by a number of people. On this tract is a block known as block 91 of the new city; but there is nothing in the said description of the tract of land that would show this fact. In the summer of 1901 Judge Swayne's wife was negotiating with a real estate firm for the purchase of several pieces of land, one of which was said block 91. This block was owned by a Mr. Edgar, who lived in New York, and upon whom service of summons had never been made in the said Florida McGuire suit. Mr. Edgar made a deed in favor of Mrs. Swayne and sent it to Thomas C. Watson & Co., the agents above named. Mr. Hooten in July, 1901, wrote to Judge Swayne that he had received the deed, but it was not a warranty deed, as Edgar was afraid of the Caro claim. To this letter Judge Swayne replied as follows:

Gentlemen, you may omit block 91 and send papers for the others along and oblige.

This ended the negotiations of Judge Swayne's wife to purchase said block. Afterwards it was sold to the Pensacola Improvement Company, and neither Judge Swayne nor his wife ever owned it or were ever in possession of it. Before the commencement of the November term of court the attorneys for the plaintiff in the Florida McGuire suit requested Judge Swayne, by letter, to recuse himself, as he owned an interest in the property in dispute. The judge did not answer this letter. On November the 5th, when court opened, the judge brought this matter up in the presence of the attorneys for plaintiff, Florida McGuire, and stated that he had received a letter from them asking him to recuse himself because he had purchased a piece of land which was a part of the land embraced in the Florida McGuire case. (Testimony of W. A. Blount; Mr. Palmer states they had no notice.)

The judge stated he had not purchased any such land; that his wife through him had negotiated for the purchase of a block of this tract, but when the deed was sent to close the trade he saw it was a quitclaim, and he asked why a warranty deed had not been given. The reply by Watson & Co., Edgar's agents, was the reason a warranty deed was not given was because this land was in controversy in this suit and he did not care to give a warranty. Judge Swayne, learning this, caused the deed to be returned, and as no formal demand had been made of him to recuse himself, he would try the case.

The foregoing is the statement of W. A. Blount, Florida's foremost attorney, who was in the court at that time. The criminal calendar was taken up first, and the court informed the parties that he would take up the civil docket right after the criminal calendar. The only case on the civil docket was the case of Florida McGuire. A jury was in attendance. During the week the attorneys for Florida McGuire informed W. A. Blount, attorney for defendants, that they were ready. All of their witnesses were in Pensacola and easy to reach. Saturday morning it was apparent that the last criminal case would be finished that day, and Mr. Blount took out a subpœna for his witnesses. Again I quote from the testimony of Mr. Blount:

The first we knew that they would not be ready was the application by Judge Paquet for a postponement of the case to Thursday. I objected very strenuously. I had tried the same issues eleven times. I called the court's attention to the fact that my knowledge of the witnesses and the issues led me to believe that 90 per cent of the witnesses were in half-hour call of the court room; there was no reason for delay. The court took that view, would not call it then, but would call it Monday, unless there was an application for a continuance in accordance with the rule.

That night, Saturday, after the court had refused to postpone the case, Davis, Belden, and Paquet, attorneys for the plaintiff, Florida McGuire, met together in a store of one of their clients, and there discussed the question of suing Judge Swayne and decided to do so. Belden admits he was present at this meeting, though the majority report says, page 8, "The papers were taken to Simeon Belden, into his hotel, where he was ill, and he signed them." The following are the facts as sworn to by Belden:

A. I was at the Park Hotel a short time, and they sent for me to come down to Judge Paquet.

Q. Where was he?—A. At Mr. Pryor's store, I think; I went there and signed the papers and left. It was a suit against Judge Swayne for the recovery of that property.

The suit was commenced after 8 o'clock at night in the circuit court of Escambia County, Fla., after the clerk had gone home, and the statement was made to him that the writ must be served that night at all hazards. After the writ was issued the sheriff was hunted up and instructed to serve Judge Swayne with it that evening. These attorneys also, in carrying out their scheme, wrote an article for the paper, to be published next morning—Sunday—stating that the suit had been brought and the object of it, and procured its publication.

The majority in their report say that they did not procure its publication, but the evidence is positive that they did. The suit was won in ejectment to recover from Judge Swayne block 91 and mesne profits amounting to $1,000, and all three of these parties well knew that Judge Swayne had never owned the land and had never been in the possession of it. Judge Belden claimed that the land was Lydia C. Swayne's, and Mr. Davis, in his petition for a writ of habeas corpus, stated the same fact. It was open, unimproved land. The action was not commenced in good faith with the intention of prosecuting it, and

nothing more was ever done with it. If the parties had been acting in good faith they certainly would have sued Mrs. Swayne, whom they claimed to be the owner of the land, and not Judge Swayne, who had never negotiated for it. When forced to state what caused them to act in this great haste, they gave as an excuse that they were afraid that Judge Swayne would leave before they could get service upon him. Monday forenoon Judge Blount talked the matter over with Judge Swayne, and he, acting on his own suggestion, prepared the papers upon which Davis and Belden were found guilty of contempt.

At the trial Judge Swayne said, so states Mr. Blount in his evidence, that he had no doubt that the people in the city had a right to sue him, but the circumstances showed it to be an attempt to influence a United States judge in his duty by putting him where he would have to declare himself disqualified, and knew he had so announced, and had no reason to believe so. Before Davis and Belden were cited for contempt they dismissed the Florida McGuire suit. They probably heard contempt proceedings were being started. They claim now that Saturday evening they had decided to dismiss the case pending before Judge Swayne. But if this is a material fact in the case, it could only have been such by calling Judge Swayne's attention to it at the time of the contempt proceedings, which they did not do. As far as the court knew, no intention of that kind ever existed. It was not sworn to, was not put in their answer, and was mentioned in no way when it ought to have been, and it seems rather late in the day to make that claim now.

Mr. Davis claims that he was not retained in the Florida McGuire suit until Sunday, after the suit against Judge Swayne had been commenced, and the majority in their report say that "E. T. Davis was not of counsel in the case and had no connection with it up to the time that court adjourned, on Saturday, November 9, at 6 o'clock." We believe that Davis was retained and was connected with the suit before Judge Swayne was sued, and had been for some time, and the evidence clearly establishes that fact beyond all doubt. J. C. Keyser was interested in the suit on behalf of plaintiff; in fact, he was one of the plaintiffs, though his name did not appear of record. He said, when asked what attorney asked Judge Swayne to recuse himself, "I think Mr. Davis and General Belden."

On page 250, Mr. Marsh, the clerk of the court, says:

> I don't think any præcipes had been gotten out. I had told Mr. Davis I would wait as late as he desired to get them out. He did not seek any præcipes.
> Q. Was Mr. Davis in the case, then, that Saturday afternoon?—A. Yes.

On page 278 Mr. Belden says:

> After receiving the telegram from Judge Pardee, Mr. Davis was to make up the record in the case, so if there was error we could appeal it—take it up by writ of error. We intended to proceed, but the judge calling the case Saturday evening, 9th of November, refusing to allow us time to get our witnesses before the court, we were deprived of the facilities of making up such a record as Judge Pardee contemplated we should make, and we had to discontinue it.

Here is a positive statement by Mr. Belden that Davis was in the case before Swayne was sued:

Mr. Paquet says, page 423, that—

> Davis was brought into the suit on Saturday, November 9, before Judge Swayne was sued; that he was one of the advising counsel of the clients, that he was associated, and asked if I had any objections; during the week he was in court very frequently, advising with some of the plaintiffs.

Davis also admits in his petition for a writ of habeas corpus that he was an attorney for plaintiffs, a copy of which writ is as follows:

United States circuit court, fifth judicial circuit, ex parte Elza T. Davis, habeas corpus.

The relator in this case, Elza T. Davis, comes into court and excepts to the consideration of what is filed herein as a certificate of Charles Swayne, judge, without date, because it contains charges and statements amounting to charges of contempt against this defendant not contained in motion and order charging contempt, and which statements and charges he has never been ordered to answer, or in any way given a chance of reply to.

Should this exception be overruled then defendant, with permission of court first had and for which he prays, says:

That on the 5th day of November, 1901, in open court of the United States circuit court of the northern district of Florida, Charles Swayne, United States district judge presiding, in answer to a letter from this defendant and Louis P. Paquet, of counsel for Mrs. Florida McGuire, of date October 4, 1901, to said judge at Guyencourt, in the State of Delaware, requesting him to recuse himself on the trial of the suit of Mrs. Florida McGuire *v.* Pensacola City Company et al., among other reasons, because of his interest in the said suit pending before him, refused to recuse himself, and went on to state from the bench in open court that a relative of his had purchased a part of the said land in litigation before him in said suit of Mrs. Florida McGuire, that the deeds had been sent north to him (the judge), and that he had returned them.

Second. In the second paragraph of the judge's certificate he mentions the desire of his wife to purchase block 91, being the block that he is sued for in the State court, but he has not stated as fully as he did in open court on the 11th of this month the facts in reference to said purchase. On said date, 11th November, 1901, said judge stated in the hearing of all present, this relator and Simeon Beldin, also counsel for Mrs. McGuire being present, that the relative referred to in his statement from the bench in open court on the 5th of November "is his wife;" that she purchased said block of ground on the Rivas tract with her own money; that finding that it was on the "Rivas" tract in litigation before him he returned the deed. At no time has he ever stated or furnished us any proof that said sale had been resolved at his request or by his wife's vendor, or that his wife, who purchased the same with her own money, desired it canceled.

Third. In paragraph 5 in said judge's certificate the facts in reference to trial of suit of Florida McGuire *v.* Pensacola City Company et al. the material facts are suppressed. They are as follows: The criminal term of said court ended Saturday, late in the evening of November 9, when said judge announced that he would take up the trial of the McGuire case the following Monday at 10 o'clock a. m. The case had never been fixed for a day to which we could have our witnesses summoned, and we therefore asked the court to allow us until the following Thursday to get our evidence in the case. The judge seemed willing, but counsel for defendant, W. A. Blount, and who is also one of the defendants in the McGuire suit, which is an ejectment suit, with much warmth insisted on the trial on Monday, November 11, to which the judge acquiesced.

This was Saturday, 9th, after office hours; next day being Sunday, no summons for witnesses could issue, thus having only from the opening of clerk's office at 9 o'clock Monday, 11th, until 10 o'clock, opening of court (one hour) to issue summons and serve more than fifty witnesses, which was physically impossible. While we were satisfied that said judge is interested in the result of said suit, still he refused to recuse himself, our intention was to try the case before him had he fixed a day for trial so that we could have secured our evidence thereto and made our record, but when thus arbitrarily cut off therefrom our duty to our clients was to discontinue the suit to prove their rights, which discontinuance of said suit, upon motion, was ordered by Judge Swayne at 10 o'clock on the morning of November 11, 1901, and after which the motion or rule for contempt was inaugurated by W. A. Blount, attorney, and a defendant.

Fourth. In paragraph 7 of said certificate said judge refers to consultation with some members of the bar, but does not name them, but finally selects W. A. Blount to call the matter of contempt before the court, assisted by W. Fisher, of whom are defendants in the suit of Mrs. McGuire *v.* Pensacola City Company et al., and trespassers on a large portion of the land in question. Now, while there is no act charged against us which under the law we were not entitled to do, still we make reply to statements and certificates, to place it beyond doubt, that we have acted strictly within the line of our sworn duty to our clients, which we have a right to do

under the law, and there can be no contempt, and no contempt was ever intended or thought of, in suing Charles Swayne in a State court, and especially is it so demonstrated by a discontinuance of suit in Federal court.

OATH.

Elza T. Davis, being duly sworn, deposes and says that all the facts and allegations recited in the foregoing exception and statement are true and correct, to the best of his knowledge and belief.

E. T. DAVIS.

Sworn to and subscribed before me this 23d of November, 1901, at the city of New Orleans, La.

[SEAL.] BENJAMIN ORY,
Notary Public for the Parish of Orleans, La.

(Indorsed:) United States circuit court, fifth judicial circuit, northern district of Florida, ex parte Elza T. Davis applying for writ of habeas corpus. Exceptions and statement of relator received and filed November 23, 1901. H. J. Carter, clerk. Filed December 10, 1901. F. W. Marsh, clerk.

NORTHERN DISTRICT OF FLORIDA, *ss:*

I, F. W. Marsh, clerk of the circuit court of the United States for the northern district of Florida, hereby certify that the foregoing is a true and correct copy of a certain paper filed in the matter of the application of E. T. Davis for a writ of habeas corpus, in the said circuit court, as the same remains of record and on file in said court.

Witness my hand and the seal of said court at the city of Pensacola, in said district, this 24th day of February, A. D. 1904.

F. W. MARSH, *Clerk.*

A petition in the same language was prepared, sworn to, and filed by Mr. Belden.

There can be no doubt, from this positive evidence, that Mr. Davis was an attorney in the case when he commenced the action against Judge Swayne, and that he knew Judge Swayne had no interest in the land can not be doubted, and the finding to the contrary by the majority is not supported by a preponderance of evidence.

The following is the record in the case of Simeon Belden, and the record of Mr. Davis is just the same.

THE UNITED STATES AGAINST SIMEON BELDEN.

Be it remembered that on the 11th day of November, A. D. 1901, at a term of the United States circuit court in and for the northern district of Florida, the following motion was made in open court and entered of record, to wit:

And now comes W. A. Blount, an attorney and counselor at law of this court, and practicing therein, and as amicus curiæ, and moves the court to cite Simeon Belden, Louis Paquet, and E. T. Davis, attorneys and counselors of this court, to show cause before this court at a day and hour to be fixed by the court, why they shall not be punished for contempt of the court in causing and procuring, as attorneys of the circuit court of Escambia County, Fla., a summons in ejectment, wherein Florida McGuire is plaintiff and Hon. Charles Swayne is defendant, to be issued from said court and served upon the judge of this court, to recover the possession of block 91, in the Cheveaux tract, in the city of Pensacola, Fla., a tract of land involved in a controversy in ejectment then pending in this court in a case wherein the said Florida McGuire was plaintiff and the Pensacola City Company et al. were defendants, upon the grounds:

1. That the said suit in ejectment against the judge of this court was instituted after a petition to this judge to recuse himself in the said case of Mrs. Florida McGuire *v.* Pensacola City Company et al. had been submitted to the court on November 5, 1901, and denied, and after the said judge had stated in open court and in the presence of the said counsel, Simeon Belden and Louis Paquet, that an allegation of the said petition, that he or some member of his family were interested in or owned property in said tract, was untrue, and had stated that he had refused to permit a member of his family to buy land in said tract, because the said suit of Florida

McGuire, involving the title to the said tract, was in litigation before him, the said judge.

2. That after the said declaration of the said judge the said counsel were aware that neither the said judge nor any member of his family were the owners of or interested in any part of the said tract and had no reason whatever to believe that he or they were so interested, and knew, or could easily have known, that the said block was not in the possession or control of anyone, but was entirely occupied.

3. That the said suit against the said judge was instituted on Saturday night, the 9th instant, after 6 o'clock, and after the court had overruled the motion of the said attorneys to postpone the trial of the case of Florida McGuire *v.* Pensacola City Company et al. for a week or more, and after the said judge had announced to the said counsel that he would call the case for trial on Monday, November 11, 1901, and would then try the case, unless counsel for plaintiff made a showing why he should not so try, and the said counsel had announced that they would make such showing.

4. That the said E. T. Davis was, before the instituting of the said suit against the judge, cognizant of all the facts herein set forth.

W. A. BLOUNT,
An Attorney of this Court.

November 11, 1901.

And afterwards, and on the same day, to wit, on the 11th day of November, A. D. 1901, the following order was made and entered of record in the said cause, to wit:

In re matter of contempt proceedings against Simeon Belden, Louis Paquet, and E. T. Davis.

Upon reading the motion of W. A. Blount, an attorney and counselor of this court, for a citation to Simeon Belden, Louis Paquet, and E. T. Davis, why they should be committed for contempt, for the reason set forth in said motion, and after consideration of the same, it is ordered:

That the said Simeon Belden, Louis Paquet, and E. T. Davis be, and they are hereby, cited to appear before me, Charles Swayne, judge of this court, at 10 o'clock, on Tuesday, November 12, 1901, to show cause why they should not be punished for contempt upon the grounds and for the reasons set forth in the said motion, which is now of record in the records of said court, and a copy of which is to be attached by the clerk to the copy of this order served upon the said Simeon Belden, Louis Paquet, and E. T. Davis.

Ordered in open court this 11th day of November, A. D. 1901.

CHAS. SWAYNE, *Judge.*

At the time of the presentation of the said motion by the said W. A. Blount, in open court, on November 11, 1901, the said Simeon Belden and the said E. T. Davis were present in the said court, and before making said order the said judge made and directed to be spread upon the minutes the following declaration concerning his connection with the land in the Cheveaux tract, mentioned in said motion, to wit:

On Tuesday, November 5, 1901, at the time of the presentation of the said motion by plaintiffs, that the court recuse himself, he had then stated, and now states, that he never agreed to accept, nor ever accepted any deed to any portion of the said Cheveaux tract; that, as he stated, a member of his family, to wit, his wife, had, with money inherited by her from her father's estate, negotiated for the purchase of some city lots in Pensacola; that certain deeds in connection therewith had been sent to her in Delaware, one of them proving to be a quitclaim deed, and upon investigation and inquiry it was found that the property in this deed was a portion of the property in litigation in the suit of Florida McGuire *v.* Pensacola City Company et al., and that thereupon, and by his advice, the said deed was returned to the proposed grantors, with the statement that no further negotiations whatever could be conducted by them in relation to this property, and they thereupon refused to purchase, either at the present time or in the future, any portion of the said tract.

W. A. Blount, an attorney and counselor at law of this court and practicing therein, and as amicus curiæ, moves the court to cite Simeon Belden, Louis Paquet, and E. T. Davis, attorneys and counselors of this court, to show cause before this court, at a day and hour to be fixed by the court, why they should not be punished for contempt of this court in causing and procuring as attorneys of the circuit court of Escambia County, Fla., a summons in ejectment wherein Florida McGuire was plaintiff and the Hon. Charles Swayne was defendant, to be issued from said court and served upon the said judge of this court, to recover the possession of block 91, Cheveaux tract, in the city of Pensacola, Fla., a tract of land involved in a controversy in ejectment then pending in this court in a case wherein the said Florida

McGuire was plaintiff and the Pensacola City Company et al. were defendants upon the grounds:

1. That the said suit in ejectment against the judge of this court was instituted after a petition to this judge to recuse himself in the said case of Florida McGuire *v.* Pensacola City Company et al. had been submitted to the court on November 5, 1901, and denied, and after the said judge had said in open court and in the presence of the said counselors, Simeon Belden and Louis Paquet, that the allegation of the said petition that he, or some member of his family, were interested in or owned property in said tract, was untrue, and had stated that he had refused to permit a member of his family to buy land in said tract because the said suit by Florida McGuire, involving the title to the said tract was in litigation before him, the said judge.

2. That after the said declaration of the said judge the said counsel were aware that neither the said judge nor any member of his family were the owners of or interested in any part whatever of the said tract and had no reason to believe that he or they were so interested, and knew, or could easily have known, that the said block was not in the possession or control of anyone, but was entirely unoccupied.

3. That the said suit against the said judge was instituted on Saturday night, the 9th instant, after 6 o'clock, and after the court had overruled the motion of said attorneys to postpone the trial of the said case of Florida McGuire *v.* Pensacola City Company et al. for a week or more, and after the said judge had announced to the said counsel that he would call the case for trial on Monday, November 11, 1901, and would then try the case, unless counsel for plaintiff made a showing why he should not so try, and the said counsel had announced that they would make such showing.

4. That the said E. T. Davis was, before the instituting of the said suit against the said judge, cognizant of all the facts herein set forth.

(Indorsements:) In re contempt proceedings Simeon Belden, E. T. Davis, and Louis Paquet. Filed November 11, 1901. F. W. Marsh, clerk.

(Marshal's return:) United States of America, northern district of Florida, ss. I hereby certify that I served the annexed citation on the therein-named Simeon Belden and E. T. Davis, the within-named Louis Paquet not found, being outside the northern district of Florida, by handing to and leaving a true and correct copy thereof with Simeon Belden and E. T. Davis personally, at Pensacola, Escambia County, in said district, on the 11th day of November, A. D. 1901. T. F. McGourin, United States marshal. By R. P. Wharton, deputy.

And thereafter, to wit, on the 12th day of November, A. D. 1901, the following answer was made and entered in the said cause by the said defendants therein, to wit:

Before the Hon. Charles Swayne, judge circuit court United States, northern district of Florida. In re matter of the contempt proceedings against Simeon Belden, Louis Paquet, and E. T. Davis.

And now comes Simeon Belden and E. T. Davis, and for reasons why they should not be punished for contempt, showeth:

First. That the general grounds upon which the said contempt is based, to wit, summons in ejectment issued from the circuit court of Escambia County, Fla., wherein Florida McGuire was plaintiff and the Hon. Charles Swayne was defendant, that said proceedings is in the jurisdiction of the circuit court of Escambia County, Fla., and that this court is without jurisdiction thereof.

Second. That the petition to recuse referred to in said motion they had nothing to do with before this court, nor were they present on the 5th day of November when submitted, as stated in said motion, nor present when any statement made by the judge concerning his connection with any of the property, except the statement made by said judge on November 11, after court convened and after the motion to discontinue the case of Florida McGuire *v.* Pensacola City Company, et al. was made.

Third: To the second paragraph showeth: As above stated, they heard no declaration made by the judge referred to in said paragraph, and as for reasons to believe that he, Judge Swayne, or some member of his family, was interested in block 91, Rivas tract of land, named in said summons, we simply refer to the declaration made by Hon. Charles Swayne on November 11, 1901, when said motion was made by the Hon. W. A. Blount, and that after hearing said declaration, believe there is in existence a deed to Mrs. Charles Swayne uncanceled, and that they have no knowledge of its repudiation, and as the negotiations for the property named in said deed was one made by Mrs. Charles Swayne in her individual right, that no act of the said Hon. Charles Swayne would repudiate or render null and void any transaction made by Mrs. Charles Swayne with her own money or property.

Fourth. That E. T. Davis, for himself, showeth that this court had no jurisdiction

over him in said matter of Florida McGuire *v.* Pensacola City Company et al. until he requested the court to mark his name as attorney for plaintiff on the morning of November 11, when he presented the motion to discontinue the aforesaid suit.

SIMEON BELDEN,
E. T. DAVIS.

(Indorsements:) Before the Hon. Charles Swayne, judge of the circuit court of the United States for the northern district of Florida, at Pensacola. In re contempt against Simeon Belden, Louis Paquet, and E. T. Davis. Filed November 12, 1901. F. W. Marsh, clerk.

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And afterwards, to wit, on the same day, November 12, 1901, the following proceedings were had in open court:

The United States *v.* Simeon Belden, No. 249, contempt of court.

This cause coming on to be heard on the motion of W. A. Blount, attorney and consellor at law of this court, as amicus curiae, to cite the said Simeon Belden to show cause why he should not be punished for contempt of this court for the reasons in said motion distinctly alleged, and on the rule granted on said motion, dated November 11, 1901, a certified copy of which has been duly served on said Simeon Belden, and on the answer to said rule on this day read and filed in open court by and on behalf of the said Simeon Belden; and after hearing the testimony of the witnesses introduced by the United States and by the said defendant, and after duly considering the same:

It is now ordered and adjudged, That the said Simeon Belden is guilty in manner and form as in said motion and rule set forth of the facts therein alleged; and it is further adjudged that the same constitutes a substantial contempt of the dignity and good order of this court.

Wherefore it is ordered and adjudged that the said Simeon Belden do pay a fine or penalty to the United States Government of one hundred dollars, and that he be taken hence to the county jail of Escambia County, Fla., at Pensacola, there confined for and during the term and period of ten days from the 12th day of November, 1901, and that he stand committed until the terms of this sentence be complied with or until he be discharged by due course of law.

Ordered and done this 12th day of November, A. D. 1901.

CHAS. SWAYNE, *Judge.*

At the hearing witnesses were examined, but their testimony is not furnished us and all we have is a short statement by Mr. Blount of what took place.

In the absence of any of the testimony taken at the hearing we have no right to assume that the allegations of the statement filed charging the contempt were not proven, or that the evidence was not sufficient to warrant the finding of the court that a contempt had been committed. On the contrary, the presumption is that they were and that the evidence was sufficient to warrant and support the judgment of contempt entered by the court.

Mr. Belden and Mr. Davis were attorneys of Judge Swayne's court, and were both attorneys in the case of Florida *v.* McGuire, pending in his court. When they requested the judge to recuse himself because he owned a part of the property involved in the litigation they were informed by the judge that he owned no interest whatever in this land and they must have known that he did not. The slightest inquiry on their part would have disclosed this fact, and they admit if anyone owned an interest it was Mrs. Swayne. On Saturday the court informed them that on Monday he would proceed with the case; they desired a postponement until Thursday. A jury was in attendance and there was no reason why the case should be postponed for that length of time. The witnesses were all within a half an hour call of the court-house, and the parties had all week in which to get ready.

The court said he would proceed with the trial Monday morning

unless they made a motion for continuance under the rule, and they said they would do so, and at that time they had in their mind what they afterwards did. Now, what followed? Paquet, Davis, and Belden in the evening met in the grocery store of one of the plaintiffs and consulted what course to take. It was decided to bring an action against Judge Swayne individually, to oust him from a portion of the land embraced within this litigation and for $1,000 mesne profits, when they all well knew, and must have known, that he had never been in the possession of the land and never owned it. They went to the clerk's office, go him to go to the court-house and file the suit. Then the sheriff was found and he was instructed to serve the papers at all hazards that night. They were not satisfied with this, but they wanted to give the suit publicity. They wanted to advertise to the world that Judge Swayne was intending to try the question of title to property in which he owned an interest, and, following this out, prepared a statement of the case and gave it to the morning paper to be published, which was done.

The only excuse they have yet been able to give for this unseemly haste is that they wanted Swayne served before he left the State, a most flimsy and unreasonable excuse. There is only one conclusion that a fair and reasonable mind can draw from all of these facts, and that is, they wanted, desired, and expected, by bringing a fictitious suit, to force Judge Swayne to recuse himself and continue the action. They wanted to so embarrass him that though not disqualified he would refuse to hear the action, and if this conclusion is true there can be no doubt, as attorneys and officers of the court, they were guilty of gross misbehavior, and clearly were guilty of contempt within the meaning of section 725 of the Revised Statutes.

It is true that Judge Swayne, for this contempt, imposed both fine and imprisonment, but this error of law was corrected by Judge Pardee, and surely it can afford no reason for impeachment. Belden and Davis say his manner in passing judgment was harsh and abusive, but all Davis can remember that was said is that the court charged them with ignorance and that their actions were a stench in the nostrils of the community.

This last remark must be very doubtful. But if they were guilty of what they stood charged, if they had collusively and in bad faith commenced this action to interfere with the trial of the case by Judge Swayne and prevent the defendants from securing a speedy trial before the judge of the court, then they were guilty of contempt, and this contempt was not purged by coming in later and dismissing the suit or by the judge using toward them harsh and abusive language.

Mr. Davis sued out a writ of habeas corpus before Judge Pardee. At the hearing Judges McCormick and Shelby sat with him and concurred in his opinion.

The court says:

> The relator is an attorney and counselor of the United States circuit court for the northern district of Florida, and, as such, one of the officers of the court, within the intent and meaning of the above statute. As such officer he was and is charged with conduct in and out of court which, if accompanied with malicious intent, or if it had the effect to embarrass and obstruct the administration of justice, was such misbehavior as amounted to contempt of court.

The writ of habeas corpus was discharged. There is no doubt that this suit was brought with no intention to ever try it. In fact it was

dropped. And there can be no other conclusion but that the commencement of this action could have no other effect than to embarrass and obstruct the administration of justice. The fact that the suit was commenced in the State court can make no difference, because its effect, as intended, was to embarrass Judge Swayne in trying the action pending before him in the United States court.

Plaintiffs dismissed the suit, but in a few months commenced it again in Judge Swayne's court, which fact shows that when they dismissed it first they had no intention to abandon it.

But the majority find fault and lay great stress upon the fact, that, in his judgment, finding Belden and Davis guilty of contempt, that he does not, in the language of the statute, find them guilty of misbehavior as officers of his court, but adjudged that their conduct constituted a substantial contempt of the dignity and good order of the court. And is it not true that a misbehavior of an attorney is a contempt of the dignity and good order of the court?

To embarrass the court in the administration of justice surely must be a contempt of the orderly conduct of the court in its business.

In discussing Judge Swayne's action in passing judgment of contempt against Belden and Davis, the majority show considerable feeling. The committee charge that he was "guilty of gross abuse of judicial power and misbehavior in office," and that knowing the law, and knowing that no contempt had been committed, he, with a bad and evil intent, declared them guilty. This is making a very broad accusation when we consider all of the facts and surrounding circumstances and the law controlling the same.

The committee say that Judge Swayne "knew that proceedings for a contempt not committed in the presence of the court must be founded on an affidavit setting forth the facts and circumstances constituting the alleged contempt" and "knew that issuing of proofs without filing was erroneous," and "knowing the law, Judge Swayne issued a rule to show cause why Davis and Belden should not be committed for contempt upon an unsworn statement of Mr. W. A. Blount."

Now, it is to be hoped that the House will not vote to impeach any one for a mistake of law or ignorance of it, for if such a precedent is established none of us will be safe. It might be possible that Judge Swayne did not know the law as stated above, and it might be possible that such is not the law. It is true that the committee cite one California and two Indiana cases, but in California the Code of Civil Procedure provides that a contempt committed out of the presence of the court can only be called to its attention by affidavit, and no doubt Indiana has a similar statute.

There is no settled practice in contempt proceedings (United States *v.* Sweeney, 95 Fed., 446). In volume 9, page 38, of the Cyclopedia of Law and Procedure we find the law stated as follows:

> As a rule the proceeding to punish for contempt committed out of the presence of the court should be instituted by a *statement* or some *writing* or affidavit presented to the court setting forth the facts.

Numerous authorities from all over the United States are cited to support this proposition of law.

And it has been held that in such a case the court may even act of its own motion and make the accusation. (24 W. Va., 416; 81 Mich., 592; 27 How. Prac., 14.)

It might have been possible that Judge Swayne did not know of the

decision in California or the statutes of Indiana, but followed the rule as stated above.

It is claimed that Davis and Belden purged themselves of contempt. The law on this question has already been given, and it is not necessary to report it again. The affidavit or answers filed by Davis and Belden were not broad enough under the rule, and Belden said, when asked a question at the hearing, that he did not purge himself and would not do it. But look at the matter seriously from the facts and circumstances that existed at the time judgment was pronounced.

The majority report proceeded on the theory that the action was commenced in good faith and upon substantial grounds; that having commenced the action in the State court no contempt could have been committed against the Federal court. If attorneys, who are officers of the Federal court, to embarrass the judge of that court in the administration of justice, commence an unmeritorious action in the State court against him, is it not contempt? Is there any law by which the place in which the contempt has been committed excuses it? Was the action brought in good faith? No; for this reason: Belden, Davis, and Paquet are all good lawyers; they knew that Mrs. Swayne was buying the land; they knew that the deed had been made in her favor, and therefore they knew that if the title had ever left Edgar it vested in her. Being lawyers, they must have known that if the title was in her no judgment against Judge Swayne individually would divest her of that title, and therefore such a judgment would avail their clients nothing. If they were acting in good faith for the purpose of trying title to land, knowing all of the facts just stated, they certainly would have sued Mrs. Swayne as the owner of the land and joined her husband with her.

Belden says:

> It was so positive she had purchased it.
>
> Q. Did you have any reason to suppose Judge Swayne had exercised any acts of ownership?—A. No.
>
> Q. Did you have any such information before you brought the suit?—A. I did not. When we learned that suit was pending in the county judge's court against Edgar that revealed the fact that sale had been made to Mrs. Lydia C. Swayne.

Commencing an action against Judge Swayne *alone*, after he had stated that he would proceed with the trial of the case unless they made a motion to continue it under the rule, and they having stated they would do so, is very suspicious, and is made more so when they never did anything further with the suit. There can be no doubt that they were acting in bad faith. There can be no doubt of their motives and what they sought to accomplish. Why was it necessary to proceed with such haste? Why was it necessary to find the clerk and sheriff that Saturday night and cause one to file the papers and the other to serve them? If they intended to dismiss the suit Monday morning, as they now claim, why did they not wait until Monday and commence the suit after the other action had been dismissed? Why was it necessary to prepare an article for the paper and procure its publication that night?

There can only be one answer to all these questions, one explanation of their conduct—that it was their intention to carry out the statement made to the court that they would show grounds for a continuance Monday morning. There can be no other sane reason; no other reason can explain their conduct. All of this was done to embarrass the court in the trial of the case pending before him. They were seek-

ing to force him to recuse himself, or, if he persisted in trying the case, to do so in the face of the charge, made public by the press, that he was, as judge, trying title to a piece of land in which he owned an interest. Where is the court in the land that would permit such conduct as this to pass unnoticed and unchallenged? Did not Judge Swayne, under all these circumstances, have the right to inquire into this matter and punish the parties if guilty? And having committed the contempt, could they purge themselves by dismissing the action? The contempt was committed Saturday evening, for, if they could have been punished then, and can it be seriously urged now that dismissing the action, perhaps because of what they had done, that they stood innocent of any wrong when their trial took place? Such a contention can have no support in reason. The judge did his duty as he saw it, and the facts certainly warranted his belief. This seems to be a very slim charge on which to impeach a Federal judge. There were certainly good grounds for his action, and he had the right, from all the peculiar facts and circumstances, to believe a contempt had been committed.

After the hearing was closed the following papers filed in the contempt proceedings of Belden and Davis were received, and the same are hereby embodied in this report.

The following is a copy of the newspaper article which it is alleged Belden, Davis, and Paquet prepared and procured to be published:

JUDGE SWAYNE SUMMONED AS PARTY TO THE SUIT IN CASE OF FLORIDA M'GUIRE V. PENSACOLA COMPANY ET AL.

A decided new move was made in the now celebrated case of Mrs. Florida McGuire, who is the owner by inheritance and claims the possession of what is known as the "Rivas tract," in the eastern portion of the city, near Bayou Texas, by the filing of a precipe for summons, through her attorneys, ex-Attorney-General Simeon Belden, Judge Louis P. Paquet, of New Orleans, and E. T. Davis, of this city, in the circuit court of Escambia County, in an ejectment proceedings for possession of block 91, as per map of T. C. Watson, which as part of the property which is claimed by Mrs. Florida McGuire, and which is alleged that Judge Swayne purchased from a real estate agent in this city during the summer months, and which is a part of the property now in litigation before him.

The summons was placed in the hands of Sheriff Smith late last night for service.

Filed November 12, 1901.

F. W. MARSH, *Clerk.*

The following is a copy of a statement filed by Louis P. Paquet in Judge Swayne's court, and connected with the commencement of the action against Judge Swayne by himself, Belden, and Davis in the State court of Florida, referred to in the foregoing newspaper article:

United States circuit court, northern district of Florida, at Pensacola.—In the matter of contempt proceedings against Louis P. Paquet.

Now comes Louis P. Paquet, respondent in the above-entitled matter, and says:

That upon full and mature consideration of his actions and conduct in the matter referred to in the motion, made as the basis of the above-entitled proceedings, through excessive zeal in behalf of his clients, he did so act that this honorable court was justified in believing that the said actions were committed in contempt thereof and as showing disrespect therefor. That respondent regrets exceedingly the course taken by him in this matter, and now appears in court and requests that he be permitted to apologize for his behavior and file with the records in the above-entitled cause this paper.

LOUIS P. PAQUET, *Respondent.*

Filed March 31, 1902.

F. W. MARSH, *Clerk.*

The contempt proceedings against Mr. Paquet were dropped.

HOSKINS CASE.

Fourth. The majority contend that Judge Swayne should be impeached because he refused to proceed to trial in the W. H. Hoskins bankruptcy proceeding, when the attorneys for the petitioners were asking for a continuance for two weeks in which to secure certain evidence.

I find the facts of this case to be as follows:

On February 10, 1902, an involuntary petition in bankruptcy was filed in Judge Swayne's court against W. H. Hoskins.

On February 24, B. S. Liddon appeared in said matter on behalf of said Hoskins and demurred to the petition. On the 24th of February, John M. Calhoun was appointed receiver and on the 25th gave the usual bond, which was approved on the 26th.

On the 27th of February the court sustained the demurrer to the petition, one of the grounds being that the petition was not verified as required by law, and also that the petition did not set forth if the petitioning creditors were firms, partnerships, or corporations, and gave petitioners ten days in which to amend their petition. After that, and in fact before this date, B. S. Liddon, the bankrupt's attorney, and who appears in this proceeding as the chief counsel for the prosecution, commenced industriously to get creditors to withdraw their petitions and claims, and, it is alleged, made misrepresentations and threats to secure affidavits from petitioners and to cause them to withdraw their claims, so as to defeat the bankrupt proceedings pending before the court, which facts are set forth in affidavits filed in the cause by J. W. Calhoun and J. Hartsfield; and in the case of Hartsfield it is stated that he signed the affidavit through fear of Hoskins and one Justice, and that notwithstanding the petition he signed he desires the proceedings to go forward.

The court on motion extended the time to file an amended petition to March 9, and on March 22 W. H. Hoskins filed his answer thereto. On March 20, Hoskins having given a bond in the sum of $5,000, had his property all turned over to him by the receiver, and he took the possession thereof and continued his business. On the 5th day of March, 1902, Charles D. Hoskins, son of the said alleged bankrupt, at the suggestion of his father to get a certain book, made an assault upon one J. N. Richardson, the deputy of the receiver; pulled him out of his buggy, beat him violently, causing the said Richardson, who was an old man, to remain in his bed for some time, and took from him the book; that this book was a book taken by the receiver from the place where the bankrupt Hoskins carried on his business, and which it was alleged by the receiver, upon information and belief, belonged to the alleged bankrupt and contained his accounts. For this assault upon Mr. Richardson, an officer of the court, Judge Swayne issued a rule for C. D. Hoskins to appear before the court and show cause why he should not be punished for contempt. Hoskins concealed himself, was never served and never appeared before the court and never surrendered the book.

On March 24 or 25 the cause was set down for trial to take place on the 31st. Mr. Hoskins contended that he was solvent and could meet all his obligations and was ready and willing to do so, which was a fact. But he, through his attorney, refused to pay one cent of costs, and

here is where all the trouble arose. Had he been willing to arrange for the payment of the costs everything could have been settled and dismissed at once without any trial. He never requested the court to fix the amount of costs, because he refused to pay any at all.

Considerable cost had been incurred, the United States marshal alone having a bill of $304 for taking care of property and feeding stock. On the morning of March 31 the attorneys for petitioners requested the court to continue the case for two weeks, as they could not safely proceed to trial without the book, which they were informed and believed contained material evidence, and which C. D. Hoskins had by force and violence taken from the custody of the receiver, and which he refused to return.

This motion was resisted by the bankrupt, he contending that he was ready for trial, that the book was not his and that he could prove by witnesses present that the book was not his. He also claimed that he had no control over the book. Judge Swayne, notwithstanding this offer, refused to hear the evidence; said he would not believe his brother under the circumstances, and insisted he would continue the case until the book was produced. The majority condemn Judge Swayne for this conduct and contend that he should be impeached for it. The case had only been at issue five or six days; all of the property was then in the possession of the bankrupt and not under expense. He had full control of his business. Also many things had come to the attention of the court in this matter besides taking the book that might well cause him to proceed with caution, to doubt the honesty of the bankrupt, and to believe that the book contained material matters and which the court should know.

Petitioning creditors had been requested to withdraw their claims, some had been threatened, and the deputy of the receiver had been assaulted in a most brutal manner and a book taken from his possession which it was alleged contained the accounts of the bankrupt. Under all of these circumstances it can not be said the court did not act with due discretion when the case was continued.

The right to continue a case rests always in the discretion of the judge. He did not deny Hoskins a trial; he did no act which injured him in his rights. Hoskins already was in the possession of his property, and the judge was ready to try the case and did offer to try it in June, but the parties had stipulated to try it in the following November, showing there was no hurry about a trial. It never was tried, but was settled, the bankrupt agreeing to pay part of the costs, and in fact the question of costs was all there was in the case and all that kept it from being settled in March.

The majority lay great stress on the fact that some lawyers had entered into a conspiracy to ruin Hoskins and plunder his estate. If this should be true the court was not a party to it, and it was never brought to his notice. The judge acted absolutely in good faith, and there is no evidence whatever that he lent himself to any conspiracy.

The attorneys on both sides are not to be commended for their conduct in this matter, and surely what they did or what they desired to do can not be used as a basis to impeach the judge, especially when he was ignorant of it all. He sustained the demurrer; he released the property; he was willing to try the case and came to Pensacola in June to do so, and did not do so from the fact that these parties, who

were so desirous for a speedy trial to the end that they would not be ruined in their property and credit, had entered into a written stipulation that the case should be tried at the November term.

This is the Hoskins's case, as it appears from the record, and for the judge's conduct in this case this committee is asked to impeach him. Still, if he is to be impeached, the grounds for doing so in this particular case are just as good and substantial as in any other instance presented by the prosecutors of the resolution. Liddon, who is the chief prosecutor in this action, was trying to force matters and was also interfering with the clients of the creditor's attorneys. The creditors wanted a book produced in court that Hoskins told his son to take from the receiver. The books must have been in Hoskins's control, and were the best evidence of what they contained. Had the books been produced for the inspection of the court there would have been no trouble or delay, and this, no doubt, Hoskins could have done. Under the circumstances the court could well have granted the continuance asked, and there was no abuse of discretion in doing so. Hoskins could not have been injured by reason of this continuance, because he had all of his property in his possession, was carrying on his business, and was suffering no loss. In fact, he agreed to postpone the trial until the following November, notwithstanding that the court was willing to try it earlier, which alone is a strong reason that no injury was done to Hoskins.

TUNISON CASE.

They say Judge Swayne appointed one B. C. Tunnison a United States commissioner after Tunison had been impeached in his court. Tunison was a commissioner in 1892 or 1893. He claimed to have been shot by one Humphreys and caused his arrest. Humphreys was tried in 1892 or 1893, and the trial was a bitter one. Tunison was impeached at that time. Tunison is one of the ablest lawyers in Florida and is so conceded. He discharged the duties as United States commissioner well and without complaint. He had the very best citizens of Pensacola for his clients and as his friends.

In 1897 the entire bar of Pensacola indorsed him for United States district attorney for the northern district of Florida. At the same time many of the best and most prominent citizens wrote letters in his behalf. After this indorsement by the bar in 1897 his term expired and he was reappointed by Judge Swayne. Most of those who impeached him were his enemies. His friends said his reputation as a citizen was good. His enemies spoke ill of him, and his friends spoke well of him, but no charge was ever made against him for neglect or wrongdoing in his official duties, and he has been commended for the able and efficient manner in which he discharged them. But it is said that it is reported in Florida that Tunison has and exercises an undue influence over the court, so that, as generally understood, to win in Judge Swayne's court you must employ Tunison.

There is no evidence that this rumor ever came to the attention of Judge Swayne, or that it is well founded. There is no instance shown wherein Judge Swayne ever granted any favor to Tunison. There is is nothing to prove that at any time, or in any proceeding, Judge Swayne was corruptly or otherwise influenced by Tunison. But this

charge caused an examination of the records to be made, and it appeared therefrom that out of 18 cases tried by Mr. Tunison before Judge Swayne he lost 12. And to further show that this charge is untrue—that is, that Tunison has influence with the court—I only have to call the attention of the committee to the instance where Tunison was employed to see Judge Swayne and induce him to dismiss the charge for contempt against C. D. Hoskins for assaulting and cruelly beating an officer of the court, and the Judge's refusal to do so until Hoskins, who had been evading the officers of the law, should present himself before the court.

It is not an uncommon thing to hear that an attorney has influence with a judge, and some go so far as to state that it is a corrupt influence; but never before now did I hear it seriously contended that because of such a rumor, of which the judge had no knowledge and which is unfounded in fact, the judge should be impeached and removed from office.

This ground for impeachment demonstrates one thing, and that is the animus behind this entire proceeding is to impeach Judge Swayne at any hazards. A number of witnesses, many enemies of the court, or in the pay of O'Neal, go on the witness stand and swear to a rumor which they have heard, to wit, that Tunison exercises an undue influence over Judge Swayne, and without any evidence showing such to be the fact, without the showing of a single instance in which the court ever favored Tunison or decided a case in his favor wrongfully, without showing that the Judge ever acted corruptly or ever knew of such rumor, the majority of the committee present this as a ground for impeachment, and as a companion piece to this ground present another equally as unfounded in the contempt proceedings instituted against C. D. Hoskins.

CASE OF C. D. HOSKINS.

When the members of the subcommittee met to disagree, it was then agreed by us all that there was nothing in the charges concerning the contempt proceedings preferred against C. D. Hoskins which would warrant any impeachment, but I see that Mr. Palmer has now embraced the same within his report, and I am glad that he has, as it will show the members of the House the character of charges preferred and how unwarranted they are.

On the 5th day of March, 1902, C. D. Hoskins, a young man, assaulted a Mr. Richardson, who was a deputy of the receiver appointed in the Hoskins bankruptcy proceeding, dragged him out of his buggy, brutally beat him, and took from him a certain book or ledger, which it was alleged belonged to said bankrupt and contained accounts of his business transactions. Young Hoskins claimed that the book belonged to him. Mr. Richardson was an old man, and the beating was so severe that he was confined, because thereof, to his bed for several weeks.

The matter was brought to the attention of Judge Swayne by an affidavit filed for the purpose of commencing contempt proceedings against young Hoskins. The affidavit was in proper form and stated sufficient facts to justify the court in granting a rule for the attachment of young Hoskins to show cause why he should not be punished

for contempt. Young Hoskins was never served. He kept in hiding. An attempt was made to get the court to dismiss the matter or to impose a fine, but Judge Swayne, considering the character of the assault and the fact that Hoskins had evaded the officers of the court, refused to do anything until Hoskins appeared in court and was examined. Hoskins was in the habit of becoming intoxicated, and one day he left for Pensacola with $450 on his person, got to drinking hard, and was found dead, it being claimed that he took laudanum to commit suicide. Now it is claimed that he took the poison rather than face Judge Swayne. A more unreasonable and unfounded statement never was made. He was not under arrest. This was a long time after the contempt had been committed. Judge Swayne had made no threats against him, and had done no act to oppress him. All he ever did was to issue a rule upon an affidavit which made it his duty to do so. He did what any judge in the land would have done when it was brought to his notice that an officer of his court, while in the discharge of his official duties, had been assaulted, brutally beaten, and property in the custody of the law taken from him by force.

I am glad that the majority have made Young Hoskins's case a ground for impeachment, because it emphasizes the effort that is being made to unjustly ruin a man who has faithfully discharged his judicial duties. He has been guilty of wrongdoing, oppression, and tyranny because he found one man guilty of contempt for stabbing an officer of his court and interfering with him in the discharge of his duties and for issuing an order for the arrest of another who brutally assaulted another officer and took from him by force property in his custody as an officer of the court. No judge was ever before in this country maligned, abused, slandered, and illtreated as Judge Swayne has been, and this maliciously, too. It has been reported of him by his enemies, and caused to be published in the press throughout the land, that he is a corrupt judge, ignorant and incompetent; that he has managed bankrupt estates pending in his court in such a manner as to absorb the entire estate in unnecessary costs, expenses, and allowances, to the great wrong and injury of creditors and others, until such administration is, in effect, legalized robbery and a stench in the nostrils of all good people.

The foregoing language first found form in a resolution lobbied by the said O'Neal through the Florida legislature. It was again stated on the floor of the House of Representatives when this resolution was offered, and it has been published throughout the land in the public press, and there is not a scintilla of truth in any part of it, or no fact proven to warrant even the suspicion of such grave and serious charges. A subcommittee spent ten days in Florida investigating these charges, and the result of their labors is now printed and on file with the documents of this House. Every opportunity was given to Judge Swayne's accusers to prove their charges. Every witness they wanted was subpoenaed, hearsay, irrelevant, and immaterial matters were received in evidence, and no obstacles were put in their way. Five lawyers for the prosecution for some time had been diligently at work, and I submit that not one single bit of proof can be shown where Judge Swayne ever did an act that was corrupt or unbecoming a just and upright judge. So much for the charges of corruption. The record introduced and printed, giving a list of cases tried by him and appealed,

shows that as a judge he has made an excellent record and that he is not incompetent and ignorant.

The fact that Judge Pardee assigned him to sit on the circuit court of appeals and to try cases in different parts of the district for six, seven, and eight months during the year is a good recommendation for his standing as a judge. In fact, no one so far has had the hardihood to come forward and swear that he is an incompetent and ignorant judge, and there is nothing in the record that shows it.

As to the bankruptcy business, there can be no excuse for the slanderous statements made, to wit: That "all cases were managed corruptly, the assets frittered away, no dividends paid, until the matter became so notorious as to be a stench in the nostrils of the people." This is hard language, and, more than this, it is not supported by the evidence.

Out of 175 cases of bankruptcy commenced in his court the prosecutors picked out five or six. They were requested to call the attention of the committee to any wrongs committed in these particular cases, and this they failed to do. Out of 175 cases not one was shown to have been managed as they had charged. On the contrary, the report of the Attorney-General shows that the bankruptcy business before Judge Swayne was managed prudently and well. Every judge has the right to have his honesty and integrity protected. Nothing so weakens the respect for a judge as to charge him with corruption. Nothing should be quicker frowned down by the people than such charges when false. Judge Swayne has for months stood up under these false and malicious reports—and they were malicious when made because they were based on no fact. He is entitled to vindication somewhere. The charges have been preferred in this House, the evidence is on file here, and he should receive his vindication here.

J. N. GILLETT.
ROBT. M. NEVIN.
D. S. ALEXANDER.
GEO. A. PEARRE.

VIEWS OF MR. LITTLEFIELD.

I have not had the time to examine carefully the minority views of Mr. Gillett, but I have examined with care the record in this case, and I have no hesitation in saying that in my opinion it does not disclose a state of facts that would justify impeachment proceedings.

C. E. LITTLEFIELD.

VIEWS OF MR. PARKER.

In the opinion of the subscriber, proceedings for impeachment of Judge Charles Swayne should not be begun. It is not necessary always to justify his action, or to maintain that his behavior has always been consistent with judicial dignity or the duty that he owes to his district. He has been out of that district a great deal of each year, but since 1901 he has rented a house there, and more lately his wife has purchased, and it can hardly be said that he has not resided there,

within the meaning of this criminal statute, for a period covering all ordinary limitations of criminal prosecutions. Those limitations should govern this case.

It does not appear that his behavior in any of the cases cited by the majority renders him liable to impeachment. He was justifiably severe with O'Neal for getting into a quarrel with an officer of his court about his official action as receiver in bankruptcy and then stabbing him. He was right to be severe when young Hoskins beat the clerk of another such receiver and took from him books claimed by that receiver. He had occasion for righteous indignation against two attorneys of his court, who doubted his word when he denied all interest in a case pending before him, and brought suit against him personally in order publicly to emphasize that doubt. In such a case he should not be censured even if he went to the limit of his jurisdiction to defend the honor of his court.

The adjournment of the proceedings in bankruptcy of the elder Hoskins was intimately connected with the contempt proceedings as to the younger one. There appears to be no substantial proof of the charges of corruption, ignorance, incompetency, d liberate waste of bankruptcy assets, criminal or improper favoritism to certain lawyers, failure to hold terms, improper acceptance of accommodation, indorsements from attorneys or litigants, or the wrongful discharge of convicts. In the opinion of the majority all these charges appear to be without foundation. Whether the conditions that prevail in this district demand some legislative remedy may be a question, which is not here now. In my opinion Judge Swayne is not liable to impeachment.

RICHARD WAYNE PARKER.

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44TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 345.

IMPEACHMENT OF WILLIAM W. BELKNAP.

MARCH 30, 1876.—Recommitted to the Committee on the Judiciary and ordered to be printed.

Mr. KNOTT, from the Committee on the Judiciary, submitted the following

REPORT:

The Committee on the Judiciary, having had under consideration the resolution of the House directing them to prepare and report articles in support of the impeachment of William W. Belknap, late Secretary of War, for high crimes and misdemeanors in office, respectfully report the following articles and accompanying resolutions for the action of the House:

Resolved, That the following articles be adopted and presented to the Senate, in maintenance and support of the impeachment for high crimes and misdemeanors in office of William W. Belknap, late Secretary of War:

Articles exhibited by the House of Representatives of the United States of America, in the names of themselves and of all the people of the United States of America, against William W. Belknap, late Secretary of War, in maintenance and support of their impeachment against him for high crimes and misdemeanors while in said office.

ARTICLE I.

That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the eighth day of October, eighteen hundred and seventy, had the power and authority, under the laws of the United States, as Secretary of War as aforesaid, to appoint a person to maintain a trading-establishment at Fort Sill, a military post of the United States; that said Belknap, as Secretary of War as aforesaid, on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading-establishment at said military post; that thereafter, to wit, on the day and year aforesaid, the said Caleb P. Marsh and one John S. Evans entered into an agreement in writing substantially as follows, to wit:

Articles of agreement made and entered into this eighth day of October, in the year of of Lord eighteen hundred and seventy, by and between John S. Evans, of Fort Sill, Indian Territory, United States of America, of the first part, and Caleb P. Marsh, of No. 51 West Thirty-fifth street, of the city, county, and State of New York, of the second part, witnesseth, namely:

Whereas the said Caleb P. Marsh has received from General William W. Belknap, Secretary of War of the United States, the appointment of post-trader at Fort Sill aforesaid; and whereas the name of said John S. Evans is to be filled into the commission of appointment of said post-trader at Fort Sill aforesaid, by permission and at the instance and request of said Caleb P. Marsh, and for the purpose of carrying out the

terms of this agreement; and whereas said John S. Evans is to hold said position of post-trader as aforesaid solely as the appointee of said Caleb P. Marsh, and for the purposes hereinafter stated:

Now, therefore, said John S. Evans, in consideration of said appointment and the sum of one dollar to him in hand paid by said Caleb P. Marsh, the receipt of which is hereby acknowledged, hereby covenants and agrees to pay to said Caleb P. Marsh the sum of twelve thousand dollars annually, payable quarterly in advance, in the city of New York aforesaid; said sum to be so payable during the first year of this agreement absolutely and under all circumstances, anything hereinafter contained to the contrary notwithstanding; and thereafter said sum shall be so payable, unless increased or reduced in amount, in accordance with the subsequent provisions of this agreement.

In consideration of the premises, it is mutually agreed between the parties aforesaid as follows, namely:

First. This agreement is made on the basis of seven cavalry companies of the United States Army, which are now stationed at Fort Sill aforesaid.

"Second. If at the end of the first year of this agreement the forces of the United States Army stationed at Fort Sill aforesaid shall be increased or diminished not to exceed one hundred (100) men, then this agreement shall remain in full force and unchanged for the next year. If, however, the said forces shall be increased or diminished beyond the number of one hundred (100) men, then the amount to be paid under this agreement by said John S. Evans to said Caleb P. Marsh shall be increased or reduced in accordance therewith and in proper proportion thereto. The above rule laid down for the continuation of this agreement at the close of the first year thereof shall be applied at the close of each succeeding year so long as this agreement shall remain in force and effect.

"Third. This agreement shall remain in force and effect so long as said Caleb P. Marsh shall hold or control, directly or indirectly, the appointment and position of post-trader at Fort Sill aforesaid.

"Fouth. This agreement shall take effect from the date and day the Secretary of War aforesaid shall sign the commission of post-trader at Fort Sill aforesaid, said commission to be issued to said John S. Evans at the instance and request of said Caleb P. Marsh, and solely for the purpose of carrying out the provisions of this agreement.

"Fifth. Exception is hereby made in regard to the first quarterly payment under this agreement, it being agreed and understood that the same may be paid at any time within the next thirty days after the said Secretary of War shall sign the aforesaid commission of post-trader at Fort Sill.

"Sixth. Said Caleb P. Marsh is at all times, at the request of said John S. Evans, to use any proper influence he may have with said Secretary of War for the protection of said John S. Evans while in the discharge of his legitimate duties in the conduct of the business as post-trader at Fort Sill aforesaid.

"Seventh. Said John S. Evans is to conduct the said business of post-trader at Fort Sill aforesaid, solely on his own responsibility, and in his own name; it being expressly agreed and understood that said Caleb P. Marsh shall assume no liability in the premises whatever.

"Eighth. And it is expressly understood and agreed, that the stipulations and covenants aforesaid are to apply to and bind the heirs, executors, and administrators of the respective parties.

"In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

"JOHN S. EVANS. [SEAL.]
"C. P. MARSH. [SEAL.]

"Signed, sealed, and delivered in presence of—
"E. T. BARTLETT."

That thereafter, to wit, on the tenth day of October, eighteen hundred and seventy, said Belknap, as Secretary of War aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading-establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans so made by him as Secretary of War as aforesaid, the said Belknap did, on or about the second day of November, eighteen hundred and seventy, unlawfully and corruptly receive from said Caleb P. Marsh the sum of one thousand five hundred dollars, and that at divers times thereafter, to wit, on or about the seventeenth day of January, eighteen hundred and seventy-one, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as

Secretary of War as aforesaid, did unlawfully receive from said Caleb P. Marsh like sums of one thousand five hundred dollars, in consideration of the appointment of the said John S. Evans by him, the said Belknap, as Secretary of War as aforesaid, and in consideration of his permitting said Evans to continue to maintain the said trading-establishment at said military post during that time. Whereby, the said William W. Belknap, who was then Secretary of War as aforesaid, was guilty of high crimes and misdemeanors in office.

ARTICLE II.

That said William W. Belknap, while he was in office as Secretary of War of the United States of America, did, at the city of Washington, in the District of Columbia, on the fourth day of November, one thousand eight hundred seventy-three, willfully, corruptly, and unlawfully take and receive from one Caleb P. Marsh the sum of fifteen hundred dollars, in consideration that he would continue to permit one John S. Evans to maintain a trading-establishment at Fort Sill, a military post of the United States, which said establishment said Belknap, as Secretary of War as aforesaid, was authorized by law to permit to be maintained at said military post, and which the said Evans had been before that time appointed by said Belknap to maintain; and that said Belknap, as Secretary of War as aforesaid, for said consideration, did corruptly permit the said Evans to continue to maintain the said trading-establishment at said military post. And so the said Belknap was thereby guilty, while he was Secretary of War, of a high misdemeanor in his said office.

ARTICLE III.

That said William W. Belknap was Secretary of War of the United States of America before and during the month of October, eighteen hundred and seventy, and continued in office as such Secretary of War until the second day of March, eighteen hundred and seventy-six; that as Secretary of War as aforesaid said Belknap had authority, under the laws of the United States, to appoint a person to maintain a trading-establishment at Fort Sill, a military post of the United States, not in the vicinity of any city or town; that, on the tenth day of October, eighteen hundred and seventy, said Belknap, as Secretary of War as aforesaid, did, at the city of Washington, in the District of Columbia, appoint one John S. Evans to maintain said trading-establisment at said military post, and that said John S. Evans, by virtue of said appointment, has since, till the second day of March, eighteen hundred and seventy-six, maintained a trading-establishment at said military post, and that said Evans, on the eighth day of October, eighteen hundred and seventy, before he was so appointed to maintain said trading-establishment as aforesaid, and in order to procure said appointment and to be continued therein, agreed with one Caleb P. Marsh that, in consideration that said Belknap would appoint him, the said Evans, to maintain said trading-establishment at said military post, at the instance and request of said Marsh, he, the said Evans, would pay to him a large sum of money, quarterly, in advance, from the date of his said appointment by said Belknap, to wit, twelve thousand dollars during the year immediately following the tenth day of October, eighteen hundred and seventy, and other large sums of money, quarterly, during each year that he, the said Evans, should be permitted by said Belknap to maintain said trading-establishment at said post; that said Evans did pay to said Marsh said sum of money

quarterly during each year after his said appointment, until the month of December, eighteen hundred and seventy-five, when the last of said payments was made; that said Marsh, upon the receipt of each of said payments, paid one-half thereof to him, the said Belknap. Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time, and to appoint some other person to maintain said trading-establishment, but criminally disregarding his duty as Secretary of War, and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said military post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy and to the great disgrace and detriment of the public service.

Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office.

ARTICLE IV.

That said William W. Belknap, while he was in office and acting as Secretary of War of the United States of America, did, on the tenth day of October, eighteen hundred and seventy, in the exercise of the power and authority vested in him as Secretary of War as aforesaid by law, appoint one John S. Evans to maintain a trading-establishment at Fort Sill, a military post of the United States, and he, the said Belknap, did receive, from one Caleb P. Marsh, large sums of money for and in consideration of his having so appointed said John S. Evans to maintain said trading-establishment at said military post, and for continuing him therein, whereby he has been guilty of high crimes and misdemeanors in his said office.

Specification I.

On or about the second day of November, eighteen hundred and seventy, said William W. Belknap, while Secretary of War as aforesaid, did receive from Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and for continuing him therein.

Specification II.

On or about the seventeenth day of January, eighteen hundred and seventy-one, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill, aforesaid, and for continuing him therein.

Specification III.

On or about the eighteenth day of April, eighteen hundred and seventy-one, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification IV.

On or about the twenty-fifth day of July, eighteen hundred and seventy-one, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification V.

On or about the tenth day of November, eighteen hundred and seventy-one, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John P. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification VI.

On or about the fifteenth day of January, eighteen hundred and seventy-two, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification VII.

On or about the thirteenth day of June, eighteen hundred and seventy-two, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification VIII.

On or about the twenty-second day of November, eighteen hundred and seventy-two, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification IX.

On or about the twenty-eighth day of April, eighteen hundred and seventy-three, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh one thousand dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification X.

On or about the sixteenth day of June, eighteen hundred and seventy-three, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh seventeen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification XI.

On or about the fourth day of November, eighteen hundred and seventy-three, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification XII.

On or about the twenty-second day of January, eighteen hundred and seventy-four, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification XIII.

On or about the tenth day of April, eighteen hundred and seventy-four, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification XIV.

On or about the ninth day of October, eighteen hundred and seventy-four, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid, and continuing him therein.

Specification XV.

On or about the twenty-fourth day of May, eighteen hundred and seventy-five, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid and continuing him therein.

Specification XVI.

On or about the seventeenth day of November, eighteen hundred and seventy-five, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh fifteen hundred dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid and continuing him therein.

Specification XVII.

On or about the fifteenth day of January, eighteen hundred and seventy-six, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh seven hundred and fifty dollars, in consideration of his having appointed said John S. Evans to maintain a trading-establishment at Fort Sill aforesaid and continuing him therein.

ARTICLE V.

That one John S. Evans was on the tenth day of October, in the year eighteen hundred and seventy, appointed by the said Belknap to maintain a trading-establishment at Fort Sill, a military post on the frontier, not in the vicinity of any city or town, and said Belknap did from that day continuously to the second day of March, eighteen hundred and seventy-six, permit said Evans to maintain the same; and said Belknap was induced to make said appointment by the influence and request of one Caleb P. Marsh; and said Evans paid to said Marsh, in consideration of such influence and request, and in consideration that he should thereby induce said Belknap to make said appointment, divers large sums of money, at various times, amounting to about twelve thousand dollars a year from the date of said appointment to the twenty-fifth day of March, eighteen hundred and seventy-two, and to about six thousand dollars a year thereafter until the second day of March, eighteen hundred and seventy-six, all which said Belknap well knew; yet said Belknap did, in consideration that he would permit said Evans to continue to maintain said trading-establishment, and in order that said payments might continue and be made by said Evans to said Marsh as aforesaid, corruptly receive from said Marsh, either to his, the said Belknap's, own use, or to be paid over to the wife of said Belknap, divers large sums of money at various times, viz, the sum of fifteen hundred dollars on or about the second day of November, eighteen hundred and seventy; the sum of fifteen hundred dollars on or about the seventeenth day of January, eighteen hundred and seventy-one; the sum of fifteen hundred dollars on or about the eighteenth day of April, eighteen hundred and seventy-one; the sum of fifteen hundred dollars on or about the twenty-fifth day of July, eighteen hundred and seventy-one; the sum of fifteen hundred dollars on or about the tenth day of November, eighteen hundred and seventy-one; the sum of fifteen hundred dollars on or about the fifteenth day of January, eighteen hundred and seventy-two; the sum of fifteen hundred dollars on or about the thirteenth day of June, eighteen hundred and seventy-two; the sum of fifteen hundred dollars on or about the twenty-second day of November, eighteen hundred and seventy-two; the sum of one thousand dollars on or about the twenty-eighth day of April, eighteen hundred and seventy-three; the sum of seventeen hundred dollars on or about the sixteenth day of June, eighteen hundred and seventy-three; the sum of fifteen hundred dollars on or about the fourth day of November, eighteen hundred and seventy-three; the sum of fifteen hundred dollars, on or about the twenty-second day of January, eighteen hundred and seventy-four; the sum of fifteen hundred dollars, on or about the tenth day of April, eighteen hundred and seventy-four; the sum of fifteen hundred dollars, on or about the ninth day of October, eighteen hundred and seventy-four; the sum of fifteen hundred dollars, on or about the twenty-fourth day of May, eighteen hundred and seventy-five; the sum of fifteen hundred dollars, on or about the seventeenth day of November, eighteen hundred and seventy-five; the sum of seven hundred and fifty dollars, on or about the fifteenth day of January, eighteen hundred and seventy-six: all of which acts and doings were while the said Belknap was Secretary of War of the United States, as aforesaid, and were a high misdemeanor in said office.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or accusation or impeachment against the said William W. Belknap, late Secretary of War of the United States, and also of replying to his

answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said William W. Belknap may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

Resolved, That seven managers be appointed by ballot to conduct the impeachment exhibited against William W. Belknap, late Secretary of War of the United States.

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42D CONGRESS, 3d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 92.

MARK W. DELAHAY.

MARCH 3, 1873.—Laid on the table and ordered to be printed.

Mr. B. F. BUTLER, from a select committee, made the following

REPORT:

The committee appointed by the House of Representatives to impeach Mark W. Delahay, district judge of the United States for the district of Kansas, at the bar of the Senate of the United States, have performed their duty and report:

That in obedience to the order of the House, the committee have been to the Senate, and, in the name of the House of Representatives and of all the people of the United States, have impeached Mark W. Delahay, district judge of the United States for the district of Kansas, of high crimes and misdemeanors; and have acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him, and make good the same.

And further, that the committee have demanded that the Senate take order for the appearance of the said Mark W. Delahay to answer to the said impeachment.

For the committee.

BENJ. F. BUTLER.

O

37TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 44.

IMPEACHMENT OF WEST H. HUMPHREYS, JUDGE OF THE UNITED STATES DISTRICT COURT OF TENNESSEE.

MARCH 4, 1862.—Ordered to be printed, and recommitted to the Committee on the Judiciary.

Mr. BINGHAM, from the Committee on the Judiciary, made the following

REPORT.

The Committee on the Judiciary, to whom was referred by the House a resolution of inquiry into the alleged official misconduct of West H. Humphreys, a judge of the United States district court for the several districts in the State of Tennessee, respectfully report:

That by the letter of the honorable Edward Bates, Attorney General of the United States, of date 25th February, 1862, it appears that West H. Humphreys was commissioned United States district judge for the three districts of the State of Tennessee on the 26th day of March, 1853; that he still holds and has not resigned said commission.

Your committee further report that by the testimony of honorable Horace Maynard, Mr. Trigg, Mr. Lellyett, all citizens of the State of Tennessee, who, by order of the House, were duly examined upon oath before said committee, it is made to appear to the committee that said West H. Humphreys, in a public meeting held in the city of Nashville, in said State, on the 29th December, 1860, in a discussion then and there held, declared in favor of secession, and refused, when interrogated, to declare South Carolina subject to the laws of the United States. It also appears by said testimony that said Humphreys, about that time, published articles in the newspapers at Nashville, in which "he took strong ground in favor of secession."—(See testimony of Mr. Lellyett.)

It further appears, upon said testimony, that said West H. Humphreys has neglected his duties as United States district judge within said State ever since the adoption of the ordinance of secession by the legislature in May, 1861; that he refused to hold his court because he considered the authority of the United States *obsolete* in Tennessee, and that since that time he has officiated as judge for the rebel confederacy in that State, and has held citizens of the United States to answer before him, as such rebel judge, for disloyalty to said rebel confederacy; has advised a citizen so charged and brought before him

to forswear his allegiance to the United States by taking the oath of allegiance to the self-styled "southern confederacy," and upon refusal so to do, said judge has required of such citizen a bond in a large sum, conditioned that he would leave said State, the place of his residence, within forty days, pursuant to an act known as an "alien act," passed by the rebel congress of said confederacy.

It further appears by said testimony that said West H. Humphreys has within said State, as such judge for said southern confederacy, entertained proceedings under the treasonable acts of the congress thereof for the confiscation of the property of loyal citizens of the United States, to the use of said confederacy, and in aid of the rebellion now prosecuted by the same against the United States. The committee, in consequence of the evidence by them collected in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, recommend the adoption of the following:

Resolved, That West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, be impeached of high crimes and misdemeanors.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.—CONGRESS OF THE UNITED STATES.

IN THE HOUSE OF REPRESENTATIVES,
January 8, 1862.

On motion of Mr. Maynard, the following was adopted:

Whereas it is alleged that West H. Humphreys, now holding a commission as one of the judges of the district court of the United States, has for nearly twelve months failed to hold the courts for the districts of East, Middle, and West Tennessee, as by law he was required to do, and that he has accepted a judicial commission in hostility to the government of the United States, and is assuming to act under it:

Resolved, That the Committee on the Judiciary inquire into the truth of the said allegations, with power to send for persons and papers, and report from time to time such action as they may deem proper.

ATTORNEY GENERAL'S OFFICE,
February 25, 1862.

SIR: I have received your note of the 24th instant, and, in reply to the questions put to me, would state that West H. Humphreys was commissioned judge of the three districts of Tennessee on the 26th of March, 1853, (that being the date of his confirmation by the Senate.)

I do not think that Judge Humphreys has tendered a resignation

of his office. Such a paper would be filed in this office, but none is here.

Very respectfully, your obedient servant,

EDW. BATES,
Attorney General.

Hon. JOHN A. BINGHAM,
House of Representatives, Congress.

CONNALLY F. TRIGG sworn:

Question by Mr. Bingham. State your age, residence, and profession.

Answer. I am in the fifty-second year of my age; reside in Knoxville, Tennessee, and am a lawyer by profession.

Question. Are you acquainted with West H. Humphreys, United States district judge of the district of Tennessee?

Answer. I am.

Question. State whether any session of the district court of the United States has been held since the act of secession was passed by the State of Tennessee.

Answer. The legislature passed an ordinance of secession, which was submitted to the people.

Question. When?

Answer. I think it was in the month of August.* There has been no United States court held in Tennessee, that I am aware of, since that act of secession. Judge Humphreys has held a court at Knoxville, which was understood to be the district court of the Confederate States.

Question. When was that court held at Knoxville, Tennessee?

Answer. My impression is that the first confederate court was held there in September last.

Question. What judge presided at that court, and acted as judge for the southern Confederate States?

Answer. Judge West H. Humphreys.

Question. State particularly what means you have of knowing that such court was held, and that he so presided.

Answer. Being a practicing lawyer, I was in the habit of attending his courts while he was a United States district judge, but being one of those regarded by the southern confederacy as a "traitor," I refrained from attending the sittings of the confederate court. I purposely avoided entering the court, but I was inside the courthouse two or three times while Judge Humphreys was sitting as a confederate judge. I did not mean to do anything on my part to recognize the legality of the court, or the existence, in any form, of the south[illegible] confederacy:

Questi[illegible] state anything which transpired upon the bench or at

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* *Corrections, by Trigg.*—I think the act of secession was passed about the 1st of May, and submitted to the people for their ratification on the 8th day of June following.

the bar to indicate that they were pretending to administer justice in accordance with the authority of the southern confederacy.

Answer. I remember one instance distinctly. A gentleman of my acquaintance, and a wealthy merchant of Knoxville, was arrested on a warrant issued, as I understand, by Judge Humphreys, of the confederate district court. He was taken before Judge Humphreys for examination upon the charge of being an alien enemy and a dangerous citizen to the southern confederacy. I think I read the warrant, but I cannot now recollect its precise terms. He was a man of northern birth, had resided for many years at Knoxville, Tennessee, and had accumulated a considerable fortune in the mercantile business. I went into the court-house while he was before the judge. Judge Humphreys seemed to be impressing upon him the propriety or the necessity of his taking the oath of allegiance to the southern confederacy.

Question. What did he say?

Answer. I cannot remember the language he used.

Question. Can you remember the substance of what he said?

Answer. I can remember his stating that a short time previous Mr. Dickinson, the gentleman referred to, in conjunction with others, on his way to New York city, visited the encampments of federal troops upon the south side of the Potomac river. While I do not pretend to give the language which was used, I have the distinct impression that Judge Humphreys strongly indicated his enmity towards the United States, and that, in a sort of advisory way, he sought to induce Mr. Dickinson to take the oath of allegiance to the southern confederacy.

Question. Was he on the bench at the time?

Answer. Yes, sir.

Question. State what disposition he made of Mr. Dickinson.

Answer. I was not in court when the case was disposed of, but the fact was notorious, and I so understood from Mr. Dickinson himself, that Judge Humphreys decided that, inasmuch as Mr. Dickinson declined to take the oath of allegiance, he would have to leave the southern confederacy, under an act of the confederate congress, known as the "alien act," and under which the confederate president, by proclamation, gave forty days to alien enemies, within which they were to leave the southern confederacy. The forty days would expire within some five or six days from that decision; at the same time Judge Humphreys required Mr. Dickinson to give bond in the sum of perhaps $20,000 for his good behavior during the time he was preparing to leave. That bond was executed by Mr. Dickinson, and he immediately set about making his arrangements to leave, such as disposing of his property, getting what money he could to defray his expenses, and so on. Within some two or three days, it may have been longer, I understand the judge went into the court-house and voluntarily revoked the order he had made, so that Mr. Dickinson was permitted to remain. He was there when I left.

Question. State whether you were summoned to appear before the court and disclose on oath what claims you held of northern creditors.

Answer. I was summoned at the instance of the receiver under the confiscation act. I do not know that the judge's name was mentioned in the summons, but I was required to appear at Knoxville, Tennessee, on the first day of the succeeding term, which was to be held in the month of November, to answer under oath what claims or property I had in my hands, or within my control, belonging to alien enemies, which were understood to be northern creditors. I did not appear in court, but wrote out a statement, and handed it to the receiver. The court did not meet at the time appointed, and it was postponed to a subsequent day in December. I understood that Judge Humphreys would be there to hold the court, but before that time I left.

Question. State whether on other occasions, and how often, you saw persons under arrest, if at all, and taken to this court, held by Judge Hunphreys, as Union prisoners, to answer for alleged offences against the southern confederacy.

Answer. During the first sitting of the court, in September, after the act of secession was passed, and which continued for three weeks at least, I saw numbers of men, said to be Union prisoners, escorted from the military camps, along the streets, taken into the court-house, between files of soldiers, and appeared before the court then sitting, at which Judge Humphreys was manifestly presiding. I have seen ten and twenty at a time.

Question. State your opportunities of knowing what was going on at the court-house.

Answer. My office was within a hundred yards of the court-house.

Question. State how the proceedings of the court were published in the papers of Knoxville when business was transacted.

Answer. They were generally headed as proceedings of the confederate court.

Question. Have you any of those papers?

Answer. I have not.

Question. At what time did you leave?

Answer. On the night of the 7th of December last. I have not been there since. I have been trying to recollect some expression of the judge going to show that he was acting in the capacity of a judge of the confederate court, but I have not been able to do so. I can state the further fact that a man by the name of Reynolds was understood to be appointed commissioner of the Confederate States by Judge Humphreys. As such commissioner he continued to act up to the time of my leaving, hearing charges against Union men, as a committing magistrate of the confederate government, either committing or holding them to appear at court. I was present when a friend of mine appeared before that commissioner. The only evidence against my friend, upon which the commissioner seemed to found his judgment, was, that he had stated upon the street that he was a *Union* man. The commissioner declared, substantially, that it was criminal for him to make such a declaration, and accordingly required him to give a bond. I became one of his securities to appear at the confederate court, which was to be held in November. That court

failed to sit, and he was re-recognized until December. I again went his security, and concluded soon after that I would not appear myself. I understood that proceedings for confiscation of their property were instituted against loyal citizens of the United States government, but they had not been prosecuted to final judgment when I left.

Question. Was any judge present in the court besides Judge Humphreys?

Answer. None whatever. I have seen no one acting in any judicial capacity, in connexion with the Confederate States, except West H. Humphreys, and this man Reynolds, who was committing officer.

And further this deponent saith not.

CONNALLY F. TRIGG.

JOHN LELLYETT sworn:

Question. State your age and residence.

Answer. I am thirty-five years of age; reside in Nashville, Tenn.; and a merchant.

Question. State whether you know personally West H. Humphreys, United States district judge for the district of Tennessee.

Answer. I have no personal acquaintance with him, but I have known him for some fifteen years.

Question. Was Nashville one of the places for holding the United States district court?

Answer. Yes, sir.

Question. State whether he has held a term of the United States district court at Nashville since the secession of Tennessee.

Answer. I left Nashville on the 31st of July, and know nothing, of my own personal observation, since that time. The time for holding the United States court there was about the time of the surrender of Fort Sumter. I was not in court, but it is a notorious fact, and mentioned in the papers, that Judge Humphreys declined to hold any court. I do not recollect exactly the remarks which he made on the occasion, but they were indicative of strong disloyalty to the United States. He declared that the federal government no longer existed or exercised authority in Tennessee. That is my recollection of the substance of his remarks on that occasion.

Question. Were they made from the bench?

Answer. Yes, sir.

Question. Did you hear them?

Answer. No, sir. They were talked about in the city, and gave great offence to the Union men. I do not pretend to state exactly the remarks which he made.

Question. Were you present in court?

Answer. I was not. I only speak of what was noised about the streets.

Question. State whether he has held a court at Nashville any time since, as a judge for the Confederate States.

Answer. I cannot state that of my own knowledge. I do not remember of his having held such a court in Nashville. From what I

have read in the newspapers, or from what I have learned from persons coming from Tennessee since I left, there have not been many prosecutions of Union men about Nashville, but I have information about prosecutions of Union men in eastern Tennessee.

Question. What facts have you, from reliable sources, going to show that Judge Humphreys held courts of the Confederate States in Tennessee?

Answer. I saw, in a paper published at Knoxville, the remarks of Judge Humphreys in regard to Mr. Dickinson being held to bail in the sum of $10,000. I have seen accounts, also, of other men who were brought before the confederate court presided over by Judge Humphreys. I read an extract from the Knoxville *Register*, a strong secession paper, of the proceedings in the case of Dickinson. Judge Humphreys's remarks, in substance, were as they were stated by Colonel Trigg. He took the ground, because of his personal acquaintance with Mr. Dickinson, and because of the high character the latter had maintained, that he would waive his examination if he would take the oath of allegiance to the Confederate States government, which Mr. Dickinson declined to do; and he then required him to give bail for his good behavior during the time he remained there. My understanding is, that his bail was not released when he was allowed to remain there, but Colonel Trigg will know that matter better than myself. I have seen, in the disloyal papers, reports of the proceedings in the case of Mr. Brownlow before Judge Humphreys. Mr. Brownlow was charged with having been disloyal to the southern confederate government. I have also read of proceedings before Judge Humphreys, or under the authority of his court, to confiscate the property of citizens of the United States on account of their disloyalty to the Confederate States government. One rumor says that he was regularly carrying on the proceedings of the confederate court for the confiscation of the property of the Union men. I have understood from Robert Johnson, the son of Senator Andrew Johnson, that the negroes of the latter were taken to Knoxville to be confiscated to the Confederate States government.

Question. What is the age of Judge Humphreys, and how long has he presided upon the bench?

Answer. I suppose he is a man of fifty years of age, but I really do not know how long he has been judge. It is within my recollection that on the 29th of December, 1860, at a public meeting held in Nashville, to consider the condition of the country, there was a turbulent element developed. It was a meeting of all parties. Among the speakers and agitators on the side of revolution was West H. Humphreys.

Question. Did you hear him?

Answer. Yes, sir. There was a discussion between him and ex-Senator Foote. It was a matter of notoriety that Judge Humphreys was a bitter secessionist, and on that occasion ex-Senator Foote appealed to him, as a sworn judge of the United States, whether the laws of the United States did not still extend over South Carolina, notwithstanding her act of secession. Judge Humphreys, however,

would not answer. He was silent on that point. After that I read articles in a paper—I could not swear that he wrote them, but they were published as the writings of West H. Humphreys, in the *Union* and *American*, of Nashville—which took strong ground in favor of secession.

Question. Where is Judge Humphreys's residence?

Answer. In the city of Nashville, or in its vicinity. I will say that I have seen it announced that West H. Humphreys was appointed by Jefferson Davis the confederate district judge for the district of Tennessee.

I wish to substitute the following as a more correct report of my answer to the fourth question:

Answer. I left Nashville on the 31st of July last, and know nothing by personal observation of the proceedings of West H. Humphreys since that time. The time for the holding of one term of the United States court there was about the time of the surrender of Fort Sumter. I was not in court at the time, but it was a matter of public notoriety that Judge Humphreys adjourned the court for that term. I do not remember exactly the remarks he was currently reported to have made on that occasion, but they were indicative of strong disloyalty. He declared, in substance, as reported, that the authority of the federal government was at an end in Tennessee, and it was no longer proper to hold his court under such obsolete authority. Such is my recollection of the substance of his remarks, as reported. I did not intend to be understood as saying that the remarks of Judge Humphreys were reported in the papers.

JOHN LELLYETT.

Hon. HORACE MAYNARD sworn:

Question. State, if you please, whether you know Judge Humphreys, United States district judge of the district of Tennessee, and what you know of his official conduct.

Answer. I have been acquainted with him for many years. He was the official reporter of the supreme court of Tennessee for several years, and his name appears to a series of reports in that connexion. I think he was appointed district judge of the United States in the year 1853, very early in the administration of Mr. Pierce. That is my recollection. We had two terms of the court a year at Knoxville, one in May and the other in November. The last time I recollect to have seen him was in November, 1860, after the presidential election, and shortly before the meeting of Congress. The public mind was beginning to be a good deal excited by the action of South Carolina on the subject of disunion, secession, and kindred topics. I had a conversation with the judge in the court room after the adjournment of the morning session of the court. It was a very long one, but the purport of it, so far as he took part, was that, being an officer of the United States government, and sworn to support the Constitution, he could not intervene actively for the purpose of destroying the government, but he regarded the destruction of the

federal Union as inevitable; as he expressed it, it had gone too far to be under the control of individual action. He stated a great many facts, which he alleged to have knowledge of, in support of that position. At that time one of the badges, indicative of secession sentiments, worn by some persons, was a cockade fastened upon the left breast. I remember of having seen some of the jurors in the court wearing those disunion badges.

Question. Were they visible to the eye of the court?

Answer. Yes, sir; they were obvious, and ostentatiously so. The sympathies and sentiments of the judge were of general notoriety, and I have heard of his expressing them freely in conversation. I only recollect of having but one conversation with him on the subject. His sympathies and influence, so far as he exercised it, were on the side of disunion and the disruption of the federal government. At the May term, 1861, after the time of the action of the State legislature looking to the secession of the State, and when the people were called upon to determine the matter, my recollection is that the judge did not hold his court. I think he did not even come to Knoxville. I think it was publicly announced, through the disunion paper there, that he would not hold the court. I am not certain about that, but my impression is that the court was not held.

Question. Did he hold a court for the Confederate States?

Answer. I left on the first day of August to attend the session of Congress, and I have not been there since. I saw from the papers that he had been appointed district judge of the Confederate States. My impression is, that that was in August. The officer who had been district attorney for the United States for eight years was also appointed district attorney for the Confederate States. I have learned from letters and personal information in various ways that the course and official action of Judge Humphreys are substantially as Mr. Trigg has stated them. I saw a detailed report of a proceeding before Judge Humphreys in the confederate court held at Nashville, where Judge Monroe, formerly the judge of the district court in Kentucky, was represented to have made a declaration as of an alien announcing his intention to become a citizen of the Confederate States. Judge Humphreys was reported to have received the declaration with marks of distinguished approbation, and to have expressed his admiration of Judge Monroe's conduct.

Question. Where was that published?

Answer. In the newspapers of the time printed in that State.

Question. Do you know anything about his taking proceedings against the property of the venerable Judge Catron because of his adherence to his oath to the Constitution of the United States?

Answer. That is reported to be the case. It is a matter of notoriety—a thing of common fame. I saw a statement, professing to come from a reliable source, that property amounting to over a million of dollars had been condemned in the eastern portion of Tennessee.

Question. Was it the property of loyal citizens?

Answer. Not all of it. It was condemned and put in the hands of

Mr. Haynes, as receiver. A part of it was stock in some valuable copper mines in the lower part of East Tennessee, and which was represented to be the property of non-resident owners, and a portion of it the property of the Hon. Andrew Johnson, the senator from that State.

Question. Was it not all put in the name of citizens of the United States?

Answer. I do not know. Andrew Johnson was proceeded against, I presume, not as a citizen of the United States, but as a traitor to the Confederate States.

Question. Is it not a matter of notoriety in Tennessee that there is a statute of the Confederate States providing for the confiscation of the property of citizens of the United States who adhere to the Constitution of the United States?

Answer. I have knowledge that such a law was published.

Question. Is it not a matter of public notoriety?

Answer. It is, I suppose, a matter of public notoriety. I know it was published in the papers.

And further this deponent saith not.

HORACE MAYNARD.

Mr. TRIGG. Mr. Maynard has spoken of Mr. J. C. Ramsay as having been appointed district attorney for the Confederate States. I know that he attended and officiated in the confederate court in Knoxville, while Judge Humphreys was sitting upon the bench as confederate judge.

CONNALLY F. TRIGG.

FRANCIS M. MCFALL sworn:

Question by Mr. Bingham. State your age and residence.

Answer. I am between 24 and 25 years of age, and reside in Washington county, near Jonesboro', East Tennessee.

Question. State your profession or occupation?

Answer. For the last several years I have been a clerk in the supreme court office of East Tennessee.

Question. Do you know West H. Humphreys, United States district judge for the district of Tennessee?

Answer. I know him, but I am not personally acquainted with him.

Question. State what you know touching his connexion with the present rebellion against the United States.

Answer. When I was in Knoxville, during the latter part of September, 1861, I saw Judge West H. Humphreys presiding in the confederate court which was then being there holden. While I was present the attention of the court was almost wholly occupied with the trial of men charged with disloyalty to the confederate government.

Question. Were they citizens of the United States?

Answer. Yes, sir. Most of the men having been arrested on frivolous charges, and many upon no charges at all, except that they entertained Union sentiments, were released by the court on taking an oath to support the confederate government, or giving bond in good security for their future conduct as good citizens of the confederate government. The oath was administered and the bonds taken by one William C. Kane, a lawyer, but who at that time was acting, as I supposed, as clerk of the court. I did not ask any questions about the matter, however. This was done in presence of Judge Humphreys. He stated to the prisoner, before administering the oath to support the confederate government, that he was not compelled to take it; that he would be released on giving bond with good security for his future loyalty to the confederate government; and that, in the event that he refused to do either, he would be considered as an enemy to the confederate government, and as a dangerous person to the confederacy, and as such must be imprisoned during the war.

Question. Were you present in the confederate court at the transactions to which you refer at Knoxville, East Tennessee?

Answer. Yes, sir. Judge Humphreys presided.

Question. State specifically whether all or any of these persons were charged with any crime or merely with disloyalty to the confederate government.

Answer. Most of them were merely charged with having entertained Union sentiments. Some were charged with having been in arms against the Confederate States. There had been what were called rebellions against the confederate authorities in different portions of East Tennessee, and some of the men engaged in them had been arrested.

Question. Then the charges against these men only consisted of their adherence to the Constitution and Union of the United States, and of taking up arms against the rebellion?

Answer. Yes, sir.

Question. Do you know anything further touching Judge Humphreys's active participation in this rebellion against the United States?

Answer. I believe that I have stated the substance of all I know.

Question. Do you know of his having held a confederate court at any other place than Knoxville, East Tennessee?

Answer. I do not know of my own knowledge, but I have heard that he held a confederate court at Nashville.

Question. Is it a matter of notoriety that he held a confederate court at Nashville?

Answer. It is a matter that is publicly known.

Question. At what time did he hold that court?

Answer. I think he held a confederate court in Nashville in October or November last.

FRANCIS M. McFALL.

22d Congress, 2d Session. [Rep. No. 88.] Ho. of Reps.

WM. CUMMINS *vs.* JUDGE JOHNSON.

February 8, 1833.

Read, and laid on the table.

Mr. Bell, from the Committee on the Judiciary, to which the subject had been referred, made the following

REPORT:

The Committee on the Judiciary, to whom was referred the memorial of William Cummins, setting forth certain charges of official and other misconduct against Benjamin Johnson, one of the Judges of the Superior Court of the Territory of Arkansas, have had the same under consideration, and make the following report:

A preliminary question presented for the decision of the committee, by the nature and object of the investigation in which they find themselves engaged, was, whether a judge of a Territorial court is such an officer as may be impeached before the Senate, under the provisions of the constitution prescribing and regulating the mode of bringing official offenders to justice. A majority of the committee are strongly inclined to the opinion that such an officer is not a proper subject of trial by impeachment. Some of the reasons upon which that opinion may be supported, will be stated.

The constitution, in article 11, section 4, provides that "all civil officers of the United States shall be removed from office by impeachment," &c. The institution by Congress of those political corporations, denominated, in the language of our legislation upon that subject, Territorial Governments, is only authorized by a very liberal construction of the general power given by the constitution to Congress over the public domain. But, admitting that exercise of power to be well enough founded, still, can a judge of such a Government be said to be an officer of the United States within the meaning of the clause already quoted? Should the doubt thrown out by the committee upon this point, appear to the House to be without reasonable foundation, they think they will be fully sustained in the opinion, that, whether liable to impeachment or not, the practice of impeaching subordinate officers, and especially such as hold their offices by a tenure not more firm and durable than the judge of a Territorial court, would soon be found highly inconvenient and injurious to the public interest. The judge whose conduct in the present instance is alleged to be such as to call for the exercise of the impeaching power of the House, holds his office for a term of four years only, and may, by the express provision of the act of Congress establishing his office, be removed at any time within that term by the President. The trial by impeachment is the highest and most solemn in its na-

ture, known in the administration of public justice. It is established for high political purposes, and would seem to be proper only against judges who hold their offices during good behavior, and other high officers of the Government, for such crimes or misdemeanors as the public service and interest require to be punished by removal from office.

But, as the House may not concur with the committee in these opinions, they have thought it their duty to look into the evidence before them in support of the charges made against Judge Johnson, and also into the evidence referred to them in his vindication. As they believe that, upon an examination of all the proofs before them, there can be but one opinion as to the question whether a sufficient ground for an impeachment is made out or not, the committee have not supposed it necessary or important to report to the House, in detail, either the charges or the evidence on the one side or the other.

Judge Johnson appears to have filled the office of judge of the superior court of the Arkansas Territory, under several appointments, during a period of twelve years. The general charges against him, are, favoritism or partiality to particular counsel in the trial of causes; irritability of temper, and rudeness on the bench towards his brother judges and the bar; incapacity, manifested by a vacillating and inconsistent course of judicial decision, and habitual intemperance. In making out specifications under these several heads, the memorialist does not confine himself to the term of the judge's office which is just expired, but the whole period of his judicial administration in Arkansas is reviewed; and, after all, it may be stated, that four cases only are brought to the notice of the House by the evidence—the trial of Herod, House, and Woods, for the murder of Melborne, being regarded as one case in which favoritism or partiality is alleged to have influenced him. There are facts stated in the case of Herod, House, and Woods, and in the case of Embree, which are no doubt true, as they are stated by members of the bar of character for veracity; but the inferences from those facts appear to the committee to be strained, being generally those of unsuccessful counsel; and, upon looking into the explanatory evidence furnished in behalf of Judge Johnson, not to be warranted by the circumstances of the whole case. For example, the discharge of the first jury empannelled to try Herod, after they had had the case submitted to them, and held it under consideration for one night only, without any charge of improper conduct in the jury, was supposed to furnish evidence of a desire to oblige the counsel for Herod; but no such inference appears to be justified upon an examination of all the facts of the case. The discharge of one jury, and the empannelling of a second, for capital offences, appears to be considered no irregularity in the practice of the courts of Arkansas, when the jury cannot agree; and, in this case, it is not alleged that they could have agreed. The just empannelling of the second jury, and the prompt discharge of the prisoner at the same term of the court, are, in the opinion of the committee, in themselves strong circumstances in favor of the innocence of the judge.

In the cases of Embree and Dunlop, the explanatory evidence appears to the committee in like manner to overthrow the inference of improper motives of the judge.

His refusal to sign a bill of exceptions, until he was repeatedly pressed by counsel to do so, is made a serious charge against him. The evidence furnished by the judge, under this charge, makes it probable that the whole

charge is founded in mistake; but, as the bill is admitted by both parties to have been signed, the charge does not appear worthy of the importance attached to it.

As to the general charge of incapacity, and an inconsistency in judicial decision, rendering the court of justice wholly uncertain, the general testimony borne by so many persons of respectability to the legal learning and ability of Judge Johnson; and the specific fact which is stated by several, that in no case has a decision of Judge Johnson in the circuit court, been reversed in the superior court, appear to be a sufficient refutation.

The charge of intemperance, although supported by proof of excessive indulgence upon a few occasions, does not appear to be well founded, to the extent alleged by the memorialist. The testimony upon this point, as well as in relation to the general integrity, impartiality, and ability of Judge Johnson, is ample, and, in the opinion of the committee, conclusive. The Governor of the Territory, a large portion of the bar, the clerks of all his courts in his circuit—clerks holding their offices by the suffrages of the people in their respective counties, together with many others in public stations, furnish the most decided and unequivocal testimony in favor of the general uprightness and propriety of Judge Johnson's conduct both as a judge and a private citizen.

21st Congress, 1st Session. [Rep. No. 325.] Ho. of Reps.

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JUDGE PECK.

March 23, 1830.

Read, and committed to the Committee of the Whole House on the state of the Union.

Mr. Buchanan, from the Committee on the Judiciary, to which had been referred the memorial of Luke E. Lawless, complaining of the official conduct of James H. Peck, Judge of the District Court of the United States for the District of Missouri, made the following

REPORT:

The Committee on the Judiciary, to which was referred the memorial of Luke E. Lawless, complaining of the official conduct of James H. Peck, Judge of the District Court of the United States for the district of Missouri, report:

That, in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion, that James H. Peck, Judge of the District Court of the United States for the district of Missouri, be impeached of high misdemeanors in office.

AN ABSTRACT OF THE CASE OF

Julie Soulard, widow, James G. Soulard, and others, heirs and legal representatives of Antoine Soulard, deceased, vs. *The United States.*	In the District Court of Missouri,

(In which the opinion of Judge Peck, referred to and printed as part of the evidence, was pronounced. Prepared from the record, by C. A. Wickliffe, under the direction of the committee.)

The petition of Soulard's heirs was filed on the 22d August, 1824, against the United States, in the District Court of Missouri, claiming ten thousand arpents of land, under a Spanish concession, which petition was amended at the November term, 1824, by leave of the court.

At the March term, 1825, the United States, by her attorney, filed in court their answer to the said petition. And at the same term, an issue of fact was submitted to the jury in these words:

"Was there such concession made to Antoine Soulard as in complainants' bill alleged?" The jury found there was a concession, as alleged in complainants' bill. The cause was then heard in chief upon the depositions and documents filed, which are spread at length upon the record

On the fourth Monday in December, 1825, the Judge of the District Court pronounced the following decree:

"And thereupon this cause was continued under advisement, from term to term, until the December term of said court, being the fourth Monday of December, in the year of our Lord one thousand eight hundred and twenty-five, at which day 'the said cause coming on to be debated and heard in the presence of the counsel for the petitioners, and of the attorney of the United States for the District of Missouri, on the petition, the answer and the testimony which is embodied in the record, it appears that the petition sets forth, in substance, that, some time in the month of April, one thousand seven hundred and ninety six, Antoine Soulard, the ancestor of the present petitioners, being then a resident of the province of Upper Louisiana, and Surveyor General of the same under the Spanish Government, presented his petition to the then Lieutenant Governor of said province, Don Zenon Trudeau, praying the grant of a tract of ten thousand arpents of land, to be located on any vacant part of the royal domain. That, in compliance with the said petition, and in order to remunerate the services of said petitioner, the said Don Zenon Trudeau, Lieutenant Governor, did, about the time aforesaid, grant to the said petitioner ten thousand arpents of land, and by said decree of concession, did order the said quantity to be located, surveyed on any vacant part of the royal domain in said province, at the election of said petitioner. That the said quantity of land was, afterwards, on the twentieth day of February, one thousand eight hundred and four, surveyed and located by the deputy surveyor, Don Santiago Rankin, on a vacant part of the public land, situate about fifteen miles West of the Mississippi river, and seventy miles North of the town of St. Louis, on a branch of the river Cuivre, and bounded as follows: commencing at a point in the Northeast quarter of section twenty-five, township fifty-one North, range three West, runs thence North, sixty-eight East, three hundred and seventeen chains eight links, to a point in the Northeast quarter of section fourteen, township fifty-one North, range two West; thence, North twenty-two West, two hundred and fourteen chains and sixteen links, to a point in the Southeast quarter of section thirty-four, township fifty-two North, range two West; thence, South sixty-eight West, three hundred and seventeen chains and eight links, to a point in the Southeast quarter of section eleven, township fifty-one North, range three West; thence, South twenty-two East, two hundred and fourteen chains sixteen links, to the place of beginning. And that a certificate of said survey was duly made and recorded in the book of record of surveys kept by the said petitioner, as surveyor as aforesaid. That before the time when claims should have been filed, pursuant to the act of Congress of the second of March, one thousand eight hundred and five, the said decree of concession and certificate of survey were, by mistake, thrown into the fire and destroyed. That, in consequence of the destruction of said concession and certificate of survey, the said petitioner considered that he was excluded from the benefit of the act of Congress passed for the relief of land claimants, and omitted to file any notice of his claim, and has thereby been deprived of the benefit of the laws heretofore passed by Congress. That, of the said tract of land,

one thousand nine hundred and forty-seven acres and thirty-five hundredths of an acre have been sold by the United States, and that the residue of the said tract is not claimed or possessed by any person other than the petitioner: and that the same has been reserved from public sale until the final adjudication thereon, by the proper tribunal. The petitioner prays that the validity of his said claim may be inquired into and decided, and that his claim and title may be confirmed to all that part of the said tract which has not been sold as aforesaid by the United States; and that he be authorized to enter, in any of the land offices in the State of Missouri, the quantity of one thousand nine hundred and forty-seven acres and thirty-five-hundredths of an acre of land, the quantity sold as aforesaid by the United States. It appears also, that, on the seventeenth day of March, one thousand eight hundred and twenty-five, Julie Soulard, widow of the said petitioner, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, childen and heirs at law of the said petitioner, filed their petition, setting forth that the said Antoine Soulard, after having filed and prosecuted his said petition, died, leaving the said widow and children his only heirs and legal representatives, and praying that the said cause might be revived and stand in their names against the United States; and the attorney of the United States freely admitting all the facts set forth in the petition of the said widow and children, the said cause was revived accordingly.

And it also appearing that the answer of the attorney of the United States, sets forth, in substance, that he is wholly uninformed of all the matters and things in the said petition of Antoine Soulard, revived as aforesaid, contained, and therefore that he does not admit the same to be true, and that he prays the court, that the said petitioners may be held and required to prove all such facts, matters, and things, the existence whereof is or may be deemed necessary to the confirmation of the said claims. And, moreover, that the said petitioners may be required and compelled to produce and show to the court the law, usage, or custom, by force and virtue whereof the said claim can or ought to be confirmed. And it further appearing, by the finding of the jury impanneled to try the issue directed in this cause, that such concession was made to the said Antoine Soulard, as in the said petition is stated: and it also appearing in evidence offered on the part of the said petitioners, that a survey of the said land was made, and a plat thereof recorded as in the said petition is stated, and that it was the practice of the Lieutenant Governors of Upper Louisiana to make concessions of land, in virtue of their office as such Governors, and not in virtue of any commission as sub-delegate. And after debate of the matters aforesaid, and the court having inquired in the validity of the title of the said petitioners; and for that it appears to the court, that no grant of the King's domain could have been legally made, unless made in virtue of some law or authority from him; and for that the regulations of Count O'Reily, of the eighteenth of February, in the year one thousand seven hundred and seventy, and of Governor Gayoso of the ninth of September, one thousand seven hundred and ninety-seven, and of Morales, the Intendant, of the seventeenth of July, one thousand seven hundred and ninety-nine, exhibit a general intention and policy on the part of the Spanish Government, in relation to the disposition of the public domain, which excludes every reasonable supposition of the existence of any law, usage, or custom, under and in conformity to which the alleged concession might have been perfected into a complete title, had not the sovereignty of the country been transferred to the United States; and for that the princi-

ples, commands, and prohibitions, in those regulations contained, are not to be reconciled with any idea of the legality of the said concession, and are incompatible with the existence of any law, usage, or custom, in conformity with which the said concession might have been confirmed, had no change of sovereignty taken place: the court doth therefore find the alleged concession and claim of the petitioners to be illegal in its origin, and invalid, and doth therefore decide, adjudge, and decree, against the validity of the same; and doth further order, adjudge, and decree, that the said petitioners pay all costs and charges occasioned in an about the prosecution and defence of this suit: and thereupon the said petitioners, by their attorney, aforesaid, pray that they may appeal from the judgment aforesaid, of the court here, so as aforesaid rendered to the Supreme Court of the United Stated, and to them the same is granted by the court here."

By which it will appear an appeal was prayed on the same day; and afterwards, on the 30th December, 1825, the following appeal bond was executed and filed with the papers:

Know all men by these presents, that I, Marie P. Leduc, am held and firmly bound unto the United States in the penal sum of five hundred dollars, to the payment of which, well and truly to be made, I bind myself, my heirs, administrators, and executors, firmly by these presents. Sealed with my seal, and dated this thirtieth day of December, eighteen hundred and twenty-five.

The condition of the above obligation is such, that whereas Julie Soulard, widow, James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs of Antoine Soulard, deceased, have this day prayed for, and obtained, an appeal to the Supreme Court of the United States, from the decree of this Court of the United States for the Missouri District against them, in a suit wherein they are petitioners, and the United States are defendants: Now if the said petitioners shall well and truly prosecute the said appeal with effect, and shall pay all costs occasioned by them in the prosecution of the same, and shall well and truly pay all costs which may be adjudged against them in said suit, then the above obligation to be void; otherwise to remain in full force and effect.

M. P. LEDUC, [L. S.]

UNITED STATES, }
Missouri District, } *ss.*

I, Isaac Barton, Clerk of the Court of the United States for the Missouri district, do hereby certify, that the appeal in the case of Julia Soulard, widow, and James G. Soulard, and others, children and heirs of Antoine Soulard, deceased, against the United States, was taken at the December term of said court, being on the twenty-sixth day of December, one thousand eight hundred and twenty-five, and that, on the thirtieth day of December, one thousand eight hundred and twenty-five, said court adjourned to sit again on the third Monday of April then next.

In testimony whereof, I have hereunto set my hand, and affixed
[L. S.] the seal of said court, at St. Louis, the sixteenth day of September, one thousand eight hundred and twenty-six.

ISAAC BARTON, *Clerk*.

Court of the United States for the State of Missouri.

PECK, JUDGE.

James G. Soulard and others,
vs.
The United States.

This is a petition under the act of Congress of the 26th May, 1824, which authorizes certain claimants of lands to institute proceedings in this court, to try the validity of their claims, to obtain confirmations thereof.

The petition states, that, in the year 1796, a concession for 10,000 arpents of land, to be located on any part of the royal domain, was issued by Don Zenon Trudeau, Lieutenant Governor of the province of Upper Louisiana, to Antoine Soulard, the ancestor of the petitioners, who was then the Surveyor General of said province, in consideration of *public services:* that, on the 20th of February, 1804, the quantity of land as conceded, was located and surveyed by Don Santiago Rankin, deputy surveyor under said Soulard, and that a certificate of said survey was recorded in the book of records of the public surveys kept by the Surveyor General: that, before the time when claims should have been filed, pursuant to the act of Congress of the 2d of March, 1805, the said decree of concession and certificate of survey were, by mistake, thrown into the fire and destroyed; and that said Soulard believing he was excluded from the benefit of any of the acts of Congress passed for the relief of land claimants, in consequence of the loss of said papers, omitted to file any notice of said claim, and that he had consequently derived no benefit of any of the laws of Congress theretofore passed for the relief of land claimants.

A jury, to whom the court had submitted that fact for trial, found, that a concession, as above stated, had issued to the ancestor of the petitioners. No settlement or improvement is alleged, nor any thing in relation to those qualifications of the grantee, as to property, which are required by the regulations. This statement of facts is all that is necessary to be prefixed to the opinion of the court.

A mass of evidence was offered on the hearing of the cause, but except that which is adverted to, and stated in the opinion, no part of it is material.

Opinion of the Court.

The interests to be affected by the decision of the questions arising in this case, are extensive. The questions themselves are novel. There is nothing in relation to them which can be regarded in the nature of a precedent, or authority to influence their decision. They are now, for the first time, without any light from this source, presented for judicial determination. In their investigation, it is necessary to explore an extensive field,—a region of waste, where darkness obscures, and labyrinths embarrass; where the desolating hand of revolution, and of time, has removed many of those landmarks which, at any time, were scarcely distinguishable. Hesitation and distrust, therefore, must reasonably accompany the inquiry.

What were the laws which regulated the disposition of the King's domain, at the date of the alleged concession, is a question, first in order for examination.

It is contended on behalf of the petitioners, that the 81st article of the ordinance of the King of Spain, became in force in Louisiana, immediately on

the ratification of the treaty of Fontainebleau, of the 3d of November, 1762, or, at all events, on the occupation of Louisiana by Spain, in 1769, under that treaty.

The assumption, that this article of the ordinance became in force in Louisiana, as contended for, either as it is attempted to be supported by the law of nations, or by the proclamation of Count O'Reily, Governor General, appears to be without foundation.

By the law of nations, the ancient laws of a ceded country, continue in force until changed by the new sovereign. But this principle does not apply to those laws which a sovereign may have thought necessary to establish for the purpose of regulating the manner in which the royal lands should be disposed of. It is a principle which applies to the municipal regulations of a country in general, and is necessary to the preservation of order, the protection of rights, and the redress of injuries. A different rule would be productive of great inconvenience. If a change of sovereignty, of itself, introduced the laws of the new sovereign, the consequence would be, that the inhabitants of a ceded country must often become subject to laws which they had not the means of knowing; which might be locked up in a foreign language, and of which there could have been no promulgation. These reasons, upon which, doubtless, the principle of the law of nations, adverted to, was established, do not exist in favor of the establishment of the same principle in relation to those laws which may regulate the disposition of the sovereign's domain. These are excepted from the operation of the general principle of the law of nations here laid down. Each sovereign disposes of his royal lands in such manner as he may think proper. He may grant them from under his own hand; or, he may adopt the more convenient and judicious mode of delegating to others the power to grant them, subject to such instructions or laws, as to him may appear expedient. But when a sovereign disposes of territory by treaty, he thereby parts with the right to grant lands in such territory; the title to them having passed by such treaty to another; and the authority of all persons whom he may have authorized to grant lands for him, ceases with his own; and all laws relating thereto become inoperative, the subject upon which they were to operate, namely, the *title* of the sovereign, having been transferred to another. The consequence which follows this, is, not that those laws of the new sovereign, which should regulate the sale of his royal lands, would be thereby introduced into the ceded country, but, that no laws whatever, in relation to that subject, would be in force there; and therefore, that no lands could be there granted, except by the sovereign himself, until he should provide therefor by law, or otherwise.

It is possible for the legislative power of a government, so to form its laws, as to make them extend to, and be in force in countries thereafter to be acquired. This is a possible exercise of power, to which every government is competent. It is said by Mr. Livingston, in his answer to Mr. Jefferson, in the discussion of the question of title to the Batture at New Orleans, that this was done by Spain, in relation to her American possessions thereafter to be acquired. His words are, "A code had long been prepared for the government of the Spanish colonies in the *Indies*, by which name they designated all their American possessions. It is called the *Recopilacion de las leyes de las Indies*. It introduces the law of Castile, those of the Partidos and of Toro, that is to say, the whole body of the laws of Spain, in all cases not provided for by the laws of the Indies, and declares that the laws of that collection shall prevail in all the Spanish colonies, as well those

then established, as those which might in future be discovered or established."

"The moment then, that Louisiana became a Spanish province, it was subjected *de jure*, to the system of laws I have described; and *de facto*, none other has had the slightest authority since the transfer." (5th Am. Law Jour. p. 143.)

That such a code as is here described was prepared by the Spanish monarch for his American dominions is certain; and that it was the intention that this code should prevail in all the Spanish possessions in America, may likewise be admitted; but it by no means follows, that it was to prevail in all countries in America, which might thereafter be *annexed to the Spanish dominions by treaty, immediately on the ratification thereof, without any further act on the part of the Spanish government, to extend it to such acquired countries;* that it was to prevail in countries which, at the date of such annexation, should be inhabited and provided with laws, in countries whose language and laws should be foreign to such code; in countries where, from this cause, as well as for want of promulgation, the means of knowledge of the laws contained in such code, had not been afforded.—The intention of this legislative declaration is sufficiently satisfied, by allowing it to extend the laws to which it has reference, to all the then Spanish colonies in America, and to such as might thereafter be established in the said dominions, as well in countries then discovered, as in those thereafter to be discovered; and by allowing it also to express an intention, that the code was to be adapted to, and to prevail in, all the Spanish possessions in America, as well those acquired by treaty as others; but, with respect to the former, that they should be extended there, and made to prevail there, by an act of the government competent for such purpose, *after* such annexation by treaty.

A view of the Spanish dominions in America, at the date at which the code was given, favors the construction here contended for. The words themselves do not embrace the case of an acquired colony. It is scarcely to be supposed, that such a case was intended by the lawgiving power to be embraced by them; shall we allow a sense and interpretation, a comprehension to words beyond their necessary and proper import? Shall we do this in derogation of the principle of international law before mentioned; in violation of those maxims of justice that should receive a universal recognition? If this construction be not correct, at what point of time was the code of the *Indies* to be regarded as in force in Louisiana? Was it to be regarded as in force there, immediately on the occupation of the country by Spain, and without any promulgation or translation of them? or was some further act necessary on the part of Spain to introduce them there? This question must be answered in the affirmative. I do not, therefore, hesitate to deny, to the words quoted by Mr. Livingston, the effect which he imputes to them. The construction here given, agrees with that given by the Spanish government itself, so far as the acts of that government furnishes any construction.

When Spain took possession of Louisiana, in 1769, after the cession to her by France, no magic influence followed this act; the laws of the country were not thereby changed; nor had they been changed by the ratification of the treaty in 1762. This change remained to be produced by an act of sovereign power on the part of the Spanish government.

Accordingly, Count O'Reily, clothed with extraordinary powers, at the head of a military force, and as the Governor General of Louisiana, by pro-

clamation made immediately after his occupation of Louisiana, and for reasons therein mentioned, abolished the then existing form of government, and established a new one; abrogated the ancient laws, and introduced the code of the *Indies*, and took measures to provide the inhabitants with the means of becoming acquainted therewith. The code itself is introduced in qualifying terms, and it was clearly no part of the intention of that proclamation to introduce the 81st article of the ordinance of 1754, but only to introduce that portion of the *code of the Indies* which was of a general nature, and not that which had relation, exclusively, to the sale and grant of the lands of the Crown. It was not until the following year, that O'Reilly directed his attention to this subject. On the 18th of February, 1770, he published a set of regulations, prescribing the terms and conditions upon which lands should be granted.

It is manifest, from these regulations, that O'Reily did not consider the 81st article of the ordinance mentioned, to be in force in Louisiana. He does not pretend to derive his authority to grant lands from that ordinance; but he assumes the exercise of that power, as one among those given by his commission.

We have the testimony of *Morales*, the intendant, in the preamble to his regulations, that the power to grant lands belonged to the civil and military Government, after the order of the King of Spain, "that is, in virtue of the *order of the 24th August*, 1770, the powers of the civil and military Government both *centered* in the Governor General. To him belonged the power to divide and grant lands in virtue of this order.

If the 81st article of the ordinance of 1754, had been introduced into Louisiana, by the law of nations, in virtue of the Treaty, or by the Legislative declaration contained in the code of the *Indies*, or by the proclamation of O'Reily, and if it also authorized the Governor General of Louisiana to grant lands, why did O'Reily think it necessary to derive this power from the special terms of his commission? And why was a special order of the King deemed necessary for this purpose?

Morales, the intendant, in the preamble to his regulations, after reciting the power to distribute lands, which had been given to the intendancy, by the decree of the King of Spain, of 1798, proceeds to state the manner in which he intends to exercise that trust, thus: "wishing to perform this important charge, not only according to the 81st article of the ordinance of the intendants of New Spain, of the regulations of the year 1754, cited in the said article, and the laws respecting it, but also with regard to local circumstances; and those which may, without injury to the interest of the King, contribute to the encouragement, and to the greatest good of his subjects already established, or who may establish themselves in this part of his possessions." If the 81st article of the ordinance mentioned were in force in Louisiana, it was a law obligatory upon *Morales*, the intendant; a command to him, and from which he could not legally depart. How, then, could he perform this important charge "*with regard to local circumstances; and those which may, without injury to the interests of the King, contribute to the encouragement and to the greatest good of his subjects?*"

It must be that the intendant here considers the ordinance of 1754 in force only by his adoption, and expresses his intention to adopt it so far, and no farther, than local circumstances should make it expedient. The regulations of *O'Reily*, of *Gayoso*, and of *Morales*, in their provisions, and the general policy in which they are dictated, are, moreover, so repugnant to the

ordinance of 1754, as conclusively to show, that the latter was not in force in Louisiana, in the opinion of the framers of these regulations; for if the ordinance was in force in Louisiana, and the Governor General derived his authority to grant lands from the 12th section of it, he certainly could not annul the provisions of that ordinance from which he derived his authority, by making regulations repugnant thereto.

A comparison of the provisions of this ordinance with those of the regulations mentioned, will show, that there exists a general repugnancy between them, and an examination of the former will also show, that, if it be regarded as having been in force in Louisiana, no concession issued by the Lieutenant Governor, or commandant, can be considered authorized or valid.

The 1st section of the ordinance of 1754, provides, "that, from the date of this my Royal order, the power of appointing sub-delegate judges, to sell and compromise for the lands, and uncultivated parts of the said Dominions, shall belong hereafter exclusively to the Viceroys and Presidents of my Royal Audiencias of those Kingdoms who shall send them their appointment or commission, with an authentic copy of this regulation."

"The said Viceroys and Presidents shall be obliged to give immediate notice to the Secretary of State and Universal Despatch of the Indias, of the ministers whom they shall make sub-delegates in their respective districts and places where they have been usually appointed, or where it may seem necessary to appoint new ones, for his approbation."

"Those at present exercising this commission, shall continue. These, and those whom the said Viceroys and Presidents shall hereafter appoint, may sub-delegate their commission to others, for the distant parts and provinces of their stations, as was previously done."

This section prescribes the authority by which alone a sub-delegate can be appointed. It gives to the Viceroys and Presidents of the Audiencias the *exclusive power* of making those appointments; makes them the exclusive judges of the places and districts where such appointments may be necessary; and vests the sub-delegates with power to sub-delegate their commission to others for the distant provinces and places of their stations.

Had the Lieutenant Governor of Upper Louisiana, his appointment, as sub-delegate, from the Viceroys or Presidents of the Audiencias? or had he a sub-delegation from one so appointed? It has been proved on behalf of the petitioners, that he had not. The evidence, of the late Lieutenant Governor of Upper Louisiana, to this point, is, that he, and his predecessors, acted as sub-delegate, *without* any commission, as such; that he, and they, performed the functions of that office in virtue of their commission as Lieutenant Governor which issued from the Governor General of Louisiana; that the practice in other parts of the province, in this respect, was the same as in Upper Louisiana; in all, the Lieutenant Governors were, *ex officio*, sub-delegates. An appointment from the Viceroys or Presidents of the Audiencias of the Lieutenant Governor to be sub-delegate, is not permitted to be inferred from the performance of the duties of that office; the absence of such appointment, as well as the authority, in virtue of which the duties of the office were assumed, having been proved. According to this evidence, the Lieutenant Governor of Upper Louisiana was not a sub-delegate within the intention of the ordinance. Nothing can be more clear, than that a concession of lands by a Lieutenant Governor who had not been appointed a sub-delegate by the authority prescribed in the recited section of the ordinance, can be allowed to possess any validity, if that ordinance be considered as

having been in force. The 12th section of this ordinance, which is relied upon on behalf of the petitioners, as authorizing grants of land in Louisiana by the Governor General, does not vest that officer with power to appoint sub-delegates; this power having been exclusively given, by the 1st section, to the Viceroys and Presidents of the Audiencias, but vests him with precisely the same power and jurisdiction, in relation to the sale and grant of lands, which had been given in previous sections to the Audiencias, and directs, in addition, that certain other officers shall be associated with him, by whose advice confirmations are to issue.

The 12th section is in these words: "In the distant provinces of the Audiencias, or where the scene intervenes, as Carracas, Habanas, Cartagena, Buenos Ayres, Panama, Yucatan, Camana, Margarita, Puerto Rico, and in other of like situation, confirmation shall be issued by their Governors, with advice of the Officiales Reales, King's (Fiscal Minister) and of the Lieutenant General Letrado, where he may be stationed. The same officers shall also determine the appeals from the sub-delegate, who shall have been, or shall be appointed in each one of the said provinces and islands, without recourse being had to the Audiencia, or chancery of the district, unless the two decisions be at variance, and then this is to be officially, and, by way of consultation, to avoid the expenses of appeal. Wherever there shall be two Officiales Reales, the younger in office shall be the advocate of the Royal treasury in these causes, and the elder, the associate judge of the Governor, using the aid of counsel where there is no Auditor or Lieutenant Governor; and if the question is a point of law, by applying to any lawyer within or out of the district, and where there shall be but one Official Real, any intelligent person of the place may be appointed as the advocate of the Royal treasury.

"It shall also be the duty of the Governors, with their appropriate judges, to examine concerning the compositions of the sub-delegates, as provided in respect to the Audiencias."

The 5th section, which prescribes duties to the Audiencias, and the other officers to whom the power of confirmation is given by the ordinance, meaning the Governors mentioned in the 12th section, is in these words: "The possessors of lands sold, or compromised for, by the respective sub-delegates, from the said year 1700, to the present time, shall not be molested, disturbed, nor informed against now, nor at any time, if it shall appear that they have been confirmed by my Royal person, or by the Viceroys and Presidents of the respective districts while in office; but those who shall have held their lands without this necessary requisite, shall apply for their confirmation to the Audiencias of their district, and to the other officers on whom this power is conferred by the present regulation. These authorities having examined the proceedings of the sub-delegates, in ascertaining the quantity and value of the lands in question, and the patent that may have been issued for them, shall determine whether the sale or composition was made without fraud or collusion, and at reasonable prices. This shall be done with the judgment and advice of the Fiscals. After considering every circumstance, and the price of the sale or composition, and the respective dues of "*mediana*ta" (first fruits of the half year) appearing to have been paid into the Royal treasury, and the King's money being again paid in the amount that may seem proper, the confirmation of the patent of possessors of these lands, shall be given in my Royal name, by which the property and claim in said lands shall be rendered legal, as well as in the waters and uncultivated parts,

and they and their successors, general and particular, shall not be molested therein.

In addition to the duties prescribed in this section, the 9th prescribes, that "the Audiencias shall issue the confirmations by provinces, and in my Royal name, after an examination by the Fiscal as before said, without greater judicial expense to the parties than what is required by the regulated prices for such act.

"For this purpose, they are to collect from the sub-delegates of their district the proceedings that have taken place in the sale or composition of that for which confirmation shall be required. With these, and in proportion to the estimated value of the lands, and considering, at the same time, the benefit which it was my pleasure to grant to these my subjects, by relieving them from the expense of applying to my Royal person, they shall determine the sum to be paid me for this new favor."

In these sections, no power is given to the Audiencias, or to the Governors, to appoint sub-delegates. But the intention to make *sales*, and not *gifts* of lands, which is perceivable in them, furnishes ground for a further objection to the validity of the concession in this case, if the ordinance extended to Louisiana. By these sections, no confirmations are to be made, except *upon sales, or compromises, for a consideration in money proportioned to the estimated value of the land, the payment of which consideration is to precede the confirmation;* and, in addition to being compelled to pay the value of the land, the purchaser is required to pay the dues of *medianata*, (first fruits of the half year) and also, to pay for the favor which it was the Royal pleasure to confer, in relieving him from the expense of applying to the Royal person to obtain confirmation.

The laws, 14 and 15, cited in the second section of the ordinance, the requirements of which laws are there directed to be regarded, show that the King's general intention is to sell his lands. In the former of these laws he declares, that, "as we have succeeded to the entire seignory of the Indies, and all the lands and soil that have not been granted away by the Kings, our predecessors, or by us, in our name, belonging to our *patrimony* and our royal crown, it is proper that all lands held under false and illegal titles should be restored to us; and that all the land that shall remain, after receiving what may be necessary for constructions, commons, and pasturages, for the places which are necessary, not only for the present but for the future; and after distributing to the Indians what may be necessary for tillage and herding, confirming the land they now hold, and granting them more, shall be free for grants and dispositions thereof at our pleasure," &c. And in the 15th law, after having, among other things, directed an adjustment of title, it is directed, that "all the lands that shall remain to be adjusted shall be offered at public sale, and knocked down to the highest bidder," &c.

The 8th section of the ordinance directs that "a *proper reward* shall be given to those who shall inform of lands, grounds, places, waters, and of uncultivated and desert lands, and shall be allowed a moderate portion of those of which they shall have informed as being occupied without title;" the 7th section having authorized the sub-delegate to determine the quantity to be granted for such service.

A view of the whole ordinance removes all doubt as to the general intention to *sell* and not to *give* the royal lands, except to the inhabitants of towns for pasturage and commons, according to their wants, and to the Indians, as mentioned in the laws, 14 and 15, just recited, and except so

far as the grants which may be made to those who shall give information against persons occupying lands without title, authorized by the 7th and 8th sections, may be considered as in the nature of gifts.

From this view of the ordinance, the ambiguous meaning of the term *mercedes*, to be found in its preamble, produces no difficulty. The sense in which that *term* must be received, is to be determined by a view of the whole ordinance; it need not necessarily be interpreted to mean gifts, but may as well be interpreted to mean grants. If, however, it necessarily imported gifts, effect is sufficiently given to it in this sense, by the gifts to be made to the inhabitants of towns for commons and pasturage, and to be made to the Indians, as directed in the 14th and 15th laws, before adverted to.

If, then, this ordinance was to be be made the basis upon which the rights to confirmation in this case should be determined, the claim could not be confirmed, on the ground that the concession was not made upon a *sale for money*, and at the *reasonable value* of the land, but was made in consideration of *public services;* a consideration unknown to the ordinance, except in the case of an *informer*, as authorized in the 7th and 8th sections, where lands are authorized to be adjudged in moderate quantities to those who shall give information of them as being occupied without title. This is the only species of *service* for which this ordinance authorizes a concession. This is the only case in which a sub-delegate is made the judge of the value of services. He is not made the judge of the value of services of the nature of those upon which the concession in question is alleged to have been issued.

From this examination, it will appear to be the interest of the claimant to deprecate a decision which is to make this ordinance the rule by which his rights are to be tried. The repugnancy between this ordinance on the one hand, and the regulations of O'Reily, Gayaso, and Morales, on the other, is apparent in the end and objects of each, and in their respective provisions. To raise a *revenue* was the leading object of the former, and the *sale of lands* the means to be used for its accomplishment; and the *settlement of the country* and *interests of tillage* were the objects of the latter, and *donations of land* were the means to be used for securing these objects. The repugnancy is such that both cannot exist together: one must give way to the other—one must be regarded as void of authority.

The regulations, especially those made by the governors, were the acts of the supreme authority in Louisiana; the acts of that authority, which the inhabitants there regarded as both legislative and executive, which, in 1799, abolished the former government, and established a new one; abrogated the existing laws, and introduced a new code; that the regulations were the acts of an authority so transcendent, furnishes a presumption in favor of their legality. That the acts of the supreme authority in Louisiana must be regarded as *prima facie* authorized, is a proposition, the admission of which appears to be necessary to entitle any of the acts of that government to be regarded as valid. The presumption arising in favor of the authority of the Governor General to make regulations for the distribution of the royal lands, is fortified by the length of time during which grants were made in pursuance of those regulations; and which, it is reasonable to believe, were made with a knowledge of the Spanish Court. And is further supported by the recital contained in the preamble to the regulations of Morales, that *the power to grant lands belonged to the civil*

and military government, since the order of the King of 1770. What this order was; what power, what discretion it vested in the Governor General in making grants of the royal domain, and what restrictions it imposed, is left to be inferred (in the absence of the order) from the regulations themselves, and the other acts of the Governor General under it. In relation to these regulations, they may be regarded as rules which the governors prescribed to themselves, and to the inhabitants of the Province, and bear evidence that they had their source in a discretionary power. They are, therefore, to be regarded as laws in respect of the subject which they regulate; this conclusion follows from what has been said, and is consistent with a doctrine already laid down, that no grant of the public domain can be regarded as legal, except made in virtue of an authority from the Crown; such authority in this instance being presumed. That the regulations of O'Reily are of a date anterior to the order of the King, of 1770, does not appear to affect their authority. There would not, necessarily, be such a repugnancy between this order and those regulations, as to annul the latter. The subsequent sanction of these, and the presumption of their being authorized, thence arising, must be considered sufficient to give them the authority of law, whether the power to make them was comprised in the general and extraordinary powers given to the Governor General, O'Reily, previous to the order of 1770, or not.

From what has been said, it appears that the regulations of O'Reily, of Gayaso, and of Morales, are the *only laws* which regulated the distribution of lands in Louisiana, under the Spanish Government. Was the concession, in this case, authorized by these laws? It is not pretended that it was; and that it was not, is unquestionable. But it is insisted, for the petitioners, that the regulations of O'Reily did not extend to Upper Louisiana, and that those of Gayaso and of Morales, being of a date subsequent to the concession, ought not to affect it; that if the regulations did not authorize this concession, they did not prohibit it; and that, as it is not prohibited, a presumption arises in favor of its legality; that this presumption sustains the validity of the concession, and is sufficient to authorize its confirmation by this court.

In examining this reasoning, if it be admitted that the concession of an inferior officer is to be considered as *prima facie* authorized, this presumption, like all others, can stand only so long as it shall remain unopposed by evidence, or presumptions of a higher nature. A presumption can weigh only so far as it is calculated to induce belief; and so soon as it shall cease to do this, in consequence of the existence of facts, inconsistent with such belief, it ceases to make a *prima facie* case—ceases to furnish ground upon which a decision can rest. The presumption which arises in favor of the validity of the acts of the supreme authority, especially such as the enactment of regulations, and the acknowledgement of the authority of these for a series of years, is of a higher nature than that which arises in favor of the legality of a single act, or even a series of acts, such as concessions of land by the Lieutenant Governor, particularly when these acts are to be subject to the approval and confirmation of that supreme authority which gave those laws that were to regulate the subject of concessions.

Upon what reason is it to be believed that the Governor General intended to authorize grants of land in Upper Louisiana, upon principles different from those upon which grants were to be made in every other part of the province? Upon what reason were grants of land to be limited in quantity

in Natchitoches, Attakapas, and Opelousas, and unlimited in Upper Louisiana? And what policy dictated the limitation of grants in the latter place to 800 arpents, which we find in the 9th and 10th sections of Gayaso's regulations, and in the 1st section of the regulations of Morales, if before these regulations there was no reason for a limitation? Was not the extension of settlement and the cultivation of the soil as much to be encouraged by the distribution of lands in Upper Louisiana as elsewhere in the Province? Why, in Upper Louisiana, should grants have been made without regard to the means of the cultivator, or without regard to any cultivation whatever, when these particulars were to be attended to with strictness in every other part of the Province?

The regulations of O'Reily were made for the entire Province. They were made, as we are informed in the preamble to them, in consequence of petitions from the inhabitants, and of the information derived by the Governor in his visit through the country, and in consequence of the reports of the inhabitants assembled in each district by the Governor's order. They were made to "fix the extent of the grants of lands which should thereafter be made, as well as the enclosures," &c. Many of the articles in the regulations refer to particular places, and have a local application merely; but the same policy, namely, the extension of the settlements, and the interest of agriculture, dictated them all.

The regulations having, in previous sections, authorized small grants to be made, in proportion to the means of the cultivator, the 8th section directs that "no grant in the Opelousas, Attakapas, and Natchitoches shall exceed one league in front by one league in depth; but when the land granted shall not have that depth, a league and a half in front by half a league in depth may be granted;" and the 9th article directs, that, "to obtain in the Opelousas, Attakapas, and Natchitoches a grant of forty-two arpents in front by forty-two arpents in depth, the applicant must make appear that he is possessor of one hundred head of tame cattle, some horses and sheep, and two slaves to look after them; a proportion which shall always be observed for the grants to be made of greater extent than that declared in the preceding article."

It would appear that the policy apparent in O'Reily's regulations did extend itself to the Province of Upper Louisiana. But it is a mistake to suppose that a prohibition was necessary to deprive the Lieutenant Governor of the power of making grants, and that, without a prohibition, his grant would be valid. The reverse of this is true—his grants are invalid unless authorized by an express authority from the King, either as derived through the Governor General, in the form of laws, or otherwise. Can it be believed that there existed an express authority which authorized this grant of 10,000 arpents, without any reference to settlement, cultivation, or property qualifications? The view which has been taken excludes such belief; and with it, every presumption in favor of the legality of the concession.

But the evidence of the late Lieutenant Governor is introduced to prove, that, in Upper Louisiana, that officer was unrestricted as to quantity, though the witness does not pretend that he had any authority, other than the law, to make such concessions. The amount of his evidence is, that the law clothed him, as Lieutenant Governor, with power to make concessions, and imposed no limitation as to the extent of the grant. Does the witness mean to prove that there existed any *unwritten law*, in virtue of which the officer mentioned, or any other officer of the Crown, was authorized to make grants

of the royal domain? If he does, the evidence is untrue. It may be assumed, with certainty, that *no unwritten law, no principle of the Spanish Constitution* gives to any officer of the Crown the power to grant the royal lands; and that such power, to be legitimate, must be derived from some authority other than the Constitution of Spain, or any unwritten law, usage, or custom. An express *written authority* was indispensably necessary to authorize the Lieutenant Governor of Upper Louisiana to grant lands. The existence of such authority might be inferred from circumstances, but its existence is indispensable to the validity of a grant. Can it be inferred in this case, that there existed a written authority in the nature of a law, or otherwise, in virtue of which the Lieutenant Governor of Upper Louisiana could grant lands, without regard to settlement, cultivation, the means of the cultivator, or the extent of the grant? It cannot, because the general law, as well as the general policy of the Spanish government, as evinced in all the regulations mentioned, is at war with such inference. If such authority did exist, it being an exception to the general law and policy, must be shown, and is not to be implied or presumed. The witness proves no such authority; he refers to none; he alleges the existence of none, in such way as to prove any thing. If he intended to prove the meaning of the regulations, that is not the subject of proof; these the court must construe for itself; if he means there was written law, which gave the alleged authority, the better evidence, the law itself, must be produced; if he means that there existed an unwritten law which gave the authority, the witness does not appear to be so learned in legal science as to make his opinion of any value; could it be considered as a foreign law, and therefore the subject of proof, and could it be at all admitted as possible, (which however it cannot) that any unwritten law could give any authority, or pertain to the subject. This evidence, then, does not vary the conclusion before made, that there existed no authority for the concession in question.

But if it were conceded that this concession furnished of itself a presumption of its own legality, and that no circumstances exist to impeach this presumption, this alone would not be sufficient to authorize its confirmation; the concession itself must be such as "might have been perfected into a complete title, under and in conformity to the laws, usages, and custom, of the Spanish government;" and the claim must be such as "the principles of justice" require to be confirmed.

The 1st section of the act of Congress, which refers this species of claim to the decision of this court, declares, "That it shall and may be lawful for any person or persons, &c. claiming lands, tenements, or hereditaments, in that part of the late province of Louisiana which is now included within the State of Missouri, by virtue of any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued, before the 10th day of March, one thousand eight hundred and four, by the proper authorities, to any person or persons resident in the province of Louisiana, at the date thereof, or on or before the tenth day of March, one thousand eight hundred and four, and which was protected or secured by the treaty between the United States of America and the French Republic, of the thirtieth day of April, one thousand eight hundred and three, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs, of the government under which the same originated, had not the sovereignty of the country been transferred to the United States, in each and every such case, it shall and may be lawful for such person or persons, &c.

to present a petition to the District Court of the State of Missouri, setting forth," &c. The section then proceeds to direct what facts the petition must contain, and after having stated these, declares that the said court is thereby "authorized and required to hold and exercise jurisdiction of every petition presented in conformity with the provisions of this act, and to hear and determine the same," &c. "in conformity with the principles of justice, and according to the laws and ordinances of the government under which the claim originated." The 2d section declares, "That every petition which shall be presented under the provisions of this act, shall be conducted according to the rules of a court of equity;" and further declares, "That the said court shall have full power and authority to hear and determine all questions arising in said cause, relative to the title of the claimants, the extent, locality, and boundaries, of the said claim, or other matters connected therewith, fit and proper to be heard and determined; and by a final decree, to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived; and all other questions properly arising between the claimants and the United States." These discordant provisions of this act, make it difficult to ascertain its intention, as to the rule of decision which the court is to adopt.

It is to be remarked, that the act vests a new jurisdiction. The first part of the first section defines, with great precission, the cases of which the court is authorized and required to take jurisdiction. Any claim not included in that description, is not within the jurisdiction of the court. To give jurisdiction, the claim must be in virtue of a French or Spanish grant, or of a concession, warrant, or order of survey. These are the only cases to which the jurisdiction extends. But the description does not stop here; other circumstances must attend it; a further description must apply to each case, to bring it within the jurisdiction. The grant, concession, warrant, or order of survey, which is to form the ground of claim, must have been "legally made, granted, or issued, before the tenth day of March, one thousand eight hundred and four, by the proper authorities, to any person or persons resident in the province of Louisiana, at the date thereof;" it must have been "protected or secured by the treaty between the United States and the French Republic, of the 30th day of April, 1803;" and it must be such as "might have been perfected into a complete title, under, and in conformity to, the laws, usages, and customs, of the government under which the same originated, had not the sovereignty of the country been transferred to the United States." If the claim is without any member of this description, the jurisdiction of the court cannot embrace it. If, for instance, it was not originated before the 10th day of March, 1804, or by the proper authorities, or could not have been perfected into a complete title under, and in conformity to, the laws of the government from which it was derived, jurisdiction would not attach. If, however, jurisdiction attaches to the case in consequence of its being of the description mentioned in the act, it does not follow that the claim would necessarily be entitled to confirmation; for although the claim, at its inception, should be such as might have been confirmed, the term "might," implies possibility, and such a claim, therefore, might or might not have been confirmed, according to circumstances, and as the principles of justice should require; the claimant might not have complied

with the conditions of the grant, or the commands of the law; or he might have abandoned his claim. Such a claim, therefore, the court in the latter part of the section, is authorized "to hear and determine in conformity with the principles of justice, and according to the laws and ordinances of the government" from which it is derived.

The first part of the 1st section not only defines the jurisdiction of the court, but also furnishes a rule of decision, which the court is necessarily to regard in determining the validity of the claim. Among other things, it requires that the claim must be such as "*might have been perfected into a complete title under, and in conformity to the laws, usages, and customs* of the Government from which it is derived, had not the sovereignty of the country been transferred to the United States." The claim before the court, is for 10,000 arpents of land, founded upon a concession issued in 1796, by the Lieutenant Governor of Upper Louisiana; and public service is the consideration upon which the concession is alleged to have been issued. No location of this concession was made until the 20th of February, 1804, some time after the treaty of cession must have become known to the claimant. No settlement, no improvement or cultivation is alleged to have been made; nor, in issuing the concession, was regard had to the means of the claimant. In conformity with what law of the Spanish Government could this claim have been confirmed? Not in conformity with the regulations of O'Reily. It is the intention of these, that grants should be made with a view to settlement and cultivation, and that the property and qualifications of the applicant should determine the extent of the grant. It is their further intention, that a failure to settle or cultivate, should occasion a forfeiture of the grant: they authorize no grant which is not subject to these conditions; they authorize no grant to be made except with regard to the means of the applicant; nor do they authorize any grant of a greater extent than a league square.

Neither would the regulations of Gayoso, or of Morales, have authorized the confirmation of the present claim. They present the same objections to its confirmation that have been already adverted to, as growing out of the regulations of O'Reily. Each of these regulations contain provisions not to be reconciled with the idea that the present concession could have been confirmed, in conformity with law, had no change of sovereignty taken place. They equally evince an intention to authorize grants, with a view to tillage, and the settlement of the country, and to secure these objects, they required that, in all grants to be made, regard should be had to the family and property of the grantee, to determine the extent of the grant.

The 9th section of Gayoso's regulations directs, that, "to every new settler, answering the foregoing description, and married, there shall be granted two hundred arpents of land; fifty arpents shall be added for every child he shall bring with him."

The 10th section of the same regulations declares, that, "to every emigrant possessing property, and uniting the circumstances before mentioned, who shall arrive with an intention to establish himself, there shall be granted 200 arpents of land; and, in addition, 20 arpents for every negro that he shall bring: *Provided, however*, that the grant shall never exceed 800 arpents to one proprietor. If he has such a number of negroes as would entitle him, at the above rate, to a larger grant, he will also possess the means of purchasing more than that quantity of land, if he wants it, and it is necessary, by all possible means, to prevent *speculations* in lands."

Both these sections refer, expressly, to the province of Upper Louisiana, then known by the name of Illinois, as manifestly appears by the context.

The 1st section of the regulations of Morales prescribes, that, "to each newly arrived family who are possessed of the necessary qualifications to be admitted among the number of cultivators of these provinces, and who have obtained the permission of the Government to establish themselves on a place which they have chosen, there shall be granted *for once*, if it is on the bank of the Mississippi, four, six, or eight arpents in front on the river, by the ordinary depth of forty arpents, and if it is at any other place, the quantity which they shall be judged capable to cultivate, and which shall be deemed necessary for pasture for his beasts, in proportion according to the number of which the family is composed; understanding that the concession is never to exceed 800 arpents in superficies."

The 10th section of the last mentioned regulations prescribes, that, "in the posts of Opelousas and Attakapas, the greatest quantity of land that can be conceded shall be one league front by the same quantity in depth, and when forty arpents cannot be obtained in depth, a half a league may be granted, and for a general rule, it is established, that, to obtain in said posts a half a league in front by the same quantity in depth, the petitioner must be owner of 100 head of cattle, some horses and sheep, and two slaves; and also in proportion for a larger tract, without the power, however, of exceeding the quantity before mentioned."

The first section of the regulations last mentioned, after having directed the grants which are to be made on the Mississippi, directs that, *if made at any other place*, "the quantity which they shall be judged capable to cultivate, and which shall be deemed necessary for pasturage for his beasts, in proportion according to the number of which the family is composed; understanding that the concession is never to exceed 800 arpents in superficies." This section lays down the general rule which is to prevail throughout the province. The larger grants authorized at Opelousas and Attakapas by the 10th section, is an exception to this general rule, which exception is confined to the posts mentioned: so that the regulations of Morales limit grants in Upper Louisiana, like those of Gayoso had done, to 800 arpents, while they authorized them at the post of Opelousas and Attakapas to the extent of a league square. It does not appear to be necessary to inquire into the reasons upon which grants a league square were authorized at the posts mentioned, while 800 arpents only could be granted, under any circumstances, at any other place in the province. It is worthy of observation, however, that the regulations of O'Reily contain a like exception, in favor of these posts, and also of Natchitoches.

The 14th section of Gayoso's regulations, operates directly upon the present claim; it declares, that "the new settler to whom lands have been granted, shall lose them without recovery, if, in the term of one year, he shall not begin to establish himself upon them, or if, in the third year, he shall not have put under labor ten arpents in every hundred."

So, likewise, does the 4th section of the regulations of Morales, which declares, that "the new settlers who have obtained lands, shall be equally obliged to clear and put in cultivation, in the precise time of three years, all the front of their concessions, or the depth of at least two arpents, on the penalty of having the lands granted, remitted to the domain, if this condition is not complied with."

That the regulations, in which these sections are found, are of a date subsequent to the concession, in this case, forms no reason why they may not impose duties on the claimant, and prescribe forfeitures for a failure to perform those duties. Might not a forfeiture of the present claim have been adjudged under each of these sections? No settlement, no improvement was made, as required by either. This omission, it is declared by each of these sections, is to occasion a forfeiture of the claim.

The right of the party, such as it was at the change of the government, is that upon which the court is to decide. If, before this time, it had been abandoned, forfeited, or in any degree impaired, under the laws of Spain, the objection to its confirmation, which Spain might have raised, for either of these causes, may be raised with the same force before this court. The precise claim which existed against Spain, at the date of the transfer, is that which the United States is bound to satisfy. What, then, could the ancestor of the petitioners, at the date of the transfer, have claimed against Spain, on account of this concession? Could he have claimed a confirmation, without having shown a performance, on his part, of all that is required in the 4th and 14th sections, above recited? Could he have claimed a confirmation of his title, except in virtue of some law? In virtue of what law could he have demanded this? What law authorized him to expect its confirmation? If there was none, the claimant could have no just ground to expect that his claim would have been confirmed, and therefore no ground of complaint.

But complete titles have been produced to show, that, in some instances, the regulations have not been conformed to by the Governor General, and by the Intendant, in confirmations made by them; and it is thence insisted, that they were not in force in the province of Upper Louisiana, or that if they were in force there, they were only intended to provide for grants to emigrants and new settlers, and were not intended to provide for grants to the inhabitants generally; and that some law must be presumed, which authorized grants of land to the inhabitants generally, in pursuance of which, the confirmations mentioned were made. In answer to this, it may be observed, in addition to what has been before said relative to this subject, that the regulations of Gayoso refer, by express words, to the province of Upper Louisiana, by the name of Illinois, the name by which it was then known; and that the regulations of Morales are general, and are indubitably intended to extend to every part of the province. This is equally the intention of each set of the regulations which have been mentioned. The regulations which we have, do not permit us to believe that there existed others; Morales, in the preamble to those made by him, mentions those of O'Reily, and of Gayoso, in a manner which implies that these were all of which he had any knowledge, and shows, that he was making regulations which were to offer the *only means by which lands were to be obtained;* his language is, "That all persons who wish to obtain lands may know in what manner they ought to ask for them, and on what conditions lands can be granted or sold; that those who are in possession, without the necessary titles, may know the steps they ought to take to come to an adjustment; that the commandants as sub-delegates of the intendency, may be informed of what they ought to observe," &c. This preamble excludes the presumption, that other laws existed, by which titles could be obtained; and the regulations themselves, exclude all belief that any law existed, under which a confirmation of the title in question could have been claimed.

That the Governor General, who exercised a legislative power generally, and particularly for the distribution of lands, should feel himself authorized to dispense with the observance of any of the provisions of his own laws, is not strange. Such a dispensing power is incident to the legislative department of every government. Legislation implies discretion, in respect of the rules which are to be prescribed. The Governor General, with whom it was to exercise the power to make the law, could change it, or could dispense with its observance, either on his part, or on the part of the claimant; and it is probable that instances of the exercise of this dispensing power were not rare. That he should have been influenced by the particular circumstances of any case not within the law, or even by personal considerations of regard, in making grants not provided for by his own laws, is a presumption more to be relied upon, than that which is contended for on the part of the petitioners.

In relation to the disposition of the Royal domain, the Governor General and the Intendant successively represented, to some extent, the power of the King; to what extent, we are left to infer from their recorded acts only. The Congress of the United States succeeded to the powers of the Intendant, and of the crown of Spain. What portion of this power has Congress delegated to this court? It cannot be admitted, as contended for at the bar, that, because the Governor General, out of the plenitude of his power, or the Intendant, on succeeding to that power, might have confirmed the present claim, notwithstanding there existed no law under which its confirmation might have been required; that, therefore, this court may confirm it. It cannot be admitted that this court succeeds to the entire power of the Intendant. Here it is proper to observe the vast distance which, in general, separates the boundary that limits the inquiry of a court of justice, from that which limits the inquiry of a Legislature, in relation to the considerations which may properly influence the decisions of the one, or the acts of the other, especially in questions between individuals and the government. Courts are governed by rules of law: these form with them the subject of inquiry; the limits of their jurisdiction. But it is otherwise with the legislature: the defect in the law, its inadequacy to afford redress, is, in general, not only the cause of, but is necessary to justify, an application to that body. And on an application to this body for any purpose of relief, the claim to such relief may be urged upon every consideration which might be supposed to influence the deliberation of wise and good men, in the exercise of a discretion limited only by the constitution. That justice, clemency, and fostering care, which a government should extend to its citizens; that policy which should direct its measures, may all be invoked in support of a claim, when the legislature is the tribunal addressed. There must necessarily be reposed a latitude of discretion, equal to every emergency, in some department of every government, to enable it fully to display either wisdom or justice. This discretion, the King of Spain, and, to some extent, the Intendant, might have exercised in relation to applications for grants or confirmations. What portion of this discretion has Congress thought proper to delegate to this court, is a question which again recurs. The answer is, none. They have left it in the exercise of those powers which are common to courts of justice in general; in its determinations, they have confined it to rules of law; there are no words in the act which show an intention, on the part of Congress, to clothe it with the extraordinary powers of the legislature, in relation to these claims; to confer upon it the power to determine what would be ex-

pedient to be granted; what would be liberal, what magnanimous, on the part of the government, to grant. These considerations may properly be addressed to the national Legislature. The constitution has confided to Congress the power to dispose of the lands, and other property, of the United States. It is, therefore, with Congress to determine, what, in relation to these claims, is just, or expedient to be granted; what would be liberal, what magnanimous, on the part of the government, to grant. These are powers which belong to Congress; those which they have conferred upon this court, in relation to these claims, are, to hear such of them as might have "been perfected into a complete title under, and in conformity to, the laws, "usages, and customs," and to determine them "in conformity with the "principles of justice, and the laws and ordinances of the government under "which they originated."

All that the laws authorized the claimant to demand of the former government, the principles of justice require of the United States to grant; and to determine this, is the power which has been conferred upon this court.

This the claimant had a right to expect and to demand of the United States; and so far, his expectation, his demand, would be founded in legal obligation.

But he could have no just expectation, no expectation founded in law, that his title would be perfected, where such title had been originated without the authority of law; and this is more emphatically true, where it had been originated against the policy or the express provisions of the law.

In answer to that portion of the argument, on behalf of the petitioners, which denies the force of law to the regulations of Morales, in Upper Louisiana, for their supposed want of promulgation, it is only necessary to remark, that such a publication is proved, as must have brought them to the knowledge of the ancestor of the petitioners. The official station which he held, does not permit us to believe, from the publication proved, that he could have been ignorant of the forfeiture to be incurred by a failure, on his part, to comply with the commands contained in these laws. It is, therefore, unnecessary to decide, whether, according to the principles of justice which prevail in our courts, this tribunal can regard a forfeiture as incurred, even under the Spanish government, and by a subject of that government, for disobedience to laws which had never been promulgated.

The 2d section of the act which directs the question of the validity of the "title" to be decided "according to the law of nations; the stipulations of "any treaty, and proceedings under the same; the several acts of Congress "in relation thereto; and the laws and ordinances of the government from "which it is alleged to have been derived;" remains to be briefly considered. The only stipulation in any treaty, which has been brought to the view of this court, is contained in the 3d article of the treaty by which Louisiana was acquired. By this stipulation, the inhabitants of the ceded country were to be *maintained and protected* in their *property*. It protects rights, such as they were; it does not confer or enlarge them; it does no more than the law of nations would have done, in the absence of any stipulation whatever. The inhabitants of Louisiana, under this stipulation, have the same claim against the United States, in relation to the soil, that existed against Spain at the date of the transfer, and none other.

It is insisted for the petitioners, that the proclamation of Salcedo and Cassa Calvo, commissioners on the part of the Spanish government to deliver the possession of Louisiana to France, under the treaty between France and Spain, confirms all grants and concessions.

By the treaty of St. Ildefonso, of the 1st of October, 1800, Spain ceded Louisiana to France; by the treaty of the 30th of April, 1803, the same country was ceded to the United States, and on the 18th of May, 1803, the proclamation mentioned, was issued; nearly three years after Spain had parted with her right to the country.

If it were any part of the object of that proclamation to confirm grants or concessions, or to declare the intention of the treaty of St. Ildefonso, in relation thereto, it might then become necessary to consider the effect of such act, either as it might serve as an exposition of the treaty, or the ground of a title. It does not appear, however, to be any part of the intention of the proclamation, either to confirm titles, or to declare that such is the effect of the treaty. Its words are, "His Majesty makes known, that, by the wishes he entertains for the advantage and peace of the inhabitants of the colony, he expects, from the sincere and close amity and alliance which unites the Spanish government to that of the Republic, that the latter will give orders to the Governors and other officers employed in its service in the said colony and city of New Orleans, to the end, that the churches and other houses of religious worship, served by the curates and missionaries, should continue on the same footing, and enjoy the same privileges, prerogatives, and immunities, which were granted to them by the titles of their establishments; that the ordinary judges continue equally as the tribunals established, to administer justice according to the laws and customs adopted in the colony; that the inhabitants should be maintained and preserved in the peaceable possession of their property; that all concessions* or property of any kind soever, given by the governors of these provinces, be confirmed, although it had not even been done by his Majesty."

The plain sense of this, is, that his Majesty expects that the French Republic will give orders to the Governors and other officers employed in its service, in the colony and city of New Orleans, to the end, that "all concessions, or property of any kind soever, given by the Governors of these provinces, be

* *Concession.*—This is believed to be an erroneous translation; that *grants*, and not *concessions*, would be the true translation.—Whether the proper translation would make the term *grants* or *concessions*, was not deemed material to the determination of the cause. The document, in the original language, has not therefore been adverted to.

It is remarkable, however, that the words, "even though they had not been confirmed by his Majesty," which immediately follow, imply, that the confirmation by the King was necessary to give a complete title. The words are not, *even though they had not been confirmed by the Governor General, or Intendant*, as they would have been, if, in the opinion of the authors of the proclamation, those officers could have given complete titles; and more particularly, if the words had reference to concession, these being subject to immediate confirmation by the Governor General, or the Intendant, on the latter succeeding to the power of the former. The inferences which would seem to follow, are, that the confirmation of the King was necessary to a complete title; and that the proclamation has reference to *grants* as distinguished from concessions: the latter term applying to the act of the Lieutenant Governor by which the title was originated, and the former to the act of the Governor General, or the Intendant, which confirms that title. These inferences appear to be fortified by the fact, that the concession was to be referred to the Governor General, or Intendant, for confirmation, and not to the King; that if the title had to be referred to the King for his confirmation, this reference would not take place until after the confirmation by the Governor General, or Intendant; and by the additional fact, that the titles mentioned are those which had been "given by the Governors of these provinces," meaning, the Governors who had successively administered the government of the then provinces, and not to the titles which had been given by the commandants of posts, who in some places in the province had, and in others had not, the title of Lieutenant Governor. The titles, therefore, given by the commandant of a post, or a Lieutenant Governor, are not supposed to be referred to in the proclamation. All this is mere suggestion.

confirmed, although it had not even been done by his Majesty." His Majesty then expects, that these orders will issue from the French Republic, but, until such orders should issue, and confirmations take place under them, the concessions would remain unconfirmed. Have those orders ever issued from the French Republic, and the confirmations been made in pursuance thereof? Upon what is this expectation of his Majesty predicated? Not upon any stipulation in the treaty; No! it is predicated upon the "sincere and close amity and alliance which unites the Spanish government to that of the Republic;" and upon "the wishes his Majesty entertains for the advantage and peace of the inhabitants of the colony." The hypocrisy which could presume to mock a people with such grounds of hope, is aggravated no less by the ignorance upon which it presumes, than by the reflection, that its author had wholly disregarded that interest, at a time when he might have secured it, about which he now affects to feel solicitude!! This proclamation then, is no confirmation; no exposition of the treaty of St. Ildefonso; and as regards the right of property, it is not a law, nor intended to be such; it is a notice merely. It is therefore unnecessary to consider whether it could be regarded as a proceeding under, or resulting from, a stipulation in any treaty; or how far this clause in the act is qualified by the provisions contained in the the previous section.

That part of the act, which requires the court to determine "the question of the validity of the title, according to the several acts of Congress," &c. has been adverted to, on behalf of the claimants, but not seriously relied upon, as furnishing the ground of a claim to confirmation in the present case.

Upon this point it is only necessary to remark, that there is certainly no act of Congress, which would authorize the confirmation of the present claim, or any part thereof.

A decree must go against the validity of the title.

In the course of this opinion, a more extensive range may, at first view, appear to have been taken, than was necessary to the determination of the cause before the court. The questions, however, which had been discussed and decided, will, upon a nearer view, be found to belong to the cause, and their discussions to have been, in some degree, necessary to the elucidation of the questions involved in it. The title to more than a million, perhaps millions, of acres of land, was supposed to depend upon the decision of the questions which have been considered; and the opinion having mainly proceeded upon a view which had not been taken at the bar, and having been extended to an inquiry into the source and nature of the Spanish titles to lands in Louisiana, and to an enquiry concerning the laws under which those titles were derived; and the decision of most of the points, therefore, having proceeded chiefly upon grounds which had been little, or not at all examined, in the argument of the cause, it is deemed proper to remark, that counsel will not be excluded from again stirring any of the points which have been here decided, when they may hereafter arise in any other cause.

[From the Missouri Advocate and St. Louis Enquirer, of April 8, 1826.]

To the Editor.

SIR: I have read, with the attention which the subject deserves, the opinion of Judge Peck, on the claim of the widow and heirs of Antoine Soulard, published in the Republican of the 30th ultimo. I observe, that, although

the judge has thought proper to decide against the claim, he leaves the grounds of his decree open for further discussion.

Availing myself, therefore, of this permission, and considering the opinion so published, to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by its operation, I beg leave to point the attention of the public to some of the principal errors which I think that I have discovered in it. In doing so, I shall confine myself to little more than an enumeration of those errors, without entering into any demonstration or developed reasoning on the subject. This would require more space than a newspaper allows, and besides, is not (as regards most of the points) absolutely necessary.

Judge Peck, in this opinion, seems to me to have erred in the following assumptions, as well of fact as of doctrine:

1st. That, by the ordinance 1754, a sub-delegate was prohibited from making a grant in consideration of services rendered or to be rendered.

2d. That a sub-delegate in Louisiana was not a sub-delegate as contemplated by the above ordinance.

3d. That O'Reily's regulations, made in February, 1770, can be considered as demonstrative of the extent of the granting power of either the Governor General or the sub-delegates under the royal order of August, 1770.

4th. That the royal order of August, 1770, (as recited or referred to in the preamble to the regulations of Morales, of July, 1799,) related exclusively to the Governor General.

5th. That the word "mercedes" in the ordinance of 1754, which, in the Spanish language, means "gifts," can be narrowed by any thing in that ordinance or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money.

6th. That O'Reily's regulations were in their terms applicable, or ever were in fact applied to, or published in, Upper Louisiana.

7th, That the regulations of O'Reily have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them.

8th. That the limitation to a square league, of grants to new settlers in Opelousas, Attackapas and Natchitoches, (in 8th article of O'Reily's regulations) prohibits a larger grant in Upper Louisiana.

9th. That the regulations of the Governor General, Gayoso, dated 9th September, 1797, entitled "Instructions to be observed for the admission of new settlers," prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804.

10th. That the complete titles made by Gayoso are not to be referred to as affording the construction made by Gayoso himself of his own regulations.

11th. That, although the regulations of Morales were not promulgated as law in Upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed, "from the official station which he held," to have had notice of their terms.

12th. That the regulations of Morales "exclude all belief, that any law existed under which a confirmation of the title in question could have been claimed."

13th. That the complete titles, (produced to the court) made by the Governor General or the Intendant General, though based on *incomplete titles* not conformable to the regulations of O'Reily, Gayoso, or Morales, afford no

inference in favor of the power of the Lieut. Governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.

14th. That the language of Morales himself, in the complete titles issued by him, on concessions made by the Lieutenant Governor of Upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.

15th. That the uniform practice of the sub-delegates or Lieutenant-Governor of Upper Louisiana, from the first establishment of that province, to the 10th March, 1804, is to be disregarded as proof of law, usage, or custom, therein.

16th. That the historical fact, that *nineteen-twentieths* of the titles to lands in Upper Louisiana were not only incomplete, but not conformable to the regulations of O'Reily, Gayoso, or Morales, at the date of the cession to the United States, affords no inference in favor of the general legality of those titles.

17th. That the fact, that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the government and population of Louisiana as property, saleable, transferable, and the subject of inheritance and distribution ab intestato, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession or of the law of nations.

18th. That the laws of Congress heretofore passed in favor of incomplete titles, furnish no argument or protecting principle in favor of those titles of a precisely similar character, which remain unconfirmed.

In addition to the above, a number of other errors consequential on those indicated, might be stated. The judge's doctrine as to the forfeiture, which he contends is inflicted by Morales' regulations, seems to me to be peculiarly pregnant with grievous consequences. I shall, however, not tire the reader with any further enumeration, and shall detain him only to observe, by way of conclusion, that the judge's recollection of the argument of the counsel for the petitioner, as delivered at the bar, differs materially from what I can remember, who also heard it. In justice to the counsel, I beg to observe, that all that I have now submitted to the public, has been suggested by that argument as spoken, and by the printed report of it, which is even now before me.

A CITIZEN.

Be it remembered, that, at a Court of the United States for the Missouri district, begun and held at the city of St. Louis, within and for said district, on the third Monday of April, in the year of our Lord one thousand eight hundred and twenty-six, under the authority of an act of Congress, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims," the following proceedings were had in said court, to wit: "The court being satisfied, from the evidence of Luke E. Lawless, that Stephen W. Foreman, of this city, is the editor and publisher of the Missouri Advocate and St. Louis Enquirer, published in the said city, and that the paper of that name, of the eighth of April instant, which contains a

false statement of and concerning a certain judicial decision made in the case of Julia Soulard, widow, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs of Antoine Soulard, deceased, against the United States, issued from the press of the said Stephen W. Foreman. It is ordered, that the said Stephen W. Foreman show cause on to-morrow morning, at eleven o'clock, why an attachment should not issue against him for a contempt of this court, in publishing the said false statement, tending to bring odium on the court, and to impair the confidence of the public in the purity of its decisions."

Thursday, April 20th, 1826.

THE UNITED STATES, vs. *Stephen W. Foreman.* } *Rule for an attachment.*

In this case, the defendant having appeared, and for cause shows, that he is not the author of the said publication, and submits himself to the court, and purges himself of all contempt. It is therefore ordered that the rule be discharged.

The court being satisfied, upon the oath of Stephen W. Foreman, made in open court, that Luke E. Lawless, an attorney and counsellor of this court, is the author of a certain publication over the signature of "A Citizen," in a public paper printed in this city, by the name of the "Missouri Advocate and St. Louis Enquirer," issued on the eighth of April, of this instant, it is ordered, that the said Luke E. Lawless show cause forthwith, why an attachment should not be issued against him for the false and malicious statements in the said publication contained, in relation to a judicial decision of this court, in the case of Julia Soulard, widow, James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs of Antoine Soulard, deceased, against the United States, lately pending and determined therein; with intent to impair the public confidence in the upright intentions of the said court, and to bring odium upon the court; and especially with intent to impress the public mind, and particularly many litigants in this court, that they are not to expect justice in the causes now pending therein; and with intent further to awaken hostile and angry feelings on the part of the said litigants against the said court, in contempt of the same court. And that he also show cause why he should not be suspended from practising in this court, as an attorney and counsellor therein, for the said contempt and evil intent.

Friday, April 21st, 1826.

UNITED STATES, vs. *Luke E. Lawless.* }

And the defendant, Luke E. Lawless, having appeared in obedience to the rule against him, to show cause why an attachment should not issue against him, and having been heard by counsel against the emanation of the said writ in the said rule mentioned; having been also heard by counsel against the said rule, to show cause why he should not be suspended from practising as an attorney and counsellor in this court; and the court having considered all and singular the premises, and for that it seems to the court

that the said defendant, Luke E Lawless, had committed a contempt, in manner and form as in the said rule is charged, it is ordered than an attachment issue against him, returnable forthwith. Which attachment was issued in the words and figures following, to wit:

"MISSOURI DISTRICT, *set.*

"*The President of the United States of America.*

"To the Marshal of said district, greeting:

"You are hereby commanded to attach the body of Luke E. Lawless, and him forthwith have before the court of the United States for the Missouri District, now in session at the city of St. Louis, to answer unto the United States, touching a certain contempt by him committed, in publishing a false statement of the decision of said court, in the case of Julia Soulard, widow, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, against the United States; hereof fail not, and have you then there this writ.

Witness the honorable James H. Peck, Esquire, Judge of the United States for the Missouri District, the twenty-first day of April, eighteen hundred and twenty-six. Issued at office, in St. Louis, under the seal of said court, the day and year last aforesaid. [L. S.]

ISAAC BARTON, *Clk.*

Upon which said writ, the marshal to whom the same was directed, made the following return, to wit:

"ST. LOUIS, *April 21st*, 1826.

"In obedience to this writ, I have herewith, in open court, the body of Luke E. Lawless, Esq. as within commanded.

H. DODGE, *Marshal.*
By JOHN SIMOND, Jr. *Dep. Marshal.*

UNITED STATES,
vs.
Luke E. Lawless.

The defendant in this case having been brought into court by attachment, and the court having demanded of him, whether he would answer interrogatories, or would purge himself of the contempt charged upon him; and the said defendant having refused to answer interrogatories, and having persisted in the contempt, the court doth find that the said defendant is guilty of the contempt to this court, as charged in the said rule.

UNITED STATES,
vs.
Luke E. Lawless.

The defendant in this case having refused to answer interrogatories, and having persisted in the contempt: It is ordered, adjudged, and considered, that the said defendant be committed to prison for twenty-four hours, and that he be suspended from practising as an attorney or counsellor at law, in this court, for eighteen calendar months, from this day.

MISSOURI DISTRICT, *sct.*

I, Isaac Barton, Clerk of the Court of the United States for the Missouri District, do hereby certify, that the above and foregoing is a full, true, and perfect transcript of the record in the cases of the United States against Stephen W. Foreman, and the United States against Luke E. Lawless, for contempt.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at St. Louis, the ninth day of August, in the year of our Lord one thousand eight hundred and twenty-six.

[L. S.]

ISAAC BARTON, *Clerk.*

ST. LOUIS CIRCUIT COURT.

MARCH TERM, 1826.

STATE OF MISSOURI, }
County of St. Louis, } *ss.*

"Upon the petition of Luke E. Lawless, setting forth that he is at present confined in the common jail of St. Louis county, by virtue of a warrant or order of the District Court of Missouri, charged with having refused to answer interrogatories, and having persisted in a contempt; it is ordered, that a writ of habeas corpus issue to the sheriff, to bring into court, forthwith, the body of the said Luke E. Lawless, together with the day and cause of his caption and detention. Whereupon the sheriff brings into court, the body of the said Luke E. Lawless, and makes his return on said writ as follows, to wit: "In obedience to this writ, I have herewith, in open court, the body of Luke E. Lawless; the cause of his detention will appear from a certain order, rule, or warrant, herewith enclosed, by virtue of which, he was committed to my custody, in the common jail of St. Louis county, April 21st, 1826. JOHN K. WALKER, *Sheriff.*" Whereupon, on examination of the paper purporting to be a commitment issued by the said District Court, and finding that the same is not authenticated by the seal of said court, it is ordered that the said Luke E. Lawless be discharged from the custody of said sheriff.

STATE OF MISSOURI, }
County of St. Louis. } *ss.*

I, Archibald Gamble, Clerk of the Circuit Court for the county of St. Louis, do certify the above to be a true copy of an order made by the said circuit court, at the March term, in the year of our Lord one thousand eight hundred and twenty-six, upon a writ of habeas corpus, upon which the said Luke E. Lawless was brought before the court.

Witness, Archibald Gamble, Clerk of said court, at office, this sixth day of September, in the year one thousand eight hundred and twenty-six, and of the Independence of the United States of America the fifty first.

[L. S.]

ARCHIBALD GAMBLE, *Clerk.*

COMMITTEE ON THE JUDICIARY

Of the House of Representatives of the United States.

FRIDAY, *19th March*, 1830.

Committee met—Present,

Mr. Buchanan, *Chairman.*	Mr. Ellsworth,
Wickliffe,	Davis, of S. Carolina, and
Storrs,	White, of Louisiana.

Luke E. Lawless, being duly sworn according to law, doth depose and say, as follows:

In the year 1826, on the 30th March, of the same year, I saw in a newspaper printed at St. Louis, called the "Missouri Republican," an article headed "Peck, Judge," and purporting to be a decision of judge Peck, as judge of the District Court of the district of Missouri, made in the case of Soulard's heirs, against the United States: In that case, I had been employed as counsel for the petitioner, in that court. I had also been employed in several other causes of a similar character. When I say a "*similar character*," I mean founded upon, unconfirmed French or Spanish titles. The similarity of character consisted only in being founded in an incomplete title; because I consider the case of the heirs of Soulard, as peculiar and original in its leading characteristics I read that opinion with all the attention I could give it. When I commenced the reading of it, I had no feeling hostile to judge Peck, or even unfriendly. I thought I saw in it a number of errors, not only in fact, but in doctrine. Those errors appeared to me to have a fatal effect, if they should be established into law, upon that particular claim, and upon almost every other claim that was presented, or could be presented, to the court, under the law of 1824, which authorized judge P. to adjudicate. Shortly after this opinion appeared, I ascertained that it had created a great alarm with my clients and others, who I considered had just titles. The value of the property included in these claims, and the titles themselves, appeared to me to be suddenly, and materially, depreciated by this opinion, and the alarm it created. I had every reason to believe, that speculators might avail themselves of that alarm, to purchase, for a nominal or disproportionate price, the property I have mentioned. Taking all this into view; and further considering, that, inasmuch as judge P. had himself submitted his decision or opinion to the public, and, as had appeared to me, invited discussion upon it; and considering that I was exercising one of the most sacred rights of the American citizen, which I am, I published, on the 8th of April, in a newspaper printed at St. Louis, called the "Missouri Advertiser and St. Louis Enquirer," an article, in which I stated, according to the best of my opinion, a number, perhaps twelve or thirteen positions, that appeared to me to have been taken by the judge, and which I conscientiously believed to be erroneous. I beg leave to refer to that article, signed "A Citizen," which is appended to the papers presented by me. A few days after that article, signed "A Citizen," appeared, the District Court sat, upon a special adjournment. At the sitting of the court, I appeared in my place, as counsel. A few minutes after the judge had taken his seat, and had disposed of some matters before him, he produced a newspaper, and inquired if any person then in court could tell who was the editor of that newspaper, called the "Missouri Advertiser and St Louis Enquirer?" The manner of the judge, and the date of the paper, induced me to suppose that he was about to take some serious notice of the article

signed "A Citizen." I therefore, without hesitation, informed the judge that I knew who was the editor, that it was one Stephen W. Foreman. Other persons in court stated the same fact. The judge thought proper then, to call upon me to swear to the fact, which I did. As soon as the affidavit was made, he dictated a rule to the clerk, upon the editor, Foreman, to show cause why an attachment should not issue against him for publishing that article. I beg leave to refer to the rule itself, which is stated in my memorial, and appended thereto, for its terms and character. I appeared as counsel for the editor, to show cause, in obedience to that rule; and, on that occasion, I stated in my argument, all the grounds that occurred to me as proper.

I submitted to the court, 1st, That the article was not such as the rule described it to be: that it was neither libellous nor contemptuous. I then took the ground, that if it was such as the rule described it to be, that judge P. had no jurisdiction of the matter in a summary way, as a contempt of his court. That the proper mode of proceeding against the printer or publisher, would be by indictment. My positions in law, and all my arguments, were overruled by judge Peck. In the course of judge Peck's remarks, he betrayed, from time to time, great indignation and emotion; and, as I thought, evidently pointed at me, as the author of the article signed "A Citizen." I therefore prevented the rule from being made absolute against that printer, by giving up my name as the author; which was done by the editor. Judge Peck then directed the editor to swear to the fact, and upon his affidavit, issued a rule upon me, to show cause why I should not be attached, I believe, and be suspended from practice. For the terms and character of that rule, I beg leave to refer to it. I requested Mr. Geyer, Mr. Magenis, and Mr. Strother, members of the St. Louis bar, to appear and show cause for me. I instructed my counsel specially, as to the grounds they were to take. The first ground, was, that no libel or contempt was committed, or intended to be committed, by me. 2d, That, if it was libellous or contemptuous, it ought not to be treated by judge Peck as a *contempt*. 3d, That if it was a *contempt*, and within the legitimate jurisdiction of the court, as a *contempt*, the punishment of suspension from practice, was not that which should be inflicted upon me. Upon this last ground, I directed my counsel to urge that I wrote the article in the capacity of a private citizen, while the court was not in session, and distinct from my character or capacity of counsel of the court; also, that suspension from practice not only affected my rights and interests, but also those of my numerous clients. The first principal ground, on the merits, judge Peck did not suffer my counsel to go into. The judge observed, that that question had already been decided in the discussion of the rule against the editor. The other grounds were, as well as I can recollect, discussed, and ably too, by my counsel. Their arguments and authorities were, however, all overruled, and judge P. proceeded to make the rule absolute. In doing so, he pronounced a long argument, or speech, upon the nature of the article signed "A Citizen;" which article he caused to be read to him, paragraph by paragraph, and observed upon each part of it very much at length, and with very great acrimony and violence, particularly against me, as I considered. In this manner, judge P. proceeded for a considerable length of time, while I was present. At length, feeling myself exceedingly irritated by what I considered contumacious language towards me, I got up and left the court. My motive for so doing was, to avoid being betrayed into an expression of my feelings, or even

into a gesture that might have become, as against me, a legitimate ground of judge Peck's jurisdiction for a contempt. From judge Peck's court, I went to the Circuit Court of the county of St. Louis, which was then sitting, and in which a cause was pending of great importance to the parties, and in which I was leading counsel for the defendant, Mr. Peter Chouteau, sen'r. of St. Louis. After I had been in the Circuit Court about an hour and a half, at least, Mr. Simonds, then Marshal of Missouri, or his deputy, which of them I cannot recollect, called me out of court, and informed me that judge Peck had made the rule absolute against me, and that I must appear before him forthwith. I appeared accordingly, and, upon my appearance, was informed by the judge, that I had a right to call for interrogatories to be exhibited to me, and asked me if I wished that interrogatories should be exhibited to me? To which I replied, that I did not wish interrogatories to be exhibited to me. And I further observed, that, if they were exhibited, I should not answer them. Upon which judge Peck dictated to his clerk an order for my imprisonment for 24 hours, in the jail of the county of St. Louis, and for my suspension from practice as attorney and counsellor at law, in his court, for the term of 18 months from the date of the order. I refer to the order amongst the documents appended to my petition, for its character and terms. I was conducted forthwith to the jail of the county of St. Louis, and was put into a room in that jail, where the common felons and criminals were put, and I was locked up therein by the jailor. After being in that room a few moments, I requested the deputy jailor to let me see the order under which I was imprisoned; which he did. I then drew up a petition, addressed to the Circuit Court of St. Louis, then in session, stating the fact of my imprisonment, and praying a writ of Habeas Corpus, which was granted. Upon this writ of Habaes Corpus, I was brought before the Circuit Court, about eight or 9 o'clock at night, having remained in prison about three or four hours. On examining the return, and discussing the matter for a short time, I was discharged by the court, upon the ground, as I believe, that the order of commitment did not show, upon its face, by what authority it was issued, inasmuch as it had not either the seal, or the signature, of the judge of the District Court.

Q. By Mr. Storrs. Had the opinion published in the "*Missouri Republican*," been previously delivered or read in open court, from the bench, by Judge Peck?

A. I do not recollect that it was; my opinion is that it was not.

Q. By the same. At what time was the final decree or judgment of J. Peck made in the Soulard cause?

A. It was made at a preceding term. It was made at December term, 1825, at which an appeal had been taken at that same term by Soulard's heirs.

Q. By Mr. Ellsworth. Whether the remarks or speech made by Judge Peck, when he made the rule absolute upon Mr. Lawless, were in writing?

A. No sir, I believe not.

Q. By the same. How much time was occupied in delivering those remarks?

A. At this distance of time, I would say, at least three hours.

Q. By Mr. Buchanan. Do you recollect any of the language of the judge which you say was offensive to yourself? and what was its character?

A. Its character was that of an imputation upon me of slander, of malice, of a wilfully false statement of the opinions or positions of the judge. The tenor of his language was, in my opinion, to represent me, not merely a

outcomer of the court, but an enemy and libeller of the judge himself, in his proper person.

Q. By the same. Were you present when Judge Peck pronounced his judgment in the case of Soulard's heirs?

A. Yes sir, I think I was.

Q. By the same. Have you related all that transpired in court after you were brought in upon the attachment?

A. Yes, sir, to the best of my recollection, I have.

Here the "Missouri Advocate and St. Louis Enquirer" of the 8th April, 1826, was exhibited to the witness, who identified it, and said the marks upon the margin of the newspaper correspond with similar marks upon the margin of the newspaper in which Judge Peck's opinion was published, and were intended by me to aid in the juxta-position of his opinion and my article.

Q. By Judge Peck. Who was the Attorney for the Government at that date? And was he in court at the time the paper referred to was produced by the court?

A. Mr. Ed. Bates was the District Attorney, and was, I believe, in the court at the time.

Q. By the same. When the paper was produced, did the court address itself to the Attorney for the Government, and request him to ascertain who was the Editor of that paper?

A. I do not recollect that the court addressed itself particularly to the Attorney of the Government in the first instance. It may be so.

Q. By the same. Did not the court request Mr. Bates to ascertain who was the Editor of that paper, and where it was published?

A. I do not recollect distinctly; but it may be so.

Q. By the same. Did you not, upon the court's addressing itself to Mr. Bates, volunteer to say that Mr. Foreman was the Editor of the paper, and that it was published in that city?

A. Yes, sir, when the court made the inquiry as to who was the Editor, I voluntarily stated that Mr. Foreman was the Editor.

Q. Was the Attorney for the Government, and the court, in conversation when you volunteered to give the information of the Editorship, and the place of publication?

A. I do not recollect that they were in conversation when I gave the information; but it may be so.

Q. By the same. Did you immediately undertake to appear for Mr. Foreman, on the rules having been made against him?

A. I did.

Q. By the same. Did Mr. Geyer appear as associate counsel with you in the argument made against the rule?

A. Until very lately I had believed that I was alone as Counsel for the printer, and I have still no distinct recollection that Mr. Geyer was counsel for the printer with me. It may be the fact that he was. This I will distinctly say, that I have no distinct recollection of having heard his argument for the printer.

Q. By the same. Was he retained or fee'd by you for his appearance on the rule against the Editor?

A. No, sir, not that I recollect. The only recollection that I have is, that I requested him, as a brother counsellor, to appear for myself.

Q. By the same. Was he otherwise retained than upon that consideration?

A. None other to my knowledge.

Q. By the same. How long was the argument upon the first rule protracted? How many days?

A. As I recollect, I argued it myself upon two successive days.

Q. By the same. Was Mr. Geyer, on the argument of either rule, heard at any great length?

A. On the argument of the rule against me, Mr. Geyer was heard, it appeared to me, as long as he chose to speak on all the grounds except one, to wit: the intrinsic merits of the article signed "A Citizen."

Q. By the same. Do you mean by your answer to say that he was not permitted to be heard upon the question of misrepresentation charged in the rule?

A. I do.

Q. Was no counsel other than yourself heard upon that question?

A. I do not recollect that any counsel other than myself was heard upon the merits.

Q. By the same. Was the court numerously attended, generally, during the course of the argument?

A. It appeared to me to be so.

Q. By the same. What were the topics upon which the counsel mainly dwelt, and particularly yourself?

A. If by topics be meant grounds of argument, I have already stated them in my direct examination.

Q. By the same. Was it insisted in the argument, that the liberty of the citizen, of speech, and of the press, would be violated by the proceeding contemplated by the rule?

A. It was.

Q. By the same. Was it insisted that the constitution and the right of trial by jury, were also violated?

A. It was.

Q. By the same. Was the proceeding represented to be incompatible with the genius of our Government?

A. I believe it was.

Q. By the same. Was the judge represented, in the argument, as sitting in his own case, to punish an offence committed against himself?

A. The judge was represented as in such a case, executing the functions of judge and juror, and perhaps witness, for the purpose of punishing an offence committed against himself.

Q. By the same. Were all these topics dwelt upon at great length?

A. I believe they were dwelt upon at considerable length, as also every topic that suggested itself, for the purpose of the argument to the counsel.

Q. By the same. Were not these arguments addressed to the surrounding crowd?

A. No, sir, they were addressed to the court. The crowd might have heard them,

Q. By the same. Were you present when the editor appeared in court, submitted himself thereto, and, under oath, purged himself of the contempt charged against him?

A. No sir, nor do I know any thing of such purgation.

Q. By the same. Were you present when he was examined by the court?

A. No sir.

Q. By the same. Did you or not endeavor to prevail upon the editor not to submit to the court, but abide its judgment and go to prison, if such should be the sentence of the court?

A. I recollect, in the first instance, that in my opinion the liberty of the press was concerned, that I thought an opportunity had occurred of vindicating that right in the person of the editor, and I did recommend to him to take that stand before the court; but when, as I have stated in my direct examination, I perceived the strong feeling of the judge directed against myself, and that he treated me as the author of the article, signed "a citizen," I changed my opinion on the subject of the printer's course, and then determined on taking the responsibility on myself, because I considered that in my person, not only the liberty of the press, but divers other rights were equally concerned.

Q. By the same. Did you come to this determination before or after the argument in behalf of the editor had been concluded?

A. The change of opinion was effected during the progress of the argument; but, as well as I can recollect, was not expressed to the editor until after the argument was concluded.

Q. By the same. Was it expressed to any body else? And to whom?

A. It may have been expressed, but I do not recollect whether it was, or to whom.

Q By the same. Did you not persist, after the argument had been closed, in desiring the editor to abide the judgment of the court, and not to give you up as the author?

A. I do not recollect that I did, after the argument had been closed.

Q. Did you not, until the editor had come to a different determination?

A. I do not know at what time he came to a different determination, therefore I cannot say whether my direction to him to give me up, was before or after.

Q By the same. Did the editor express to you, his determination to give you up against your consent?

A. Never.

Q. By the same. In the course of your argument, did not you and the bench confer upon the subject of your publication, as though you were the author?

A. As I have already stated, the court seemed to point at me as the author of the article, but, as respects myself, I avoided acknowledging the authorship, and appeared, as far as I could, in the distinct character of counsel.

Q. By the same. Did you at any time, by inadvertence, appropriate the sentiments contained in the publication to yourself?

A. I do not recollect that I did. It was not my intention so to do.

Q By the same. Who accompanied you to the prison?

A. As I recollect, Mr. Gaston Soulard, and Mr. Wharton Rector, and to the best of my recollection they were locked up with me; I do not think they remained the whole time.

Q. Was Mr. Soulard one of the parties against whom the decree was passed?

A. Yes.

Q. During the course of the argument upon those rules, who, generally, composed the crowd, who attended upon the court? Were they the land claimants, or, for the most part, persons hostile in feeling to me?

A. As far as I can recollect, there were persons of all descriptions there, land claimants, and not land claimants. As to their hostility, I know not that there was any existing in the breasts of the persons attending there against you; at the same time it is very possible that there may have been persons in that crowd with feelings unfriendly to Judge Peck.

Q. By the same. Had you any interest in Soulard's claim, and in other unconfirmed claims brought, or to be brought, before the Court?

A. I had.

Q. By the same. Were there not a number of causes depending before the court at the time of the publication, depending upon the principles of that determined, and involving other principles not decided in that case?

A. I believe there were.

Q. Were there not other causes depending involving other principles than those decided, the merits of which were attempted to be impressed upon the public in the publication?

A. My object in the publication was to show that Judge Peck had taken several positions in doctrine and in fact, which, should they be sustained, would, in my opinion, be fatal to the great majority of the claims, and which in my opinion, were erroneous. I was counsel in a great number of the claims depending at the date of the article.

Q. By Mr. Storrs. Were there any persons committed for criminal offences in the room in which you were imprisoned?

A. No, there was no person there at the time but myself.

Q. By Mr. Buchanan. Did your suspension continue during the whole of the 18 months?

A. Yes. And when I presented myself to Judge Peck, at the expiration of the 18 months, at the first court, he inquired of the Clerk, particularly, if the time had expired.

Q. By the same. Is that printed pamphlet, produced and identified by the signature of James Buchanan, on the title page thereof, the true substance of the argument delivered by you before Judge Peck?

A. It is, sir.

Q. By the same. When was it published?

A. It was published early in 1825. The argument was made in November, 1824.

Q. By Mr. Storrs. Were you required by the court to make any apology or other atonement for the publication of the article signed "a citizen," before the order was made for your imprisonment and for suspending you from the bar?

A. No sir. The only observation made to me by the court, previous to the order for imprisonment, was, that I had a right to have interrogatories exhibited to me, and demanded if I wishedto have them exhibited, to which I replied, that I did not, and would not answer if they were exhibited.

Q. By Judge Peck. Did or did not the court inform you that you had a right to purge yourself of the contempt by your own oath, and that this was a privilege, and that interrogatories were not to be put for the purpose of fixing the contempt, which must be otherwise proved; but for the purpose of enabling you to discharge yourself therefrom; and then asked you, whether you would avail yourself of that privilege?

A. I have no distinct recollection of this explanation by Judge Peck, but I understood him to have the intention of enabling me to purge myself of what he called a contempt, by those interrogatories. I don't recollect the details.

Q. By the same. Do you recollect of your coming in to address the court for the purpose of asking time to attend to a cause depending in the Circuit Court then sitting?

A. I do not say positively I did not, but I don't recollect it.

Q. By the same. Do you recollect commencing to address the court upon any subject pending the rule against you, and in which address you began to say "may it please your honor," and in a manner marked and significant, stopt in the middle of the word "honor" and adopted a different address?

A. I have no recollection of any such thing.

Q. Where did you first reappear in court after your suspension?

A. In the District Court of Jefferson City.

Q. By the same. Were you present when the opinion of the court in the case of Soulard's heirs was delivered?

A. I have no distinct recollection that I was; but I think it probable that I was, as counsel in the case.

Q. By the same. Was the opinion delivered and the decree rendered at the same term?

A. I am not certain, but believe they were. I have no recollection of hearing the reasons for the judgment delivered in open court. It seems to me, on recollection, I was not present.

L. E. LAWLESS.

Sworn and subscribed before the Judiciary Committee on the 19th March, 1830.

ATTEST,

JAMES BUCHANAN, *Chairman.*

Henry S. Geyer, being duly sworn according to law, doth depose and say as follows:

Some time in the month of April, 1826, I was informed that proceedings had been instituted against the printer of the Missouri Advocate, for an alleged contempt towards the District Court, then sitting for the trial of land claims. I went into the court, at which Judge Peck presided. According to my recollection Colonel Lawless was then addressing the court in behalf of the editor. I remarked at that time, that the judge treated Col. Lawless as the author of the publication. In the course of Colonel Lawless' remarks he was often interrupted by the judge, with observations like these: "But, sir, in your strictures, you say;" he would then repeat something which I supposed had been said in the publication imputed to Colonel Lawless. Once or twice, I think, he added, with some emphasis, "Which is false." I thought the judge, at that time, somewhat excited. After Col. Lawless had concluded his remarks, I, of my own accord, without solicitation from any person, addressed an argument to the court, against the alternative presented by the rule, which was an attachment. I was heard by the court without interruption. The point for which I contended, in that argument was, that the publication could not be punished as a contempt, insisting that

the guaranties of the Constitution extended to all cases not absolutely necessary to protect the court from interruption in the administration of justice; that the publication being made after the decision of the cause, if libellous, must be punished as a libel as against any other person; and insisted, also, that the published opinion of a judge was a fair subject of criticism to all persons; and if misrepresented, it must be met as the misrepresentation of the conduct of any other public officer. Those propositions were all overruled by the court. On the next day after I had appeared before the court, I was informed that Col. Lawless had been given up as the author of the publication in question, and that a rule had been made upon him to show cause why an attachment should not be issued against him for a contempt. I again went into the court. Col Lawless, with Mr. Magenis, and Col. Strother, were sitting at the bar. These gentlemen, I was informed, were to act as the counsel of Col. Lawless. Mr. Lawless requested me to assist them in the argument of the question. Mr. Magenis made an argument, but I am not certain whether Mr. Stother did or not. I followed Mr. Magenis, and attempted to re-argue the whole ground which had been taken on a former occasion. I was stopped by Judge Peck, who stated, that he had already decided the publication was a contempt, and that he would hear no argument on that point. I then insisted that the court could not punish Col. Lawless, in his character of counsel, for the publication, by suspending him from practice, as had been intimated in the rule. I maintained, that the counsel, as such, was only to be punished while acting in that character in court, or in relation to business of that court, out of it. After the argument was concluded, Judge Peck requested Mr. Bates, then District Attorney, to read the publication, signed "a Citizen," sentence by sentence. At the end of each sentence the judge made some commentaries. I remember when Mr. Bates read the following sentence from the publication: "I observed that, although the judge has thought proper to decide against the claim, he leaves the ground of the decree open for further discussion," the judge repeated the first words, putting an emphasis on the word "judge," adding, "there, it is very manifest, that this publication is aimed at the judge, with a view to bring him into contempt." This was said with an unusual degree of emotion, I thought. It appeared to me, at that time, from the manner of the judge, as well as from expressions he used, he thought the attack was made upon him from some motive of personal hostility, and that advantage had possibly been taken of his then situation in order to impress upon the public mind, that he was incompetent to the duties of his station. He was some time in delivering his opinion, and in the argument in support of it, to make the rule absolute against Col. Lawless. In the course of which I thought some of his remarks exceedingly harsh, so much so, that I told Col. Lawless, who was sitting near me, that I did not think he ought to stay there and listen to that abuse of himself. The only expression that I remember distinctly, however, was, in substance, this: the judge said, "that in China such a calumniator would have his house blacked, as a fit emblem of his heart, that all persons might avoid him." This made an impression on me at the time, as the fact was new, and because it put Col. Lawless in the attitude of a libeller, and, as such, I thought could not be punished summarily. Before the final order was taken I left the court house. I saw nothing more on that occasion that I remember.

Question by Mr. Davis, of So. Co. Did the judge exhibit much anger or excited temper when giving his reasons for making the rule absolute?

Answer. I thought he was very angry, more so than I had ever observed him on any occasion. That circumstance struck me with particular force, as Judge Peck was generally mild.

Q. by the same. Was the conduct of the memorialist generally decorous or otherwise in the presence of the judge, on the proceedings against him under the rule?

A. I do not remember that Col. Lawless said one word after the rule had been made against him. In the discussion of the rule against the printer, his manner was unusually subdued. He bore his interruptions submissively, much more so, than, from my knowledge of him, I had anticipated.

Q. by the same. Did the suspension continue till after the time that trials of these land causes were limited by the act of Congress?

A. I think it did, beyond the time limited by the first act.

Q. by the same. How long did Col. Lawless remain in prison?

A. I think it could not have been more than two or three hours, when he was brought into the Circuit Court, in custody, and the argument continued two or three hours, when he was dismissed.

Q. by Mr. Wickliffe. Was Col. Lawless suspended from practice in the District Court when sitting for the trial of ordinary causes as well as when sitting for the trial of land causes?

A. It was so understood both by the court and the bar, as I believe. In point of fact, Col. Lawless did not practice in either court during the eighteen months for which he was suspended.

Q. by Mr. Buchanan. Why was Mr. Bates requested to read the publication, signed "A Citizen?"

A. I suppose it was because Judge Peck had very sore eyes, and could not see to read himself. I believe he was almost entirely blind at the time.

Q. by the same. To what did you refer when you said you believe Judge Peck supposed that advantage had been taken, by Mr. Lawless, of his then situation, to impress upon the public his unfitness for the office which he held?

A. I allude to this: the situation of Judge Peck's eyes had been the subject of much conversation out of doors. Many persons were under the impression that, under such circumstances, he was incapable of discharging his duties; and, I suppose that Judge Peck imagined, that the opportunity had been thus seized, part of the public being thus impressed, to create the belief that he was incapable, mentally, as well as physically, of discharging his duties.

Q. By the same. How long was Judge Peck delivering his opinion, when he made the rule absolute?

A. At this distance of time, I cannot answer that question with precision; but my impression is, he was between two and three hours.

Q. By the same. What portion of that time did Mr. Lawless remain in court?

A. I don't think he was in the court room more than one hour.

Question by Judge Peck. Do you know what number of days had been consumed by the counsel in the argument against the rules against the printer and Col. Lawless.

Answer. I cannot answer the question with certainty. I was there part of two days myself, and occupied about four hours in the two days, address-

ing the court against the rules. I know that Col. Lawless occupied considerable time about two hours after I came into the court the first day, on the rule against the printer. On the second day Mr. Magines occupied some time—how long, I can't say. I now remember, also, Col. Strother commenced a speech; but in consequence of his taking a ground which Col. Lawless did not wish him to assume, he was desired by Col. Lawless not to proceed further in his remarks.

Q. By the same. What ground was Mr. Strother assuming when Col. Lawless interrupted him?

A. I think he was rather manifesting a disposition to apologise and acquiesce in the positions assumed by the court.

Q. By the same. Was it after he, Strother, had requested the use of Wheaton's reports, which the court had procured for him to examine a case in those reports, and after he had examined the case?

A. There was, at the time, a vol. of Wheaton's reports on the table; how he procured them, I know not; or whether he read it on the occasion, I do not remember.

Q. By the same. Was there, at that date, a sentence of suspension against Col. Strother himself in the Circuit Court, as attorney and counsellor of that court?

A. I know there had been such a sentence for six months; whether it was in force or not at that time, I know not of my own knowledge.

Q. By the same. Do you recollect, that, in the argument against the rule, the counsel had insisted that the opinion being published, made it public property; and that, if it had been misrepresented, the opinion itself could be recurred to to correct any misrepresentation which had been made of it; and that the court, in reply to that argument, said those who might see the misrepresentation, might never see the opinion which had been misrepresented; that men could not know, intuitively, whether what they read was true or false; that, if they could, calumny would cease to be mischevous, and would not require punishment; that there would be no wisdom in that law of China, by which the dwelling of the calumniator was painted black, as emblematical of the heart of the calumninator, while it afforded an admonition that what he should say should be harmless?

A. The substance of the argument of the counsel on that branch of the subject, and the answer given to it by the judge, as stated in the above question, is substantially correct, with the exception that I do not think that the allusion to the law of China, was made in reply to that argument of the counsel. The effort of the judge was to prove the publication of Col. Lawless, signed "A citizen," calumnious. In the course of his observations, Col. Lawless was represented as a libeller, and I thought that the allusion to the law of China was made in such form and in such connection, as satisfied me, that, in the mind of the judge, Col. Lawless was a fit subject for a similar operation. In this, however, I may possibly be mistaken. The judge was very warm and vehement in his manner, and may have intended a different application.

Q. By the same. Did the judge at that period wear goggles?

A. I am not certain that he wore goggles then, or a bandage over his eyes: one or the other he certainly wore.

Q. By the same. In the course of the argument, had popular themes been much dwelt upon by the counsel, such as the liberty of the citizen, of the press, and of speech, and the importance of the right of trial by jury: all said to be encroached upon, by the proceeding of the court?

A. The guaranties of the constitution, the freedom of the press, the liberty of speech, the right of trial by jury, were frequently referred to in the course of the argument, and it was insisted that all of them would be violated, if the author or publisher was punished, summarily, for contempt; and, in the course of my remarks, I referred to the bill of rights of the State of Missouri, which declares that no man shall be punished, summarily, for an offence indictable. unless by the intervention of a grand jury; and which also, authorizes the truth to be given in evidence upon the trial of all cases for libel. When I read those clauses in the bill of rights, the judge intimated that they were inapplicable to his court, to which I replied they were applicable in all cases to citizens in Missouri. The counsel spoke at large against the danger of invading those constitutional guaranties.

Q. By the same. Was there generally a crowded audience in attendance in court, during the argument and proceedings of the court upon the rule?

A. There were many persons both in the court room and the room adjoining, which was occupied by a private family, and as many persons as could gain admittance then were in the room.

Q. By the same. Was there a considerable excitement produced in the crowd, and generally through the city, by the argument of counsel?

A. I heard many persons express dissatisfaction at the conduct of the court: whether that was produced by the argument of counsel, or their own views of the subject, I am unable to say. Those I heard express themselves most warmly, were some of those who were present at the argument.

Q. By the same. Was the dissatisfaction expressed during the whole course of the proceedings?

A. I don't remember on the first day that I heard any person say any thing upon the subject. On the second day, there were many persons conversing freely and warmly among the crowd.

Q. By the same. Did the court, in its opinion, examine all the grounds which the counsel had taken in argument against the rule?

A. I think it did.

Q. By the same. Have not the Supreme Court of Missouri exercised the same power of punishing for contempts, when their opinions have been misrepresented by publications in the newspapers?

A. There was, I remember, a case which was decided by the Supreme Court of Missouri, affirming the judgment of the Circuit Court. The plaintiff in error, upon a petition, obtained a rehearing of that cause; and a publication was made in a newspaper, in relation to that cause, after the rehearing had been granted. The Supreme Court held that publication to be a contempt; not on the ground, as I understood it, of its being a misrepresentation of the opinion of the court, but a publication about a cause then pending. After argument of the rule against the publisher, the court ruled it to be a contempt, and the publisher purged himself of the contempt.

Question by Mr. Buchanan. What were the names of the parties in the cause to which you have alluded? and against whom was the rule to show cause granted?

A. Alexander Billissime was the plaintiff, and Joseph McCoy the defendant; and Col. Lawless was the person against whom the rule was granted.

Question by Judge Peck. What was the state of the Judge's health during the pending of these proceedings?

A. I do not think his health was good; he was enfeebled, and very much debilitated.

Question by the same. In the conference to which you have referred, between the Court and Mr. Lawless, on the first rule, did Mr. Lawless, by inadvertence or otherwise, apply to himself the sentiments contained in the publication?

A. Not while I was there, to the best of my recollection.

Question by the same. In the words which you have attributed to the Judge, in the first part of your deposition, do you pretend to speak with accuracy, as to the words used by the Court?

A. I do not. I cannot be positive that I use the words of the Judge, precisely as they were delivered: I have, however, given his language, as near as I can remember it.

Question by the same. Has the intercourse between you and myself been rather limited to a professional one than otherwise?

A. I think it has.

Question by the same. Do you know whether the members of the St. Louis bar were generally monopolised by the land claimants?

A. I do not know that any of the members of the St. Louis bar were employed in any of the land cadses, unless it was by the claimants.

Question by the same. Do you recollect whether, when the publication of Mr. Lawless had been read by Mr. Bates, so far as that the Judge had been three times brought to view in it, twice by his proper name, that the Court then stopped Mr. Bates, and commented upon that fact as indicative of an intention to hold the Judge up to public observation rather than the Court?

A. That was the substance of the Judge's remarks on the paragraph, which I have quoted in the first part of my deposition. He adverted to the frequent repetition of the words "Judge," and "Judge Peck," as an evidence that he was aimed at rather than the Court. He commented upon the words "has thought proper," as implying that he had made the decision in the exercise of his own will, rather than having been governed by the law.

Question by Mr. Davis. Was the memorialist engaged in much professional business, in the District Court of the United States, other than the class of land cases before alluded to?

A. I answer that Colonel Lawless' business was chiefly in the land courts; there was very little other business in the District Court, and of that I do not think Col. Lawless had his proportionate share.

H. S. GEYER.

Sworn and subscribed before the Committee on the Judiciary, the 19th March, 1830.

ATTEST,

JAMES BUCHANAN,
Chairman.

MARCH 20, 1830.

Judge Peck requested that Mr. Geyer might be recalled and asked the following questions; which was done accordingly:

Q. Did you request of me that the opinion in the case of Soulard's heirs might be published?

A. I expressed such a wish.

Q. Do you recollect whether—before you made your first argument—you had compared the publication with the opinion, or whether you argued the matter of the agreement or disagreement, or left that to your associate counsel?

A. I do not think I ever compared the two documents, either before or after that argument. I left the question of misrepresentation entirely out of my argument, proceeding on a different ground.

Q. Whether Colonel Lawless was interrupted in his argument whilst discussing any other question, except that of misrepresentation; and if so, what?

A. The interruptions occurred whilst Colonel Lawless was attempting to show that the piece signed "A Citizen" was not a misrepresentation. He read occasionally a sentence from the opinion of the Judge, as published, and then from his own publication, and proceeded to argue there was no misrepresentation in that part of it, from time to time. It was on these occasions, and these only, that I recollect he was interrupted in the manner I have stated upon my former examination. The Judge referring occasionally to other remarks in the piece signed "A Citizen," which he insisted were misrepresentations. The Judge referred at the same time to other parts of the opinion.

H. S. GEYER.

Sworn and subscribed before the Committee on the Judiciary, the 19th March, 1830.

ATTEST, JAMES BUCHANAN,
Chairman.

Arthur L. Magenis being duly sworn according to law, doth depose and say, as follows:

I had heard an intimation that, on the convening of the District Court of Missouri, sitting as a court for the trial of land claims within the State of Missouri, the court would, in all probability, take some proceedings relative to a publication which had appeared in the "Advocate," under the signature of "A Citizen," commenting upon an opinion delivered by that court, and published in the "Missouri Republican," relative to the case of Soulard. I was not in court immediately on its opening. I think that some time in the course of the day, on my going to the place where court was held, I found Colonel Lawless addressing the court upon the subject of a rule being made against the printer of the Advocate, and contending against the legality of making such a rule. It is not in my power to say, for what length of time the counsel, Colonel Lawless, had been engaged in addressing the court upon that subject. As far as I can recollect, there were frequent interruptions made by the court, and a species of colloquy going on between the bench and the counsel. I thought the interruptions calculated to embarrass and impede the counsel in his discussion. I am not certain that I remained in court until the conclusion of the argument, nor do I think that I was present when the court pronounced its decision upon the points made at bar. I did, however, learn that the court had over-ruled the grounds assumed by Colonel Lawless. Either on that evening, or the succeeding morning, I was informed, either that the printer and publisher of the Advocate had given up the name of Colonel Lawless, as the author of the piece signed "A Citizen," or that Colonel Lawless had avowed himself to be such; which of the two I cannot positively state. At the same time, I think it was stated to me, by Colonel Lawless, that a rule to shew cause had been made by the court against him, as the author of that piece, why an attachment should not issue for a contempt alleged to be by him committed in the publication of the piece referred to. I was requested by Col. Lawless

to attend at the place where court would meet, and, as his counsel, argue against the rule. In compliance with that request I accordingly appeared and delivered an argument before the court, contending against the legality of the rule. Whether I was informed by the court, or learned it privately, that the question, as to whether the matter contained in the publication, signed "A Citizen," amounted to a contempt, and that argument would be precluded as to that point in the case, I am not able to state precisely, though the impression on my mind, now is, that, before commencing the argument, I applied to the court for information, and was informed that that point was not debateable; it being settled that the matter in the piece involved a contempt. I then assumed the ground before the court, that, admitting the matter contained in the piece to be such as would amount to a libel, that the cause having been finally decided by that court, and passed away from its jurisdiction, it could not be considered a contempt: That I viewed the doctrine of contempt as applying only in relation to publications which were made, touching cases pending in court, and to offences committed in the presence of the court: That the case before the court did not come within that rule: That the case was as much beyond the control of that court, as if it had been decided years before; and that the court of King's Bench, might just as well punish, for a comment upon an opinion delivered by some of its judges, who were dead and no longer ceased to exist, as this court attempt to exercise that authority. I believe I urged upon the court the propriety, even admitting the legality of the position assumed by the court, of submitting the matter to the consideration of a Grand Jury. I was listened to by the court without interruption. Mr. Geyer followed me on the same side. Mr. Strother was making observations, and sat down at the request of Col. Lawless, I believe. The court, on the conclusion of the argument, sustained the rule, and over-ruled the positions assumed by the counsel of Colonel Lawless. I think that previous, or immediately at the point of time, when the court commenced delivering its opinion, Mr. Bates, the District Attorney, was requested by the court to read the publication, signed "A Citizen;" as he proceeded in the perusal of it, the court commented upon the paragraphs, and so on until the publication was read through by Mr. Bates, or nearly so. The judge appeared to be under a strong excitement; his manner was vehement; he commented upon the motives which could have induced that publication. The precise words which he used, I cannot pretend to give; some of them impressed themselves upon my recollection; and to the best of my belief, the terms false, malicious, slanderous, calumniator, were repeatedly used in the course of his observations, and, as I understood them, applied to the author of that publication. One particular passage I know, referred to the course which was pursued in China, as against an individual who was convicted of slander or calumny, that his house was blacked as significant of the heart of its inhabitant, and as a warning to the community to beware of such a person, or something like that. During the time when the court was pronouncing its opinion, Colonel Lawless, I think, to the best of my recollection, spoke in an under tone to Mr. Geyer and myself, to know whether we thought he ought to remain—I think he said to listen to such a torrent of abuse, or words to that effect; and I recollect, he was advised to go away, either by Mr. Geyer or myself, or both, and accordingly left the room. On the rule being made absolute, I cannot presisely say whether I remained or left the court house, nor can I say, that I was present when the court pronounced its sentence. The Circuit Court of

the State was then in session, and my attention was so divided that I am unable to assert, whether I was present at the delivery of the sentence or not, but it was immediately communicated to me, if I were not present. Colonel Lawless was taken into custody by the marshal, and so soon as I was released from my duties in the circuit court, I went to the gaol of the county of St. Louis, where I found him. I obtained the cause of his detention, and on the proper affidavit being made, a writ of habeas corpus was obtained, the body of the prisoner was brought before the Circuit Court, and he was discharged in from, two to four hours after his commitment; not less than two, nor more than four hours.

Q. By Judge Peck. From whom did you receive the information that proceedings were, probably, to be taken by the court, in consequence of the publication by "A Citizen," and when?

A. I cannot state any individual in particular from whom I received the information; it appears to me that it was a topic of conversation or discussion, first among the members of the St. Louis bar. The time at which the matter was first broached, could not have been long previous to the session of the court at which the rule was made.

Q. By the same. Were you present during the whole, or what part of the argument made by Colonel Lawless?

A. I was not present at the whole of the argument made by Colonel Lawless. To the best of my recollection, when I heard Colonel Lawless, he was commenting upon the piece signed "A Citizen;" and endeavoring to prove, or to shew to the court that it contained nothing which was derogatory to the character of the court, or a misrepresentation of its opinion.

Q. By the same. Were the interruptions by the court, made during his comment upon the publication, and while he was endeavoring to sustain its truth by a reference to the opinion?

A. It appears to me so. In this I may be mistaken, but to the best of my opinion such was the fact.

Q. By the same. On these interruptions, did the court refer the counsel to parts of the opinion from time to time, which it supposed to be misrepresented?

A. I think the court did. In some of the interruptions, the court referred the counsel to some parts of the opinion, in which it stated, that the publication misrepresented it.

Q. By the same. Did the court, in other interruptions of the counsel, refer to parts of the publication which it supposed to be exceptionable?

A. It is very possible the court may have so done.

Q. By the same. Did Mr. Geyer make any argument upon the question of misrepresentation of the decision of the court, which was charged in the rule?

A. I rather think I did not hear Mr. Geyer on the argument, made upon the rule against the printer; and when Mr. Geyer spoke upon the rule made upon Colonel Lawless, I am of the opinion that Mr. Geyer did not take any such ground, as I have before stated; it having been decided by the court, upon the rule against the printer, that the publication signed "A Citizen" was a misrepresentation, and no longer left for discussion.

Q. By same. If the court interrupted Colonel Lawless with any other object than that above referred to by you, please state it.

A. I cannot pretend to divine the motive of the court.

Q. By the same. Please state the nature of the interruptions on the part of the court, and the words it used, other than that of directing the attention of counsel to particular parts of the publication, which were supposed to be addressed, with the view of influencing the public mind, or that of the claimants, or supposed to reflect upon the court, or to contain a misrepresentation of the points decided by the court, or to some part of the opinion supposed to be misrepresented?

A. It is not now in my power, nor perhaps could I even then have repeated the words used by the Court to the counsel during the course of those interruptions. As to the nature of the interruptions they were frequent. From the manner of the Judge he appeared to be impatient. The impression made upon my mind by his manner was, that he was aware the counsel who was addressing the Court was himself the author of the publication in question.

Q. By the same. Did the understanding seem to be mutual between Court and Counsel in relation to the authorship of the publication?

A. I was aware of the fact that Col. Lawless was the author of that publication, and thought that he showed a more subdued tone when engaged in the discussion, in consequence of his being the author, than he would have done in a case where he was simply acting as counsel without being at all implicated personally in the transaction.

Q. By the same. Do you or not say, during the progress of the argument, to Mr. Bates, that the Court and Counsel seemed to understand very well as between them who the author was, or in substance to this effect?

A. I have no particular recollection of such an observation; but, as I believe such was my impression, I think it highly probable I may have so said.

Q. By the same. Did Col, Lawless, in the course of his argument, frequently affirm or assert that all that was contained in the publication was true?

A. Colonel Lawless, it appears to me, whenever he touched upon the question of the publication having misrepresented the opinion of the Court, strenuously contended that the opinion was not misrepresented by the publication. I cannot state whether he did or did not use the precise words *that every thing contained in the publication was true.*

Q. By the same. Were you present after Colonel Lawless had been brought in upon the attachment?

A. That is previously answered in my statement in chief. I cannot say whether I was or not.

Q. By the same. Do you recollect of presenting a bill of exceptions to the Court, and of the Court declining to sign the bill of exceptions, of moving that the bystanders should do so?

A. Since it has been mentioned by the Judge, it rather appears to me that such may have been the fact, though even yet I would not speak with certainty upon the subject. I can only attribute my want of a clearer recollection of the circumstances to the hurry in which it must have been done, as my attention was very much divided at the time, the Circuit Court of the State being then in session, and my presence in that Court being almost every moment required.

Q. By the same. Could you recollect the day of the week upon which the judgment was rendered against Colonel Lawless?

A. I could not.

Q. By the same. Do you recollect how many days the proceedings were continued?

A. Several days, but the number I cannot state.

Q. By the same. Did the Court, in delivering its opinion, recite in substance the several parts of the opinion which it supposed was misrepresented in the publication, to point out the character of the misrepresentation?

A. I believe it did.

Q. By the same. Did the Court comment upon the influence of the publication upon the public, and upon the claims?

A. The Court spoke of the evil tendency of the publication, of its falsity, and of the motive of its author, which it declared was intended to prejudice the claimants against the Court, to bring the Court into disrepute, and to shake the faith of the suitors in the impartiality of the Judge.

Q. By the same. Is there not a general rule of the Court which precludes more than two counsel from arguing any cause or question except by permission of the Court?

A. I believe there was before and at that time a rule of the Court which confined the argument of any point of law to two counsel on the same side.

Q. By the same. Was the apparent irritation, of which you speak, on the part of the Court, constant during the whole course of the argument by Colonel Lawless?

A. I have already stated that I was not present during the whole of the argument by Colonel Lawless. I thought the Court was excited; whether or not there was an internal excitement going on during the whole time in the breast of the Court I will not undertake to say. I could only judge of the feeling of the Court, by the manner of the Judge displayed when addressing himself to Counsel.

Q. By the same. Is there feeling of ill-blood on your part against me?

A. I am the relative of Col. Lawless. I never was intimate with the District Judge of Missouri. Previous to his appointment as judge, we were upon terms of common acquaintance; subsequent to his appointment I never concealed my dislike to that appointment. It was frequently and publicly expressed. Up to the period when the transaction took place, in which the rule of court was made absolute against Col. Lawless, I believe we were barely on speaking terms. Since that time I am not aware that I have ever addressed myself to Judge Peck, except upon matters of business, and freely admit that I have been unfriendly to him.

Q. By the same. Were you concerned as counsel for the claimants, or any of them?

A. I am inclined to the opinion that, up to the time of the proceedings against Col. Lawless, I was not concerned for any claimant. Subsequent to that period, I was employed and acted as counsel in relation to some claims of Col. John Smith T. and perhaps in one other case.

Q. By the same. Was this paper, identified by the name of James Buchanan written thereon, and produced here by Col. Lawless, read in open court by you or Col. Lawless, after he had been brought into court and before sentence pronounced?

In the District Court for the District of Missouri, sitting at St. Louis, on the 21st day of April, 1826, for the decision of land titles.

The United States,
vs.
L. E. Lawless.

Be it remembered, that on the day and year aforesaid, the said [illegible] upon the said defendant to know whether if there were interro[illegible]

in this cause he would answer them, which the said defendant declined for the following reasons, which he assigned to said court in the words following: First, I refuse to answer the above interrogatories because this court has no jurisdiction of the offence charged upon me, in manner and form as the court has proceeded against me. Second, because the positions ascribed in the article signed "A Citizen" are true, and fairly inferred, and extracted from the opinion of this court in the case of Soulard's widow and heirs *vs.* the United States, as published.

A. The paper described in the interrogatory is in my hand writing, and I presume was read in open court at the period mentioned, but whether by myself or by Col. Lawless I cannot say; and, in truth, my belief upon that subject is based more upon the fact of that paper being in my hand writing, than upon any distinct recollection of the transaction, apart from the paper itself.

Q. By the same. Were you present when the rule was made against Col. Lawless?

A. My impression is rather that I was not.

Q. By the same. Was there much excitement during the pendency of the proceedings of the court?

A. There was considerable excitement among the members of the bar, during the pendency of the proceedings of the court. I do not think that the excitement became general until after sentence was pronounced by the court against Col. Lawless. Previous to that time I think it was confined, in a great degree, to the persons who were present during the discussions which took place. The room in which the court sat, was an apartment in a private dwelling, by no means remarkable for its size. After the decision against Col. Lawless, the excitement became strong and general throughout the community. It may be proper to remark, that I think the room upon the day when Mr. Geyer and myself addressed the court, was well filled, if not crowded.

Q. by Mr. Davis, of South Carolina. Was the language and deportment of the memorialist respectful and decorous to the court, while discussing the rule against the editor?

A. At those times when I was present I thought entirely so.

Q. by the same. Was the conduct of the judge respectful to the memorialist during his argument of the rule, or impatient, or rude?

A. I thought that the manner of the judge evinced considerable impatience and abruptness. It appeared to me that it was entirely different from the usual manner of Judge Peck, and I drew the inference that he was treating Col. Lawless rather as the author of the publication than as the counsel of the printer or publisher.

Q. by the same. Did you understand the allusion of Judge Peck to the Chinese custom of blacking the door of the slanderer's house, as being intended by him to have any application to Col. Lawless?

A. I understood it distinctly to apply to Col. Lawless. During the delivery of his opinion, he had frequently used the words slanderous, malicious, false, as applicable to the publication, and immediately then quoted the custom in China, which was adopted to a slanderer or calumniator, leaving the conclusion in my mind, that he thought him a proper object of such a mark of distinction.

Q. by Mr. Buchanan. How do you stand related to Col. Lawless?

A. We are second cousins.

Q. by same. Has the conduct of the court towards Col. Lawless, since the termination of his suspension, been respectful?

A. I know nothing to the contrary.

A. L. MAGENIS.

Sworn and subscribed before the Committee on the Judiciary, this 20th March, 1830.

ATTEST, JAMES BUCHANAN, *Chairman.*

John Mullanphy being duly sworn according to law, doth depose and say as follows;

I was in Court when the Judge made strictures upon a publication in the newspapers. I thought the Judge was a little irritated, when giving his opinion, and the only words I remember of his remarks, were the punishment of a calumniator in China, which is to have his house painted black. I know nothing more of the business than what I have stated.

Question by Judge Peck. How long were you in Court during the delivery of the opinion?

A. I cannot tell exactly, perhaps an hour or more.

Question by the same. Did the Court appear to have for its object the discussion of the questions which had been argued by counsel, and which were presented in the case?

A. I cannot tell what was the object of the Court, excepting as a preparatory step to the punishment of Col. Lawless.

Question by the same. Was the manner of the Court rude, in relation to any body?

A. I considered the Judge to be irritated against the author of the piece.

Question by the same. Had you been present during the previous discussion?

A. I do not remember that I was. What brought me there that day, was, that I understood proceedings were to be had against Colonel Lawless, for a contempt of Court.

Question by the same. Did the Court appear to wander from the subject under its consideration, for the purpose of lavishing abuse upon any one?

A. No. I do not know that it did. The various parts of that publication was discussed, and remarks made by the Judge as he went along.

Question by the same. Will you state the indications of excitement? In what did they consist? In sharpness of voice, in earnestness of manner, or in what?

A. I thought there was an earnestness of manner in the remarks made upon the piece, and the words slander and falsehood, as applicable to the author, were made use of more than once.

Question by Mr. Davis, of South Carolina. Did you understand the allusion of Judge Peck to the Chinese custom of blacking the door of the slanderer's house, as being intended by him to have any application to Col. Lawless?

A. I remember looking at Mr. Lawless whilst the Judge made that remark. Knowing Mr. Lawless to be of rather a hasty temper, I had my eye fixed upon him during the time, to see how he would take the language, as I conceived it applied to him.

JOHN MULLANPHY.

Sworn and subscribed before the Committee on the Judiciary, this 20th March, 1830.

Attest. JAMES BUCHANAN, *Chairman.*

The Reverend Thomas Horrell, being duly sworn according to law, doth depose and say as follows:

When I entered the room in which the Court was sitting, Mr. Magenis was making an argument before the Court as counsel for Colonel Lawless; I cannot distinctly recollect the grounds of his argument. His object was to shew that the rule could not apply in that case. He was succeeded by Mr. Geyer, who also appeared as counsel for Colonel Lawless. Colonel Strother commenced a speech, but stopped abruptly; I did not then know from what cause. The Judge then called upon Mr. Bates to read the publication signed "A Citizen," and proceeded to comment upon it. I cannot distinctly recollect the language of the Judge, but remember that the words calumny, slander, and misrepresentation, were used by him; and I considered them as intended to be applied to Colonel Lawless. I distinctly recollect his referring to the law of China, by which calumniators were punished by having their houses painted black. I did not remain in the Court until the Judge had concluded his remarks, but left it soon after Colonel Lawless absented himself. I cannot be expected to recollect particulars, not having charged my memory, and expecting never to be called upon to testify in this case.

Q. By Judge Peck. Is your recollection perfect as to the words of the Court so as to enable you to say whether it charged the publication to be slanderous, libellous, or false; or, whether such imputations were actually made against the defendant himself?

A. I certainly understood the language of the Judge as applicable to the author of the publication.

Q. By the same. Were not the matter of the publication, when the language referred to as used by the Court, the subject of its consideration??

A. I think so.

Q. By the same. Was not the words applied to the publication, and it charged to be slanderous and libellous, rather than as addressed by the Court to the defendant himself?

A. I perhaps shall find some difficulty in distinguishing between the application of the language of the Court to the publication and the then known author of it. I certainly understood the language of the Judge to be applicable to the author.

Q. By the same. Was the paper the subject of remark?

A. The paper, as I have before stated, was read by paragraphs, and the Judge proceeded to comment on that publication.

Q. By the same. Did the Court address itself to the author personally, or was it treating of the publication, and pronouncing upon its character?

A. I think the Court did not address itself personally to Colonel Lawless, but thought the language used was intended to be applied to him.

Q By the same. Were you in Court when the rule against Colonel Lawless was made?

A. I was not.

Q. By the same. Were you in Court, at any time after that, when Colonel Lawless came in and addressed the Court?

A. I was not.

Q. By the same. Were you in Court when Colonel Lawless was brought in upon the attachment?

A. I was in the Court but once during that term, and left it before the Judge had finished his comments upon the publication signed "A Citizen."

Q. By the same. Whether, in the course of that discussion, the Court in delivering its opinion was earnest and ardent in defence of principles, which you could have inferred had been the previous subjects of discussion?

A. I cannot distinctly recollect what principles were involved in the discussion. The manner of the Judge I thought animated and vehement.

Q. By Mr. Buchanan. How long had the Judge been employed in delivering the opinion of the Court before you left the court-room?

A. I suppose not more than twenty or thirty minutes—not more than half an hour.

Q. By the same. What was your understanding as to the application intended by the Judge of the law of China?

A. I understood it as being applicable to the author of the piece signed "A Citizen."

Q. By the same. What was the manner and conduct of Mr. Lawless whilst the Court were delivering their opinion?

A. I saw Mr. Lawless occasionally, and during some parts of Judge Peck's comments. His countenance indicated considerable excitement. He, however, remained quietly in his seat until he got up for the purpose of leaving the room, and until he left the room.

THOMAS HORRELL.

Sworn and subscribed before the Committee on the Judiciary, this 20th March, 1830.

Attest, JAMES BUCHANAN, *Chairman.*

Charles S. Hempstead being duly sworn according to law, doth depose and say as follows:

Understanding that a rule had been served upon Mr. Foreman, the Editor of "the Missouri Advocate," to shew cause upon an alleged contempt for the publication of an article which had been printed in his paper, signed "A Citizen," which contained strictures upon an opinion of the District Court of Missouri, sitting as a Land Court, in the case of Soulard's heirs; being a practitioner in that Court, I recollect being present in that Court when the argument was had upon that rule against Stephen W. Foreman. According to my recollection, at this time, Col. Lawless, Mr. Geyer, Mr. Strother, and perhaps Mr. Magenis, appeared as Counsel on behalf of Foreman on that occasion and resisted the rule being made absolute upon Foreman. The argument of the Counsel upon that occasion I cannot state at length, but from what I have understood from the testimony of Colonel Lawless and Mr. Magenis before this Committee, according to the best of my recollection the positions which they have stated in their testimony have been correctly stated, and were discussed by them before the Court. I understood that those positions were overruled by the Court, and that Col. Lawless was either given up or acknowledged himself to be the author of the piece signed "A Citizen," and I understood that a rule was served upon Col. Lawless to answer for the alleged contempt committed by him in the writing and publication of the piece signed "A Citizen." I was probably in Court during most of the proceedings against Col. Lawless upon that rule, but do not now distinctly recollect all the proceedings that occurred on that occasion, until the Judge delivered his opinion upon the rule against Col. Lawless. I distinctly recollect being in Court at that time. When Judge Peck commenced delivering his opinion, I think that he called upon Mr.

Edward Bates, then District Attorney of Missouri, to read the article signed "A Citizen." The Judge, according to my recollection, laid down what he considered to be the general principle of law as applicable to the doctrine of contempts, and applied them to the case then before the Court; that he expressed himself at some length, but what were his arguments I do not now recollect, but he stated, as the result of his opinion, that the case before the Court was one of those contemplated by the law of contempt, as he understood it, and that he should accordingly apply it to the author of the publication signed "A Citizen;" that he then proceeded to comment upon the article signed "A Citizen," paragraph by paragraph, as read by Mr. Bates, but I do not now recollect, from the lapse of time, all that he said upon that branch of his opinion, but I remember some portions of it. He stated it was evidently the intention of the author of "A Citizen" to misrepresent the opinion of the Court in the case of Soulard's heirs, to shake the public confidence in the impartiality of the Court, to bring the Court into disrepute, and to create a belief in the country, that land claimants having suits before that Court, could not expect justice from it. That the statements contained in the Citizen, as to matters of fact, were mistated. The Judge, I do not pretend to recollect the precise language of the Judge upon that occasion, but that he applied the terms of slanderer and of calumniator to the author of the piece signed "A Citizen;" that he expressed himself with much vehemence of manner, and appeared to be at times much excited. I now. recollect, although it had escaped me in my previous examination before the Committee, of the Judge mentioning the punishment awarded to slanderers and calumniators in China, of having their houses blacked, as an evidence of their disgrace, and to give a warning to all persons to avoid and pass by such a character, and according to my recollection, I think that he said that if the author of "A Citizen" was in China, and had committed such an offence as the Court deemed that he had by the publication of such an article as the "Citizen," that such would be his punishment. I do not now recollect whether I was in Court when the final sentence was pronounced on Colonel Lawless, but recollect being in Court during the time that most, if not all the Judge's opinion on that occasion was delivered. The time consumed in delivering that opinion, according to my recollection, was something more than an hour, perhaps two hours. I do not know that I can state any thing more at this time.

Q. By Judge Peck. Were you in Court when the rule was made upon Col. Lawless?

A. I do not recollect.

Q. Were you in Court when Col. Foreman, the Editor was examined by the Court?

A. I think I was.

Q. Do you recollect whether he did not, under that examination, disclaim all knowledge of the mischievous tendency of the publication, and all intention on his part to reflect upon the Court?

A. I don't recollect Col. Foreman's precise answer, but according to my recollection he disclaimed all intention of committing any contempt of that Court.

Q. Were you present at any time after the rule made upon Col. Lawless, when he appeared in Court, and addressed the Court for the purpose of having time allowed to him to attend to his professional business in the other Court, before the argument should proceed in his case?

A. I was probably present, but do not recollect distinctly of Col. Lawless' addressing the Court at any other time than as Counsel for Col. Foreman. Although he might have made the motion you speak of, I don't recollect it.

Q. Were you present when the opinion of the Court was delivered in the case of Soulard?

A. I was, and took notes of it. I was also present during the argument of that case.

Q. Who was associated with Col. Lawless in the argument of that case?

A. Col. George F. Strother.

Q Were they heard at great length?

A. Col. Lawless made an argument of great length, and a very elaborate argument, but I don't recollect when Col. Strother spoke or how long, although I know he appeared in the case.

Q. Was the decree rendered at the same term at which the opinion was delivered in the case of Soulard?

A. I do not positively recollect; my impression is, it was not.

Q. Was its rendition postponed for the purpose of enabling Col. Lawless to be present?

A. I do not know the fact, Col. Lawless was absent during the progress of the suit; possibly it might have been so.

Q. Were you present during the argument of Col. Lawless on the rule against the Editor?

A. I was.

Q Can you say whether the Court interrupted Col. Lawless for any other purpose than that of directing his attention to some point arising out of the publication, or the opinion commented upon therein, and if you can, what?

A. I do not distinctly recollect; Col. Lawless was interrupted several times, but I do not now recollect for what purpose.

The witness here said,

There is one thing which escaped me in my direct examination; that the Judge, in commenting upon the motives which probably induced the author of "A Citizen" in writing that article, appeared to be directed not only to injure the Court, but to reach the Judge.

Q. By Mr. Buchanan. What was the manner of the Judge and of Mr. Lawless, respectively, whilst the argument of the rule against the printer was proceeding?

A. I do not recollect that there was any thing extraordinary in the conduct of either.

Q. By the same. What was the manner of each of them, whilst the Judge was delivering his opinion on the rule against Mr. Lawless?

A. The manner of the Judge did not appear to be directed personally towards Mr. Lawless, but speaking of him as the author of "A Citizen" and the defendant on that rule before the Court, appeared to be vehement and much excited. I observed nothing particular in the conduct of Mr. Lawless whilst he remained in Court, which he left before the opinion was finished.

CHARLES S. HEMPSTEAD.

Sworn and subscribed before the Committee on the Judiciary, this 20th of March 1830.

Attest, JAMES BUCHANAN, *Chairman.*

Edward Charless being duly sworn according to law doth depose and say as follows:

"The Missouri Republican" of the 30th March, 1826, identified by the name of James Buchanan written thereon, was exhibited to the witness, whereupon his examination proceeded as follows: I was the publisher and printer of this paper. The opinion therein contained, was published, to the best of my recollection, at the request of Judge Peck. He unquestionably furnished the original for publication.

Q. By Judge Peck. Were you in court during any part of the proceedings against Mr. Foreman or Mr. Lawless?

A. I was I think about ten minutes on the day on which the rule was made against Col. Lawless. Col. Lawless was addressing the court. I have no recollection of the arguments made by him or the language used. I merely recollect that he was sometimes interrupted by the Judge.

Q. By the same. - With what view did the interruptions, on the part of the court, appear to be made? Had they for their object to refer the counsel to any matter arising out of the publication or the opinion which had been commented upon?

A. They were in relation to the article published in the Advocate. The short time that I remained in court, so little of the proceedings did I hear, that I am unable to answer the question fully.

Q. By the same. Was there any thing remarkable in the manner of the court whilst you were there?

A. I thought the manner of the Judge was earnest, and appeared at times a little excited.

EDWARD CHARLESS.

Sworn and subscribed before the Committee on the Judiciary, March 20, 1830.

Attest: JAMES BUCHANAN, *Chairman.*