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IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE G. THOMAS PORTEOUS, JR.

HEARINGS

BEFORE THE

SENATE IMPEACHMENT TRIAL COMMITTEE
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

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

November 16, 2010

Volume 1 of 3, Part A

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Volume 1 of 3, Part A
I. PRELIMINARY MATTERS

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III

111TH CONGRESS
2D SESSION

H. RES. 1031

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2010
Received

RESOLUTION

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

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

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

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ARTICLE I

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

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

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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.

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

ARTICLE II

G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court Judge. That conduct included the following: Beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, and continuing while he was a Federal judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail 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

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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;

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(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

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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".

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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.

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

NANCY PELOSI,
Speaker of the House of Representatives.

Attest: LORRAINE C. MILLER,
Clerk.

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III

111TH CONGRESS
2D SESSION

S. RES. 457

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against G. Thomas Porteous, Jr.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2010

Mr. REID (for himself and Mr. MCCONNELL) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against G. Thomas Porteous, Jr.

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

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

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

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

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

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

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

SEC. 8. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the

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Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

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

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III

111TH CONGRESS
2D SESSION

S. RES. 458

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge G. Thomas Porteous, Jr.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2010

Mr. REID (for himself and Mr. MCCONNELL) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge G. Thomas Porteous, Jr.

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

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

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

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

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

SEC. 6. (a) The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the

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contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

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

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

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

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

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

S. RES. 457

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

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

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

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

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

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

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

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

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

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

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

The motion to lay on the table was agreed to.

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

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

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

The legislative clerk read as follows:

A resolution (S. Res. 458) to provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge G. Thomas Porteous, Jr.

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

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

S. RES. 458

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

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

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

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

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

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

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

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

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

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

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

The motion to lay on the table was agreed to.

APPOINTMENT OF IMPEACHMENT TRIAL COMMITTEE

Mr. REID. Mr. President, in accordance with the resolution on the appointment of an impeachment trial committee, I recommend to the Chair the appointment of Senators MCCASKILL, as chair, KLOBUCHAR, WHITEHOUSE, UDALL of New Mexico, SHAHEEN, and KAUFMAN.

The PRESIDING OFFICER. The Republican leader is recognized.

Mr. MCCONNELL. Mr. President, in accordance with the resolution on the appointment of an impeachment trial committee, I recommend to the Chair the appointment of Senator HATCH, who will serve as vice chairman, and Senators BARRASSO, DEMINT, JOHANNS, RISCH, and WICKER.

The PRESIDING OFFICER. Pursuant to the resolution on the appointment of an impeachment trial committee and impeachment rule XI, the Chair appoints upon the recommendation of the two leaders the following Senators to be members of the committee to receive and report evidence in the impeachment of Judge G. Thomas Porteous, Jr.: Senators MCCASKILL (chairman), KLOBUCHAR, WHITEHOUSE, UDALL of New Mexico, SHAHEEN, KAUFMAN, HATCH (vice chairman), BARRASSO, DEMINT, JOHANNS, RISCH, and WICKER. The Senate will take further proper order and notify the House of Representatives and counsel for Judge Porteous.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

TAX ON BONUSES RECEIVED FROM CERTAIN TARP RECIPIENTS—Resumed

The ACTING PRESIDENT pro tempore. The clerk will report the pending business.

The legislative clerk read as follows:

A bill (H.R. 1586) to impose an additional tax on bonuses received from certain TARP recipients.

Pending:

Rockefeller amendment No. 3452, in the nature of a substitute.

Sessions/McCaskill modified amendment No. 3453 (to amendment No. 3452), to reduce the deficit by establishing discretionary spending caps.

McCain/Bayh amendment No. 3475 (to amendment No. 3452), to prohibit earmarks in years in which there is a deficit.

McCain amendment No. 3527 (to amendment No. 3452), to require the Administrator of the Federal Aviation Administration to develop a financing proposal for fully funding the development and implementation of technology for the Next Generation Air Transportation System.

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TERRANCE W. GAINER
SERGEANT AT ARMS

SH-B 1
THE CAPITOL
WASHINGTON, DC 20510-7700
(202) 224-2341

United States Senate

OFFICE OF THE SERGEANT AT ARMS

April 7, 2010

The Honorable Nancy Erickson
Secretary of the Senate
United States Senate
S-312, The Capitol
Washington, DC 20510

Dear Ms. Erickson:

Enclosed is the official writ of summons served upon Judge G. Thomas Porteous, Jr. on March 19, 2010. Please let me know if you need additional information.

Respectfully,

Terrance W. Gainer
Sergeant at Arms

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

Terrance W. Gainer
Sergeant at Arms

Witness
Andrew B. Willison
Deputy Sergeant at Arms

Dated 23 March 2010

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

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

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

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

PREAMBLE

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

For the first time in modern history, the House of Representatives has impeached a sitting Article III Judge who has never been charged with a crime. Indeed, it has been more than 74 years since the House of Representatives has brought Articles of Impeachment against a judge that were not preceded by that judge's indictment in the criminal courts. The Articles of Impeachment brought against Judge Porteous are also unprecedented in two additional ways. First, this is the only time since the ratification of

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the Constitution that the House of Representatives has brought Articles of Impeachment against a judge after the Executive Branch, having conducted a thorough investigation, has declined to prosecute. Second, it is the only time in the same period that the House of Representatives has based an Article of Impeachment against a judge, or any other officer, upon allegations that pre-date his or her entry into federal office.

These actions are unprecedented and they are also unjustified by the facts of this case. The four Articles of Impeachment do not allege a single offense that supports the conviction and removal of a sitting Article III Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Indeed, in some instances, the Articles allege violations of the canons of judicial ethics or criticize Judge Porteous' handling of matters before the Court. While Judge Porteous vehemently denies violating those canons or mishandling matters, non-criminal ethical violations or incorrect decisions have never been found to be a sufficient basis for conviction and removal from office. Such issues simply do not rise to the level of "high Crimes and Misdemeanors" as contemplated by the Framers. To the extent that a trial on the Articles in this case is permitted to convert – in contravention of both the Constitution and impeachment precedent – such acts into grounds for removal of an Article III Judge, it will set a new standard. A standard that treads deeply and

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dangerously into the realm of an independent judiciary that was at the very core of the Framers' vision of three co-equal branches of government.

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

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

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GENERAL DENIAL OF FACTS NOT ADMITTED

Judge Porteous denies each and every material allegation of the four Articles of Impeachment not specifically admitted in this ANSWER.

ARTICLE I

ANSWER TO ARTICLE I

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

FIRST AFFIRMATIVE DEFENSE TO ARTICLE I

Article I does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon "Impeachment for, and Conviction of, Treason,

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Bribery or other high Crimes and Misdemeanors." The charges in the articles against Judge Porteous do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Because Article I does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE I

Article I is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. In essence, Article I alleges that Judge Porteous took several judicial actions while presiding as a United States District Judge in *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises*, including failing to grant a recusal motion and failing to disclose certain facts. In doing so, the Article alleges that Judge Porteous "deprived the parties and the public of the right to the honest services of his office." This "deprivation of the right to honest services" language is borrowed from Title18, United States Code, Section 1346, a statute that is fraught with vagueness concerns. Indeed, its constitutional viability is currently pending before the United States Supreme Court in a series of cases. *See Weyhrauch v. United States*, No. 08-1196; *Black v. United States*, No. 08-876; and *Skilling v. United States*, No. 08-1394. The inclusion of this standard, as well as the non-specific allegations regarding the allegedly improper judicial actions taken by Judge Porteous, render Article I unconstitutionally vague.

It is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare

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the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific "high Crime and Misdemeanor" upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

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

THIRD AFFIRMATIVE DEFENSE TO ARTICLE I

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

Despite these clear pronouncements, the House of Representatives, in Article I, has alleged a series of allegedly wrongful acts. In doing so, the House of Representatives has returned an Article of Impeachment which might permit a Senator to vote for impeachment if he or she finds that Judge Porteous committed even a single allegedly wrongful act, even where two-thirds of the Senators do not agree on which wrongful act was committed. This creates the very real possibility that conviction could occur even though Senators were in wide disagreement as to the alleged wrong committed. The structure of Article I presents the possibility that Judge Porteous could be convicted even though he would have been acquitted if separate votes were taken on each allegedly

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wrongful acts included in the article. As written, Article I does not require the constitutionally required number of Senators to agree on the specific conduct forming the basis for conviction and removal. By charging multiple wrongs in one article, the House of Representatives has made it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of two-thirds of the members. Accordingly, Article I should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I

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

ARTICLE II

ANSWER TO ARTICLE II

Without waiving his affirmative defenses, Judge Porteous denies that he engaged in a longstanding pattern of corrupt conduct demonstrating his unfitness to serve as a United States District Court Judge as alleged in Article II. Judge Porteous further denies

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that he improperly set aside or expunged felony convictions for two Marcotte employees. Judge Porteous also denies that he at any time took any action in his capacity as a United States District Judge that related in any way to the Marcottes or their business interests.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE II

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

SECOND AFFIRMATIVE DEFENSE TO ARTICLE II

Article II is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. Article II alleges that Judge Porteous engaged in certain corrupt actions prior to his appointment and confirmation to the position of Untied States District Judge. Article II makes no specific allegations concerning actions taken by Judge Porteous while on the federal bench. Indeed, the only allegations concerning Judge Porteous tenure on the federal bench is that he in some unidentified way "used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals

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important to the Marcottes' business." The vagueness problem here cannot be overstated. It is simply not possible to begin to defend against this type of allegation. It is wholly lacking in any factual basis and clearly fails to frame a set of facts that amount to "high Crimes and Misdemeanors."

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

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

THIRD AFFIRMATIVE DEFENSE TO ARTICLE II

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

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FOURTH AFFIRMATIVE DEFENSE TO ARTICLE II

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

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ARTICLE III

ANSWER TO ARTICLE III

Without waiving his affirmative defenses, Judge Porteous denies that he knowingly and intentionally made material false statements and representatives in connection with his personal bankruptcy or that he knowingly and intentionally repeatedly violated a court order in his bankruptcy case.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE III

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

SECOND AFFIRMATIVE DEFENSE TO ARTICLE III

Article III is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. In essence, Article III alleges a number of actions taken by Judge Porteous in connection with his personal bankruptcy, but it unclear as to the specific acts are claimed to violate the

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constitutional standard. Moreover, it is also does not clearly state the specific allegations regarding what transaction Judge Porteous concealed during the bankruptcy process or what new debts he allegedly incurred.

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

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

THIRD AFFIRMATIVE DEFENSE TO ARTICLE III

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

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE III

For the reasons set forth in the FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I, Article III was returned by the House of Representatives in violation of

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Judge Porteous' constitutional rights in that it is based, in part, upon his compelled testimony provided under a grant of immunity. Because the process of impeachment, conviction and removal is a quasi-criminal one and under the circumstances here, Judge Porteous has constitutional rights that are violated by the use of his prior compelled, immunized testimony, Article 1 must be dismissed. Further, because the immunity grant by Judge Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals and Chair of the Special Committee of the Judicial Conference of the Fifth Circuit, was not proper under the immunity statute, the compelled testimony was wrongly procured and any Article of Impeachment based upon that testimony must be dismissed.

FIFTH AFFIRMATIVE DEFENSE TO ARTICLE III

The allegations in Article III do not rise to the level of "high Crimes and Misdemeanors" because they address purely personal conduct that is not criminal. Prior impeachment precedent has never before sought to convict and remove a judge from office based upon personal non-criminal conduct. The very nature of the impeachment process is focused first and foremost upon the official actions of judges. Where allegations in the Articles of Impeachment address non-official personal acts by judges, longstanding precedent has limited "high Crimes and Misdemeanors" to those personal acts that are also indictable offenses. Article III ignores this precedent in seeking to convict and remove Judge Porteous from office for non-official, non-criminal acts. While it is possible that the House of Representatives would claim that the actions taken in relation to the personal bankruptcy were indictable offenses, this claim would conflict with the multi-year investigation of the United States Department of Justice which concluded that

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prosecution was not warranted in light of the concern that the issues related to the bankruptcy were not material. It would also conflict with the criminal bankruptcy statues, which require that any alleged false statement not be made simply knowingly or willfully, but fraudulently, before criminal liability may attach to such conduct. In framing Article III, the House of Representatives is seeking to convict and remove a sitting United States District Judge based upon a lowered standard, one that does not constitute "high Crimes and Misdemeanors," and one that has never before provided a basis for impeachment, much less conviction and removal from office. Article III of the Articles of Impeachment should be dismissed.

ARTICLE IV

ANSWER TO ARTICLE IV

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

FIRST AFFIRMATIVE DEFENSE TO ARTICLE IV

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

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Misdemeanors." Because Article IV does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of "high Crimes and Misdemeanors" as required by the Constitution. In essence, Article IV alleges that Judge Porteous gave false answers on various forms that were presented in connection with the background investigation that was used to evaluate his appointment and confirmation as a United States District Judge. However, it is not clear whether Article IV contends that simply providing a single one of the alleged false statements is a "high Crime or Misdemeanor" or whether the "high Crime or Misdemeanor" is based upon all of the acts alleged, i.e., several alleged false statements and other conduct alleged. Moreover, the nature of the questions on the forms that are the focus of this Article themselves add to the vagueness problem.

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

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

THIRD AFFIRMATIVE DEFENSE TO ARTICLE IV

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

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE IV

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

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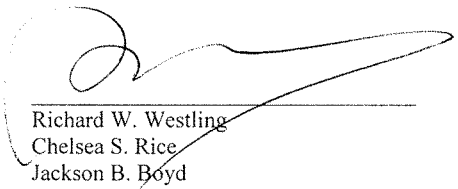
House has clearly applied that lower standard in returning the four Articles of Impeachment. To the extent that the House has relied on the "good behaviour" clause, that clause states that judges "shall hold their offices during good behaviour" and clearly relates to a judge's conduct while in federal judicial office. Because the allegations of Article IV relate to a period prior to Judge Porteous taking the federal bench, Article IV must be dismissed.

Respectfully submitted,



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Submitted: April 7, 2010

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In The Senate of the United States

Sitting as a Court of Impeachment

—

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

—

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

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

RESPONSE TO THE PREAMBLE

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

At several points in his Preamble, Judge Porteous notes that he was not criminally prosecuted by the Department of Justice, the implication being that the House and the Senate should abdicate their Constitutionally assigned roles of deciding whether the conduct of a Federal judge rises to the level of a high crime or misdemeanor and warrants the Judge's removal, and should instead defer to the Department of Justice on this issue. Judge Porteous maintains that impeachment and removal may only proceed upon conduct that resulted in a criminal prosecution, no matter how corrupt the conduct at issue, or what reasons explain the

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Department's decision not to prosecute. Judge Porteous provides no support for this contention because there is none – that is not what the Constitution provides.

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

Further, according to Judge Porteous, pre-Federal bench conduct cannot be the basis of Impeachment, even if that conduct consisted of egregious corrupt activities that was beyond the reach of criminal prosecution because the statute of limitations had run, and even if Judge Porteous fraudulently concealed that conduct from the Senate and the White House at the time

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

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

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of his nomination and confirmation. There is nothing in the Constitution to support this contention, and it flies in the face of common sense. The Senate is entitled to conclude that Judge Porteous's pre-Federal bench conduct reveals him to have been a corrupt state judge with his hand out under the table to bail bondsmen and lawyers. Such conduct, which, as alleged in Articles I and II, continued into his Federal bench tenure, demonstrates that he is not fit to be a Federal judge.

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

ARTICLE I

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

FIRST AFFIRMATIVE DEFENSE

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

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SECOND AFFIRMATIVE DEFENSE

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

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

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THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the voluntary statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges. Judge Porteous was provided a grant of immunity in connection with his Fifth Circuit Hearing

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[4]The respective Articles of Impeachment against Judges Halsted L. Ritter, Harold Louderback, and Robert W. Archbald each set forth lengthy descriptions of judicial misconduct arising from improper financial relationships between those judges and the private parties. These consist of detailed narration specifying numerous discrete acts. See "Impeachment of Judge Halsted L. Ritter," H Res. 422, 74th Cong., 2d Sess. (March 2, 1936) and "Amendments to Articles of Impeachment Against Halsted L. Ritter," H. Res. 471, 74th Cong., 2d Sess. (March 30, 1936), reprinted in "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) [hereinafter "1973 Committee Print"] at 188-197 (H. Res 422), 198-202 (H. Res. 471); ["Articles of Impeachment against Judge Robert W. Archbald"], H. Res. 622, 62d Cong., 2d Sess (1912), 48 Cong Rec. (House) July 8, 1912 (8705-08), reprinted in 1973 Committee Print at 176; and ["Articles of Impeachment against George W. English,"] Cong Rec. (House), Mar. 25, 1926 (6283-87), reprinted in 1973 Committee Print at 162.

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testimony, and the immunity order provided that his testimony from that proceeding could not be used against him in "any criminal case." Simply put, an impeachment trial is not a criminal case.[5] Accordingly, there is simply no credible basis to argue that the Senate should not consider Judge Porteous's voluntary and immunized Fifth Circuit testimony.

ANSWER TO ARTICLE II

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

FIRST AFFIRMATIVE DEFENSE

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

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[5]The Constitution makes it clear that impeachment was not considered by the Framers to be a criminal proceeding. It provides: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const., Art. 3, cl. 7. See also, United States v. Nixon, 506 U.S. 224, 234 (1993) ("There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses–the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. . . . The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments . . .").

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SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that Article II improperly charges pre-Federal bench conduct as a basis for impeachment. First, Article II plainly alleges that Judge Porteous's corrupt relationship with the Marcottes continued while he was a Federal Judge. Second, Judge Porteous's assertion that pre-Federal bench conduct may not form a basis for impeachment finds no support in the

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Constitution and is not supported by any other sound legal or logical basis.[6] As a factual matter, it is especially appropriate for the Senate to consider Judge Porteous's pre-Federal bench corrupt relationship with the Marcottes where it was affirmatively concealed from the Senate in the confirmation process, where it involved conduct as a judicial officer directly bearing on whether he was fit to hold a Federal judicial office, and where that conduct, having now been exposed, brings disrepute and scandal to the Federal bench.

ARTICLE III

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

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges in substance that the allegations in Article III are vague. To the contrary, Article III sets forth several specific allegations associated with Judge Porteous's

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

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conduct in his bankruptcy proceedings. There is no credible contention that Judge Porteous cannot understand what he is charged with in this Article.

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

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

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FIFTH AFFIRMATIVE DEFENSE

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

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

Third, what the Department of Justice may consider material for purposes of a criminal prosecution has nothing to do with what the Senate may deem to be material for purposes of determining whether Judge Porteous should be removed from Office - an Office which requires that he oversee bankruptcy cases and administer and enforce the oath to tell the truth.[7]

ARTICLE IV

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

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

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FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

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statements, all involving a single issue, in a single Article is consistent with precedent.[8]

FOURTH AFFIRMATIVE DEFENSE

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

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

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Office of United States District Court Judge. The proposition that the Senate lacks power under these circumstances to remedy the wrong committed by Judge Porteous is simply untenable.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

April 15, 2010

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In The Senate of the United States

Sitting as a Court of Impeachment

—

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

—

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

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

RESPONSE TO THE PREAMBLE

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

At several points in his Preamble, Judge Porteous notes that he was not criminally prosecuted by the Department of Justice, the implication being that the House and the Senate should abdicate their Constitutionally assigned roles of deciding whether the conduct of a Federal judge rises to the level of a high crime or misdemeanor and warrants the Judge's removal, and should instead defer to the Department of Justice on this issue. Judge Porteous maintains that impeachment and removal may only proceed upon conduct that resulted in a criminal

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prosecution, no matter how corrupt the conduct at issue, or what reasons explain the Department's decision not to prosecute. Judge Porteous provides no support for this contention because there is none – that is not what the Constitution provides.

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

Further, according to Judge Porteous, pre-Federal bench conduct cannot be the basis of Impeachment, even if that conduct consisted of egregious corrupt activities that was beyond the reach of criminal prosecution because the statute of limitations had run, and even if Judge

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

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

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Porteous fraudulently concealed that conduct from the Senate and the White House at the time of his nomination and confirmation. There is nothing in the Constitution to support this contention, and it flies in the face of common sense. The Senate is entitled to conclude that Judge Porteous's pre-Federal bench conduct reveals him to have been a corrupt state judge with his hand out under the table to bail bondsmen and lawyers. Such conduct, which, as alleged in Articles I and II, continued into his Federal bench tenure, demonstrates that he is not fit to be a Federal judge.

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

ARTICLE I

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

FIRST AFFIRMATIVE DEFENSE

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

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SECOND AFFIRMATIVE DEFENSE

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

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

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THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which, in effect, seeks to suppress the statements of a highly educated and experienced Federal judge, made under oath, before other Federal judges. Judge Porteous was provided a grant of immunity in connection with his Fifth Circuit Hearing testimony, and the

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[4]The respective Articles of Impeachment against Judges Halsted L. Ritter, Harold Louderback, and Robert W. Archbald each set forth lengthy descriptions of judicial misconduct arising from improper financial relationships between those judges and the private parties. These consist of detailed narration specifying numerous discrete acts. See "Impeachment of Judge Halsted L. Ritter," H Res. 422, 74th Cong., 2d Sess. (March 2, 1936) and "Amendments to Articles of Impeachment Against Halsted L. Ritter," H. Res. 471, 74th Cong., 2d Sess. (March 30, 1936), reprinted in "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) [hereinafter "1973 Committee Print"] at 188-197 (H. Res 422), 198-202 (H. Res. 471); ["Articles of Impeachment against Judge Robert W. Archbald"], H. Res. 622, 62d Cong., 2d Sess (1912), 48 Cong Rec. (House) July 8, 1912 (8705-08), reprinted in 1973 Committee Print at 176; and ["Articles of Impeachment against George W. English,"] Cong Rec. (House), Mar. 25, 1926 (6283-87), reprinted in 1973 Committee Print at 162.

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immunity order provided that his testimony from that proceeding could not be used against him in "any criminal case." Simply put, an impeachment trial is not a criminal case.[5] Accordingly, there is simply no credible basis to argue that the Senate should not consider Judge Porteous's immunized Fifth Circuit testimony.

ANSWER TO ARTICLE II

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

FIRST AFFIRMATIVE DEFENSE

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

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[5]The Constitution makes it clear that impeachment was not considered by the Framers to be a criminal proceeding. It provides: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const., Art. 3, cl. 7. See also, United States v. Nixon, 506 U.S. 224, 234 (1993) ("There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses–the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. . . . The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments . . .").

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SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, namely, that Article II improperly charges pre-Federal bench conduct as a basis for impeachment. First, Article II plainly alleges that Judge Porteous's corrupt relationship with the Marcottes continued while he was a Federal Judge. Second, Judge Porteous's assertion that pre-Federal bench conduct may not form a basis for impeachment finds no support in the

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Constitution and is not supported by any other sound legal or logical basis.[6] As a factual matter, it is especially appropriate for the Senate to consider Judge Porteous's pre-Federal bench corrupt relationship with the Marcottes where it was affirmatively concealed from the Senate in the confirmation process, where it involved conduct as a judicial officer directly bearing on whether he was fit to hold a Federal judicial office, and where that conduct, having now been exposed, brings disrepute and scandal to the Federal bench.

ARTICLE III

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

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

The House of Representatives denies each and every allegation of this purported affirmative defense, which alleges in substance that the allegations in Article III are vague. To the contrary, Article III sets forth several specific allegations associated with Judge Porteous's

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

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conduct in his bankruptcy proceedings. There is no credible contention that Judge Porteous cannot understand what he is charged with in this Article.

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

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

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FIFTH AFFIRMATIVE DEFENSE

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

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

Third, what the Department of Justice may consider material for purposes of a criminal prosecution has nothing to do with what the Senate may deem to be material for purposes of determining whether Judge Porteous should be removed from Office – an Office which requires that he oversee bankruptcy cases and administer and enforce the oath to tell the truth.[7]

ARTICLE IV

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

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

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FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

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statements, all involving a single issue, in a single Article is consistent with precedent.[8]

FOURTH AFFIRMATIVE DEFENSE

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

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

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Office of United States District Court Judge. The proposition that the Senate lacks power under these circumstances to remedy the wrong committed by Judge Porteous is simply untenable.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

April 22, 2010

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United States Senate

WASHINGTON, DC 20510

April 13, 2010
At 4:00 p.m.
SR-301, Russell Senate Office Building

ORGANIZATIONAL MEETING OF THE

Impeachment Trial Committee on the Articles of Impeachment Against Judge G. Thomas Porteous, Jr. of the Eastern District of Louisiana

AGENDA

1. Opening Remarks by the Chairman and Vice Chairman
2. Overview of the Role of the Committee by Senate Legal Counsel Morgan Frankel
3. Committee Delegation of Authority to the Chairman and Vice Chairman
4. Committee Consideration of Rules and Procedures
5. Discussion of Timeframe for the activities of the Committee
6. Adjournment at the Call of the Chairman

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THE ARTICLES AGAINST JUDGE G. THOMAS PORTEOUS, JR. ORGANIZATIONAL MEETING

TUESDAY, APRIL 13, 2010

UNITED STATES SENATE,
IMPEACHMENT TRIAL COMMITTEE,
Washington, D.C.

The committee met, pursuant to notice, at 4:09 p.m., in Room SR–301, Russell Senate Office Building, Hon. Claire McCaskill, Chairman of the committee, presiding.

Present: Senators McCaskill, Klobuchar, Whitehouse, Udall, Shaheen, Kaufman, Hatch, DeMint, Barrasso, Wicker, Johanns, and Risch.

OPENING STATEMENT OF CHAIRMAN McCASKILL

Chairman MCCASKILL. The committee will come to order. I want to say good afternoon to everyone and welcome the members of the Committee, welcome my colleagues to this organizational meeting of the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge G. Thomas Porteous, Jr., of the Eastern District of Louisiana.

On March 17, 2010, the Committee agreed to S. Res. 457, which provides for the issuance of a summons and for related procedures concerning the Articles of Impeachment against Judge Porteous. That summons was served by the Sergeant at Arms, and on April 7, 2010, Judge Porteous filed his answer with the Senate.

The Senate also agreed to S. Res. 458, which provides for the appointment of a Committee to receive and to report evidence with respect to the Articles of Impeachment against Judge Porteous. As a Committee, we recognize the seriousness of our work to prepare the Senate for an impeachment trial. Article 1, Section 3 of our Constitution establishes that the Senate shall have the sole power to try all impeachments. It is one of our most sacred responsibilities, appearing in the section of the Constitution that establishes the Senate as a body. It is the first and most substantial check that the Founders provided to the legislative branch to balance the other branches. We intend to proceed fairly, yet expeditiously, to gather the necessary evidence and present a neutral report to the full Senate and allow the body to make an independent decision based on the facts and evidence as presented.

This is an organizational meeting and I will have a number of motions that we will have a chance to discuss, but at this point in time, I would turn over to the Vice Chairman, Senator Hatch. I

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want to say first, for the record, how grateful I am that he is serving on this Committee because I believe he is, in fact, the only member of this Committee that has been involved in other impeachment trials, and I think as a member of this same Committee, and I think it is very important that we have his experience and expertise as we begin our work on this obviously very important responsibility.

So thank you, Senator Hatch, and I would turn the meeting over to you for any opening remarks you would like to make, and then if any of the other members of the Committee would like to make any opening remarks.

OPENING STATEMENT OF VICE CHAIRMAN HATCH

Vice Chairman HATCH. Well, thank you, Madam Chairman. A common feature of our system of government is what we call checks and balances. Legislation requires the President's signature. Nominations require Senate consent. In fact, the Constitution uses the word "sole" only twice. It gives the House of Representatives the sole power of impeachment and it gives the Senate the sole power of trying impeachments.

That is what brings us together today, the grave and the solitary task of beginning the trial process regarding the impeachment of U.S. District Judge G. Thomas Porteous, Jr. That task is the Senate's alone and we must proceed with the utmost seriousness and dedication to fairness. A majority of public officials impeached in American history have been judges, and a majority of those have been convicted by the Senate and removed from office. Judicial independence is a hallmark of our judicial system and the reason why the Constitution does not set a time limit for judicial service.

I have served on the Senate Judiciary Committee for 34 years—nearly 34 years—and chaired it for eight of those years. Three of my colleagues on this Committee serve on the Judiciary Committee, as well. That Committee has the positive task of evaluating nominees for appointment to the judiciary. This Committee, in contrast, has the negative task of assisting the Senate in evaluating whether to remove a judge from the judiciary. That is, thankfully, a very rare situation in our country, but it is crucial to maintain the public trust.

I look forward to working with you, Senator McCaskill, and the other members of the Committee in the weeks and months ahead. This is not an easy process that we have to really be diligent with. Technology will allow this Committee process to be more accessible and transparent than when it was last used more than 20 years ago, and so the American people will be better able to understand what their elected representatives are doing.

I am grateful for your diligence and for your willingness to allow me to make these opening remarks and I look forward to serving with you very, very much.

Chairman MCCASKILL. Thank you, Senator Hatch.

Do any other members wish to make any opening comments?

[No response.]

All right. Thank you. At this time, I would like to turn to Morgan Frankel, the Senate Legal Counsel, to provide an overview of the role of the Committee.

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Mr. FRANKEL. Thank you, Madam Chairman and members of the Committee. The idea of having the Impeachment Trial Committee originated in the Senate's rules in 1935. It was first used in 1986 and used three times with three Federal judges who had been impeached in the 1980s.

The idea arose from experience in the early part of the 20th century in which all trial proceedings in impeachment trials were conducted solely on the Senate floor, occupying a great deal of time of the Senate's business on the floor and often involving spotty or limited attendance by members.

The Senate, after a couple of impeachment trials along those lines, determined that it would be better to have the option of appointing a Committee of members who would create the evidentiary record and receive the evidence in order to certify a record for the Senate's consideration. The Senate then could hear any witnesses itself it wanted to, could study the record, which now can include videotaped hearings as well as transcripts, and hear final argument and deliberate and vote on the Articles of Impeachment based on a record that a group of Senators had dutifully attended to. And it would be better to have a small group who intensely participated and followed the entire proceedings and were able to put these proceedings in context and direct other members to parts of the record, if you will, that were especially important than to have everything happen on the floor without that kind of attention to the specifics.

The Committee has four principal functions as part of that role. The first is to conduct necessary pretrial proceedings to get the case to be ready to be tried in hearings before the Committee.

The second is to conduct the hearings themselves, which serve as the evidentiary process of the trial, and to create the record.

The third is to file a neutral report with the Senate, which consists of a certification of the evidence, the testimony that was heard and the documents that were admitted into evidence, and to, in the last couple of trials, accompany that with a neutral statement, a neutral report, that summarizes the uncontested facts and the evidence on the contested facts with references to the record to help all members understand and digest the evidence. The Committee does not make any findings or recommendations as a Committee. Its sole job is to create a fair and full record for the use of the Senate.

The final task, though, that has developed is when the matter does get to the full Senate, inevitably, members look to members of this Committee to guide them through the evidence, and help them understand the arguments and the issues. But members of the Committee do that individually according to their own views, not as members of the Committee.

The first task will be to develop the pretrial proceedings necessary to get the case ready to be heard by the Committee. Usually, administrative matters are handled by the Chair and Vice Chair, who will spend the most time on pretrial issues, working with the representatives of the parties. Usually matters needing resolution, such as motions on important pretrial matters, would be reserved to the entire Committee to make decisions on.

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The kinds of issues that will potentially arise are, first, requests for some kind of pretrial discovery. There have been some proceedings previously that have created some opportunities for discovery, but there may be more discovery requested, including the possibility of depositions. There may be a process of trying to get the parties to stipulate to various uncontested facts or to authentication and admissibility of documents to streamline the trial. That has been successful in the past.

The parties may each offer a series of pretrial motions. The Judge may file some—has indicated that he may file some—motions to dismiss various of the Articles of Impeachment on purely legal grounds. The Committee will need to decide how to handle those.

And the parties may, as well, have a number of pretrial motions for the parts of the trial, some or all, that will go forward. These could include issues about the use and admissibility of the prior evidence that has been created in the judicial forum and in the House forum and in Grand Jury investigations, potentially motions in limine, meaning motions to exclude various kinds of evidence from the trial, and requests for immunity orders. A number of the witnesses who may be called may assert a Fifth Amendment right, as they have done in prior proceedings, and need to be immunized by this Committee's motion, which is taken down to the Federal District Court to obtain a use immunity order, after hearing from the Department of Justice.

And then ultimately, the Committee receives pretrial submissions from the parties describing the witnesses, a proffer of their evidence, the exhibits they want to use, how much trial time they estimate needing, and the Committee issues a pretrial order to structure the proceedings.

The next phase is the trial itself. Typically, Impeachment Trial Committees have operated only with a natural quorum, that is, seven out of 12 members. Often, all 12 members have been present to hear almost all of the testimony.

The job of the Committee is not to investigate the matter. The House is presenting the case. The Judge is defending the case. The Committee sits as a judge and a jury to create a fair record. That means that the predominant questioning, the direct examination and cross examination, is performed by the parties of each others' witnesses. Senators then typically have had the opportunity to ask follow-up questions to clarify areas of confusion or areas that were not fully developed. But the principal task of questioning is left to the two adversary parties.

The Committee will be called upon—likely first through the Chair—to rule on various motions that may arise in the course of the trial itself. But typically the Senate has not adopted formal rules of evidence. It has not adopted the Federal Rules. And it has instead been guided by reliability, fairness, and wholeness. Because the Committee is receiving evidence on behalf of the entire Senate, the Committee has—prior Impeachment Committees have—thought it best to include as inclusive a record as possible, to leave it to individual members to assign whatever weight they chose to various forms of evidence rather than to rely strictly on rules of evidence and hearsay exceptions and all the like.

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At the end of the trial, the parties typically file post-trial briefs, where they provide their own summary of the case. There is a time provided for the Committee then to submit its neutral report so that all of those materials can go to members in anticipation of their action on it, so that they have time to study the record.

And the Senate hears—if it has no interest in hearing any of the witnesses again, or any different witnesses who weren't called, on the floor—the Senate typically then schedules oral argument by the representatives of both parties to argue a closing, if you will, of the case. The Senate then retires in closed session to deliberate. Under the rules, all Committee deliberations and Senate deliberations must be held in closed session. The analogy is to a jury deliberation.

Then the Senate returns to open session to vote on each of the Articles of Impeachment separately, and there are four Articles in this case.

That is my quick run-through on the duties of the Committee.

Chairman MCCASKILL. Thank you very much, Mr. Frankel.

Does anyone have questions for Senate Counsel at this point?

[No response.]

All right. Thank you so much. We will rely on your experience and your expertise as we move forward with this matter.

I have circulated——

Vice Chairman HATCH. Madam Chairman, can I just say that was an excellent presentation and I appreciate it very much. I am sure all of us do.

Mr. FRANKEL. Thank you, Senator.

Chairman MCCASKILL [continuing]. Thank you, Mr. Frankel.

I have circulated two motions for consideration by the Committee. These rules were developed by my staff and Senator Hatch's staff based on discussions with Senate Legal Counsel, the Congressional Research Service, and their own research into the rules of the three Impeachment Trial Committees that preceded this Committee.

The first motion provides for the delegation of authority to the Chairman and Vice Chairman for the operation and administration of the Committee. Without a delegation of authority, it would be necessary to call a meeting for every administrative decision moving forward, including staffing, discovery, conferences with the parties, and other administrative functions.

Are there any questions about the need for a rule considering how we move forward with the administrative decisions? Does any member so move?

Senator SHAHEEN. I so move.

Senator RISCH. I move.

Chairman MCCASKILL. Senator Shaheen has moved, with a second by Senator Risch. Is there any discussion as to this motion, either opposed or in favor?

[No response.]

All right. Seeing no discussion, all those in favor, say aye.

[Chorus of ayes.]

Opposed, nay.

[No response.]

The ayes have it, and the motion is agreed to.

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The second motion codifies what has been the past practice of the Impeachment Trial Committees. It provides that, given the uniqueness of these proceedings, a natural quorum of seven members will be required to receive sworn testimony or take evidence. Does any member so move?

Senator JOHANNS. I do.

Senator KLOBUCHAR. I so move.

Chairman MCCASKILL. Senator Johanns has moved. Senator Klobuchar has seconded. Do you have the motion, Senator Johanns? Would you mind reading that aloud? I think this is an important motion for us all to hear, because I know what scheduling is like around this building.

Senator JOHANNS. Yes. Thank you. I will read the motion. The motion is, I move that a natural quorum of seven members shall be required for the Committee to receive sworn testimony or take evidence. So moved.

Chairman MCCASKILL. Is there any discussion on this motion?

Senator SHAHEEN. Yes.

Chairman MCCASKILL. Senator Shaheen.

Senator SHAHEEN. Can somebody explain to me what a natural quorum is compared to a regular quorum?

Chairman MCCASKILL. I think maybe, Mr. Frankel, you can explain.

Mr. FRANKEL. A natural quorum means an actual majority, what most regular people would consider a quorum. Under the Senate's rules for committees, committees may reduce their quorum for hearing witnesses to as few as one member while retaining a quorum. But a natural quorum means a majority of members actually being present at all times.

Senator SHAHEEN. Thank you.

Chairman MCCASKILL. Yes, Senator Risch?

Senator RISCH. I have a question. You made reference to the fact of what has been going on around here. It is very difficult for people to make time for these things because we all have critical things going on. It seems to me we are going to have a floating quorum anyway. That is, I doubt the seven people that make up the quorum are going to be the same seven all the time, so all of us are going to have to rely on the record that is made as we review the record and then make our decision. So from a purely practical standpoint, it seems to me that it might be appropriate to reduce that maybe down to five or something like that.

I mean, there is no appeal from this. I mean, we have the constitutional authority to do this. We have to be very careful when we do it. But having said all that, I don't think—I would hate to see the proceedings disrupted because, okay, we were supposed to have seven and we only have six. It would just seem to me that if we reduced it some, it might be more helpful, because it is important, also, that we get through this quickly for everyone's benefit. For the defendant's benefit, for the benefit of the Senate, for the benefit of the American people, it is important that we get through this. So it seems to me that it would be more expeditious to reduce that a little bit.

I am open—I don't feel that strongly about it——

Chairman MCCASKILL. Well, let me——

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Senator RISCH [continuing] But it just seems to me that we want to do this as expeditiously as possible.

Chairman MCCASKILL [continuing]. Let me respond to that. I understand the sentiments, believe me. In fact, as time has gone on, when I initially was told that I was given this responsibility, my first reaction was, this will be interesting. I am looking forward to this. And then I felt a little bit like, after I presided for about three hours over the Senate, I figured out why one of the new kids maybe got this, because it is going to take a lot of time. So I understand the sentiment.

Having said that, we have looked—and I certainly look forward to Senator Hatch weighing in on this—we have looked at the previous proceedings and what has passed muster—and this is a relatively new—this has only been done a handful of times before. Before that, as you heard Mr. Frankel say, the entire Senate sat for all of the hearing of the evidence.

It seems to me that since this is what has been done before, I certainly am comfortable with a quorum of seven, but I do agree perhaps that we need to look at organizing this in a fashion so that we can ask members and maybe help coordinate when members can be here so we don't get in a situation where all of a sudden someone leaves and we only have six and we have to suspend testimony. In other words, ahead of time saying, please sign up, like we have to sign up for presiding time, that you will be at the hearing for this hour or for these two hours, and in that way, we can maintain the seven that we need.

That is my reaction, but certainly I defer to Senator Hatch if you have any sentiment about the proposal that we could conceivably go forward with less than seven as a quorum on this matter.

Vice Chairman HATCH. Well, let us see how it works. I don't think we should go with less than a natural quorum if we can. This is one of the most important constitutional duties that we might have in our whole Senate service, so it is incumbent upon each of us to try and be here. And I agree with the Chairman in this regard, I think. And keep in mind, we don't want to give any excuses for anybody upset with our final decisions in these matters, or at least what we finally do in presenting this to the Senate. So I think it is pretty incumbent that we should probably have a natural quorum.

Senator RISCH. Madam Chairman.

Senator WHITEHOUSE. Madam Chair.

Senator RISCH. Could I respond just briefly?

Chairman MCCASKILL. [Nodding head.]

Senator RISCH. First of all, I will yield to the Chairman and Vice Chairman on this. You guys are the ones that are running this train, so I will certainly yield to that. But I am certain there was a reason originally they went from the full Senate down to a Committee, and that was in 1935. And I could be wrong, but I think the workload around here has probably increased a little bit since 1935. But in any event, you guys are going to have to make this fly, so I will certainly yield to the Chairman and Vice Chairman on the issue.

Vice Chairman HATCH. Well, Madam Chairman, we are going to have to, of course, work with the leadership to make sure that they

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understand that this work is important, too, because we are going to have to be able to have the time to do this. So I think both you and I and everybody on this on this Committee ought to do everything we can to make sure that the Senate procedures acknowledge and accommodate this type of proceeding.

Chairman MCCASKILL. And Senator—let me go to you, Senator Whitehouse. Do you have——

Senator WHITEHOUSE. I was curious whether we have any estimation at this point of the number of hearing hours or days that are expected. I understand that previous such proceedings have followed a full criminal trial and prosecution. This is a little bit more ab initio, and I don't know what the Committee staff has done by way of trying to estimate the number of witnesses, amount of testimony, and the extent to which this will require our time.

Chairman MCCASKILL [continuing]. Well, a couple of things. First, it is hard for us to do any kind of meaningful estimate at this juncture. There is no Committee staff, and that is one of the reasons this meeting was important, because we need to—I am not anxious to bring on a phalanx of lawyers for this, but I do think we are going to have to have a little bit of help along with some clerks to help with some of the research and writing, because we are going to have matters of law that we are going to have to get briefed and we are going to have to look at.

I believe the Judge has indicated very preliminarily that he thinks, through counsel, five to ten days for actual testimony, for actual presenting the evidence that he would like us to hear. Obviously, we are not holding the Judge to any kind of estimate at this point.

And the comment I was going to make previously, in sensitivity to what has been mentioned by the Vice Chair, Senator Hatch, and by Senator Risch, I, too, am anxious to move with deliberate speed on this. At the same time, I think we have to be ever mindful that the guiding force of this matter has to be due process, because that is where our work could be undone, if we are not careful and mindful of due process considerations.

So it is—we have got a time line in here we will go over, just a very preliminary estimate that we will try to go over when we finish up. But at this point, if I could, I would like to call the motion on the natural quorum of seven members.

Senator WHITEHOUSE. Before we do, there is nothing that would prevent us from revisiting this question——

Chairman MCCASKILL. There is nothing to prevent us from revisiting this question.

Senator Klobuchar.

Senator KLOBUCHAR. I would also note—as I noted to Senator Whitehouse—we have an upcoming Supreme Court nomination hearing. There are four of us on the Judiciary Committee and it could at some point conflict with this, and that is a week-long thing, as well. So again, I think it will be good—I seconded this motion, I favor it, but I do think we should be open to revisiting it if we need to.

Chairman MCCASKILL. All right. All those in favor, say aye.

[Chorus of ayes.]

All those in opposed, nay.

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[No response.]

The third rule is actually a waiver of a rule. For all the proceedings of the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge G. Thomas Porteous, Jr., pursuant to Senate Resolution 458, Section 4, I hereby waive the requirement of the Rules of Procedure and Practice in the Senate, when sitting on impeachment trials, a question by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer.

Is there any discussion of waiving the rule on requirement that the questions be in writing prior to the evidentiary hearing?

[No response.]

Okay. I don't think I have to move that, do I? Just waive. Okay. That rule is hereby waived.

Let us take a minute to acknowledge the presence—it is my understanding that Richard Westling, Counsel for Judge Porteous, and Alan Baron, Special Counsel Representing the House Managers, are both here. Thank you. I assume that the gentleman on our left is Richard Westling, Counsel for Judge Porteous?

Mr. WESTLING. Assuming I know my left from my right, yes. [Laughter.]

Chairman MCCASKILL. My left. Correct.

And obviously we acknowledge the Congressman who is here, and thank you very much—I mean, the Special Counsel representing the House Managers. I elevated you there for a minute.

Mr. BARON. It felt very good.

Chairman MCCASKILL. You had a look of panic on your face.

Let me say about another potential motion, I haven't had a chance to talk to Senator Hatch about this, but we do have the matter of hearing any information on pretrial motions, and it may be that we can discuss whether some kind of hybrid quorum might be appropriate. I am not comfortable with a quorum of one for that because I don't want that responsibility, but it might be that we can look at perhaps a hybrid quorum of three or five with a mix of both parties as maybe something less than the full seven simply for purposes of hearing evidence as it relates to pretrial motions.

And so we will circulate any proposed rule in that regard, and it might be that we could work something out, that that would help people with their scheduling and, I don't think, do any harm to the due process nature of our obligation here.

Moving to the proposed time frame for our work, I have included a proposal in your binders. This is just a guide. The parties have not had the opportunity to provide any input into this time line. It is not set in stone. It is meant to be a discussion starter. However, I believe that it complies with our charge to move expeditiously yet fairly.

Generally, it sets target dates for close of discovery, hearings on pretrial motions, and our evidentiary hearings. My goal is to hold the hearing on pretrial motions in June and to complete the full evidentiary hearings during the first week of August prior to recess. This gives Committee staff some time during recess to prepare the report. We would meet to consider the report upon our return. If we complete our work by mid-September, the Senate could consider the Articles on the full floor by the end of September.

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Is there any discussion about this general proposed time line with the understanding that this is just for purposes of what would happen if everything went according to plan? Any discussion? Okay. Yes?

Senator RISCH. The date you picked for the evidentiary hearing is the week immediately preceding recess. The question I guess I have would be how did you come up with the five days? Did someone——

Chairman MCCASKILL. I think——

Senator RISCH [continuing]. Take a look at the potential witnesses and that sort of thing? That is part one of the question.

Part two is, probably there are a lot of people leaving on CODELs or what have you at the time that the August recess starts. So would it be your intent if we don't get done in that week to put it off until after the August recess? Those are the two questions I would have.

Chairman MCCASKILL [continuing]. Well, we will certainly do our best to keep you informed in plenty of time. We have actually planned that if we needed to, we could back up a week if it was going to be longer. I think, as I mentioned earlier, I think there has been just preliminary discussions. The Judge indicated that he would need five to ten days. So we put this out there just for purposes of beginning the discussion. It may be that we have to wait until after the August work period. But certainly it would be our goal, if we could, to complete the work before the August work period, the August home work period.

Senator RISCH. Thank you, Madam Chairman.

Senator KAUFMAN. Madam Chair, I think this really brings starkly home that we don't have a lot of flexibility. When you look at this schedule, it doesn't look to me like it is an overly generous schedule and we are supposed to be out of here September 30. I would hate to be sitting around here in October doing this. So I think—I mean, just looking at it, it doesn't look to me like we have got a lot of space between now and September 30 to kind of play with. So I commend you for coming up with the schedule, but I also think it points out how tight this is going to be.

Chairman MCCASKILL. It is. This is a responsibility, and I am grateful to Senator Hatch for reminding us all that we do get very busy with lots of things around here, but this is important. This is something that no one else in our country has the responsibility of doing, and we have been given this responsibility and hopefully we can dispatch it with appropriate speed and also with an eye on the fairness of the proceedings, so——

Senator WHITEHOUSE. I think, Madam Chair, nothing in the Constitution, as I find it, requires us to sit only between nine in the morning and five in the afternoon. We have a great number of hours to the day, and I think that we will be under considerable pressure as we close out towards that August recess with legislative activities on the floor. So I would expect and urge my colleagues to expect to spend some late evenings here with you.

Chairman MCCASKILL [continuing]. Well, I know everyone around this table—many around this table could tell war stories about their time in court. I have had several judges decide that there was nothing wrong with us starting at seven in the morning,

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and I had several judges that didn't think there was anything wrong with us taking evidence until ten o'clock at night. So I think we may end up with some long hours to try to, really, to try to accommodate people's schedules and to accommodate the unforgiving schedule of the United States Senate and the other business we have to do around here.

Is there any other business any member wishes to discuss? I might just add for the record, as we look for—yes, we did it. That was the first one we did. We just didn't have you read it. It will be in the record, the wording of it.

If there are any members of anyone's—I know that you all have staff sitting around that has no work to do, but I do want to inform the Committee that as we work at finding people to help with this effort, if there is any staff that you are aware of that would be interested in assisting—I am not anxious to spend a great deal of the taxpayers' money in hiring a number of staff people to work on this, so if there are people that you have that would like to assist on it because of the uniqueness of this situation and the experience that it represents, please contact my office and let me know because we will be moving quickly to try to get some people on board to begin the work of getting to it, so to speak.

Anything else? Any other discussion of the Committee? Let me say ahead of time, I appreciate your diligence and your attention to this matter. I know that if everyone makes this a priority, we can get this done in a way that we can all be proud of.

Thank you very much, and the hearing is adjourned.

[Whereupon, at 4:42 p.m., the hearing was adjourned.]

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Congress of the United States
Washington, DC 20515

May 11, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Dear Senator McCaskill and Senator Hatch:

We are writing to follow up on our earlier letter of April 15, 2010 (a copy of which is attached). We share the Senate's desire to move both carefully and expeditiously in this matter, and we believe that the time-frame set forth by Senator McCaskill, at the Senate Impeachment Trial Committee Organizational Meeting of April 13, is both realistic and fair. In particular, we share the Senate's desire to complete the trial by Congress's summer recess so that the full Senate can consider this matter in September. Given the Senate's busy schedule, particularly in the coming months, we would like to respectfully offer some thoughts and suggestions on how the parties might work to ensure that the Trial Committee's timeline is met.

MOTIONS SCHEDULE: The Managers await a proposed schedule from the Trial Committee for filing and ruling on all motions – dispositive and procedural/evidentiary. Given that early rulings will have a great effect on all phases of the proceedings thereafter, we suggest that all motions by both sides be filed no later than May 21, that all responses be due two weeks thereafter, and that replies (if any) be filed one week after that. We recommend a date for arguments be set as soon thereafter as practicable. Such a schedule would provide for dealing with dispositive motions and other motions that are essential to the trial preparation process, but would not preclude the possibility that either party might need to file last minute motions that may be decided shortly prior to or at trial.

STIPULATIONS: In an effort to expedite matters, the House has already sent proposed stipulations of fact and proposed stipulations as to authenticity of documents to counsel for Judge Porteous. We await responses from Judge Porteous to our proposals and await any proposed stipulations he may submit. We recommend that the Senate Committee direct the parties to either agree or to provide reasons to justify any refusal to agree. This will give the parties an

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opportunity to discuss and perhaps resolve the issue. If the parties cannot resolve the issue, the Committee will be able to decide whether the refusal has merit.

We suggest that the stipulation process track the motions process: that all proposed stipulations be exchanged by the parties as of the date motions are due; all responses to the proposed stipulations be exchanged by the parties as of the date the responses to the motions are due; and the submission of the proposed stipulations as to which no agreement has been reached be submitted to the Committee for decision on the date the replies to the motions are due.

DISCOVERY: All statements of witnesses the House presently intends to call have already been provided to counsel for Judge Porteous. These statements were included in the discovery that was provided on March 23, 2010. We are generally aware of Judge Porteous's counsel's claim that there are thousands of pages of discovery. We refer you to our discussion of this claim that we set forth in our letter of April 13, where we pointed out that the vast majority of the documents that we anticipate using at trial were provided or made available to Judge Porteous years ago because a substantial portion of the factual issues in this Impeachment trial (Articles I and III) are identical with the factual issues that were previously litigated before the Fifth Circuit. Moreover, Mr. Westling is personally familiar with the statements of the Marcottes (Article II), having represented Louis Marcotte in 2004 when Louis Marcotte was interviewed by the FBI concerning his relationship with Judge Porteous. In those interviews Louis Marcotte made statements that he repeated in substance in his testimony before the House Committee on the Judiciary Impeachment Task Force.

The House will work diligently to accommodate all reasonable discovery requests by Judge Porteous.

OTHER PRE-TRIAL MATTERS: We request that as part of a scheduling order in this case, that one week prior to trial, both sides should be required to provide witness lists and proposed testimony in summary form, and to exchange binders with pre-marked exhibits which are anticipated to be used at trial.

TRIAL DATE: We understand the Senate Impeachment Trial Committee plans to hold the trial between August 2 and August 6, 2010. Based on the parties' estimates of the time necessary for trial, we fear there is a reasonable possibility the trial could not be completed in this time frame. Moreover, even if each side were to be held to 20 hours of trial time, scheduling trial for the week prior to the August recess would not allow any latitude for unforeseen events (including unrelated matters demanding the attention of Senators on the Committee) that might interfere with the ability to hold trial as scheduled or which might unexpectedly interfere with the parties' ability to properly present or defend their cases. We thus suggest that the Committee might consider whether it is preferable that trial be set to start in the prior week of July 25 or earlier.

CONFLICT OF INTEREST: There is a potential conflict of interest on the part of

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Richard Westling, Esq., counsel for Judge Porteous.[1]

We urge the prompt resolution of this conflict of interest issue. In October of 2009 we brought the matter to counsel's attention and requested he obtain appropriate waivers from his clients – Judge Porteous and the Marcottes – at that time. Our concern is that the conflict not be made an excuse for Judge Porteous to seek to remove his attorney and thus obtain a delay of this trial. We note that Judge Porteous had two attorneys in succession in connection with the Fifth Circuit proceedings and that the latter of these attorneys withdrew approximately 2 weeks prior to the Hearing citing "irreconcilable differences" with Judge Porteous. After counsel withdrew, Judge Porteous then sought to postpone the Hearing (a request which was denied), which is why he ended up representing himself at that Hearing. We request that the Senate Committee direct Judge Porteous to provide a written waiver of any potential conflict that his attorney may have in representing Judge Porteous arising from his representation of Louis Marcotte and Lori Marcotte.

We look forward to working with the Senate Committee and Judge Porteous's counsel in this matter.

Respectfully,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

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

cc: Morgan Frankel
Senate Legal Counsel

Attachment

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[1] This potential conflict was previously referenced at footnote 5 in our letter of April 13, 2010 to Senators McCaskill and Hatch.

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In The Senate Of The United States
SITTING AS A COURT OF IMPEACHMENT

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

SCHEDULING ORDER

The United States Senate Impeachment Trial Committee on the Articles of Impeachment Against G. Thomas Porteous, Jr. of the Eastern District of Louisiana ("the Committee") establishes the following schedule to govern the events leading up to, and including, the final evidentiary hearing in the matter regarding the Articles of Impeachment Against G. Thomas Porteous, Jr. of the Eastern District of Louisiana. Modifications to the Scheduling Order shall be made only upon a showing of good cause.

Discovery Motions Due	May 28, 2010
Response/Opposition to Discovery Motions Due	June 4, 2010
Preliminary Designation of Witnesses/Immunity /Subpoena Requests/Stipulations	June 8, 2010
Meeting of All Counsel Re: Witnesses, Immunity, Etc.	June 10, 2010
All Other Pre-Trial Motions Due	June 15, 2010
Response to Pre-Trial Motions Due	June 22, 2010
Committee to Hold Hearings on Motions	June 29, 2010
Meeting of All Counsel Re: Stipulations & Objections, Exhibits, Witnesses	July 6, 2010
Pre-Trial Statements Due	July 23, 2010
Committee to Hold Evidentiary Hearings	August 2-6, 2010
All Post-Hearing Briefs Due, If Any	August 16, 2010

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Form of Filings : All filings shall be submitted in both MS Word and PDF formats via electronic mail to filings@sitc.senate.gov and in paper form, two (2) copies, with the Clerk of the Committee (or his designee) in B-34A of the Russell Senate Office Building no later than 5:00 p.m. on the due date.

Schedule Modification: Modification of this schedule shall be made by Order of the Committee under the signature of the Chairman and Vice Chairman. Applications for modification shall be made no later than two (2) business days prior to the due date. Parties shall seek the consent of the opposing party prior to filing an application for modification.

Service on Opposing Parties: All filings must include a certificate of service indicating when and by what means the filing party served the opposing party with a copy of the filing. Any letter directed to the Committee or any member of the Committee shall include a copy to the opposing party.

Dated: May 26, 2010

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

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II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

a. Discovery Matters

i. General Issues

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Congress of the United States
Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

Pretrial Motions. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;

- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;

- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the Liljeberg proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;

- Motion to permit or admit expert testimony; and

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- Motion relating to stipulations, if appropriate.

Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely – including his financial relationship with them prior to becoming a Federal judge, his handling of the Liljeberg case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true."[1] The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

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[1] "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 169 (1989).

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substantial dispute.[2]

Witnesses. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

Article 1

1. Robert Creely [Immunity]
2. Jacob Amato [Immunity]
3. Leonard Levenson [Immunity]
4. Donald Gardner
5. Joseph Mole
6. Rhonda Danos [Immunity]

Article 2

7. Louis Marcotte
8. Lori Marcotte
9. Ronald Bodenheimer
10. Bruce Netterville [Immunity]
11. Mike Reynolds
12. Jeffrey Duhon
13. Aubrey Wallace

Article 3

14. Claude Lightfoot
15. FBI Special Agent DeWayne Horner
16. FBI Financial Analyst Gerald Fink
17. Richard Greendyke

Article 4

18. Former FBI Agent Cheyanne Tackett
19. Former FBI Agent Robert Hamill

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[2]See, e.g., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 170 (1989).

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Length of the case-in-chief. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Hearing.[3] Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the Liljeberg case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.[4]

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations – such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy – a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

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[3]These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

[4]Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are Liljeberg court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

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Article I. Judge Porteous has been aware of the details and substance of the Liljeberg allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the Liljeberg case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole – the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations – having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.[5] The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte – information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

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[5]In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

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We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

cc: Morgan Frankel
Senate Legal Counsel

Attachments

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Congress of the United States
Washington, DC 20515

April 15, 2010

Via Hand Delivery

The Honorable Claire McCaskill
Chairman, Senate Impeachment Trial Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Impeachment Trial Committee
United States Senate
Washington, D.C.

c/o Morgan Frankel
Senate Legal Counsel

Re: Impeachment of Judge G. Thomas Porteous, Jr.

Dear Senator McCaskill and Senator Hatch:

In light of the matters raised at the organizational meeting of the Senate Trial Committee on April 13, 2010, the Managers for the House request that a meeting be held with Senator McCaskill, Senator Hatch, and counsel for Judge Porteous at the earliest opportunity to discuss various issues regarding the pre-trial phase of the proceedings and other scheduling matters. The Managers who would attend that meeting would include, at a minimum, Mr. Schiff and Mr. Goodlatte (who were the Chairman and Ranking Member, respectively, of the House Impeachment Task Force). Topics might include the following:

- When dispositive motions should be filed and the related briefing and argument schedules;
- When requests for stipulations of fact and authenticity of documents should be filed;
- When witness lists should be filed;
- When the parties should specify which documents they intend to introduce in their case in chief;

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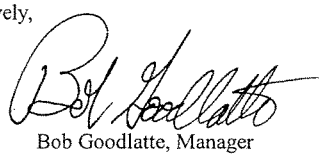
- Setting a firm trial date, in light of the need to make arrangements for out-of-town witnesses.

This list is not intended to be exhaustive, but simply a starting point for discussion. We believe it is in everyone's best interest to address these and other issues as soon as possible so the schedule does not get away from us in the months ahead.

We look forward to hearing from you at your earliest convenience.

Respectively,

Adam Schiff, Manager



Bob Goodlatte, Manager

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

cc: Morgan Frankel, Esq.
Richard Westling, Esq.

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IN THE SENATE OF THE UNITED STATES
SITTING AS A COURT OF IMPEACHMENT

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

MOTION OF JUDGE G. THOMAS PORTEOUS, JR.
FOR DISCOVERY FROM THE HOUSE MANANGERS

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and moves the Senate of the United States, through the Senate Impeachment Trial Committee, for an order granting his motion seeking discovery from the House Managers. In support of his motion Judge Porteous states as follows:

1. Introduction and Procedural Background

From a discovery perspective, this case is unlike any impeachment trial that has taken place under Senate Rule XI. In each of the three prior cases involving a Rule XI committee, the House of Representatives returned Articles of Impeachment against a district judge after that judge had been indicted and tried at a criminal jury trial. Those trials were conducted pursuant to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. As a result, in those cases, by the time the issue of discovery arose before the Senate Impeachment Trial Committee, the parties had developed a

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record at a federal criminal trial and had been involved in extensive discovery prior to the return of the Articles of Impeachment. Thus, before appearing before the Senate Impeachment Trial Committee each of these judges had the opportunity to cross-examine the government's witnesses, inquire in to the validity of documents presented as evidence against them, and call witnesses on his own behalf.

In contrast, while discovery has commenced in this proceeding, prior to his impeachment Judge Porteous was provided with only minimal information regarding the government's case against him. Judge Porteous was the subject of a multi-year grand jury investigation in which he had no discovery rights. Later, a Special Committee of the Judicial Conference of the Fifth Circuit held an adversarial proceeding at which Judge Porteous was forced to proceed without counsel. While some discovery was provided to Judge Porteous, it was limited to those materials that investigatory counsel chose to provide. During the House Impeachment Task Force hearings, Judge Porteous was invited to participate, through counsel, in the hearings. However, only a handful of witnesses testified at those hearings and Judge Porteous' counsel was only permitted a very limited time for cross-examination. Moreover, minimal documentary discovery was provided before the hearings and, in many cases, witnesses were examined based upon documents which had not been provided to Judge Porteous' counsel prior to the hearings.

On March 23, 2010, the House Managers provided respondent with a compact disk containing a number of exhibits, totaling approximately 9,702 pages. This compilation of documents amounted to all of the exhibits referenced in the House Judiciary Committee's Report to the House of Representatives on the Articles of

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Impeachment against Judge Porteous. Significantly, this compilation was not assembled with Judge Porteous' discovery rights in mind, but instead amounted to taking those materials that supported to the Impeachment Report and providing them to Judge Porteous. To date, it remains unclear what other efforts were made to search the House Judiciary Committee's files to determine whether other information should be provided at the time of this original production.

The March 23 production was carefully reviewed by respondent's counsel. Based upon this review, a letter was sent to the House Managers counsel on May 6, 2010 detailing a number of items that were either incomplete or that had been redacted. See Letter from Richard Westling to House Impeachment Counsel, dated May 6, 2010. (Exhibit 1). The May 6 letter sought production of these documents in complete and unredacted form. Additionally, the May 6 letter sought production of two other categories of documents: (1) other documents and information gathered by the Task Force as part of its impeachment inquiry; and (2) any deposition transcripts that had not been produced, a list of all witnesses interviewed, and any notes or memoranda of those interviews.

In a May 11, 2010 letter, the House Mangers' Counsel responded that they would make the previously incomplete and redacted materials available in complete and unredacted form (to the extent the redactions were not on the documents when they received them) and refused the other two requests. The letter began with a statement of principles:

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> As you know, there are no formal "rules" that provide for discovery in an impeachment trial. Nonetheless, consistent with precedent, the House takes the position that it is appropriate that the House provide the following materials: 1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence. The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process. It is against this statement of principles that we address your specific requests.

See Letter from Alan Baron to Richard Westling, dated May 11, 2010 (Attached as Exhibit 2).

On May 20, 2010, following up on the House Managers' offer to review the incomplete and redacted materials, respondent's counsel reviewed and requested copies of the previously incomplete and redacted material. These copies were provided on May 21, 2010. Also on May 20, 2010, counsel for the House Managers informed respondent that additional discovery material would be forthcoming and, on May 26, 2010, these materials were viewed by respondent's counsel and certain copies were requested. Also on May 26, counsel for the House Managers informed respondent's counsel that additional discovery materials would be made available some time in the near future. The House Managers did not specify an exact date and have not contacted us in the last two days to inform us that additional discovery materials are ready for review. While this is a detailed recitation of the discovery events that have taken place to date, it is

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important for the Committee to understand the discovery process is still on-going and it is far from complete. While respondent's counsel made clear at the conference held on May 18, 2010 in Vice Chairman Hatch's Office that we would do everything we could to adhere to the proposed schedule of pretrial proceedings and evidentiary hearings, that representation was made based on a belief that the House Managers would provide us with all their discovery materials expeditiously and in advance of the dates on which witnesses must be designated and other critical decisions made. Respondent's counsel are, frankly, concerned that the pace of discovery is not keeping up with the pace required by the schedule as currently established in the Committee's scheduling order.

2. Applicable Law and Senate Precedent

An individual's right to a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment has long been held to trigger serious concerns when the government refuses to disclose information or provide discovery. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976). While the rules in these criminal cases may have limited application in the impeachment trial context, the Due Process Clause clearly applies and supports Judge Porteous' right to discovery. Moreover, based upon Senate precedent, the House Impeachment Counsel's cramped reading of the House Manager's discovery obligations is unsupported and Judge Porteous is entitled to far more substantial discovery than the House Managers have provided to date.

In the Hastings impeachment trial process a discovery dispute similar to the one here was addressed to the Senate Impeachment Trial Committee. Judge Hastings sought

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very broad discovery akin to what would be normal in a civil case, while the House Managers took the position that the rules of criminal discovery should set the outer limits of the House's discovery obligations. The Senate Impeachment Trial Committee resolved the dispute in an order, part of which stated:

> (c) Concerning other documents, the sharing of information should be guided by a broader principle than that advanced by the House in its offer to provide exculpatory evidence and the prior sworn, adopted, approved, or substantially verbatim and contemporaneously recorded statements of witnesses. In addition to the interests of the House in its role as advocate for the articles of impeachment and the interests of Judge Hastings in defending against those articles, the Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make. We therefore ask the House – for documents that it has obtained from elsewhere in the government that are responsive to a particularized request from Judge Hastings – to determine whether there are specific objections, such as the need to honor promised confidences to people who may be at risk, to production to Judge Hastings. In the absence of specific objections by the House or by the governmental entity that provided the material to the House, which should be articulated in writing so that the parties and the committee may be apprised of them, the special constitutional process that we are now engaged in will be served best by the fullest disclosure possible. It may be that for some documents an appropriate course of action would be to provide them to the committee for an evaluation of their sensitive nature, if any, and a determination by the committee whether any restrictions should be placed on the terms of access to them.

See Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, S. Hrg. 101-194, Pt. 1, at 285-86.

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Significantly, this prior precedent is contrary to the limited approach to discovery advocated by the House Managers in Judge Porteous' case. The Hastings Impeachment Trial Committee expressly stated that the interests of the impeachment trial process "will be served best by the fullest disclosure possible." The House Managers in this case have clearly not embraced this position.

Judge Porteous suggests that in light of this precedent the specific discovery requests set out in Section 3 below are appropriate. Additionally, Judge Porteous notes that in the Hastings impeachment trial the House Managers provided Judge Hastings with a list of all information gathered during the impeachment inquiry and identified what information had been supplied to Judge Hastings and what had been withheld. To date, the House Managers in this case have refused to provide this information to Judge Porteous. Unfortunately, this approach not only conflicts with precedent, but also has the potential to delay these proceedings because Judge Porteous is not in a position to determine whether he has all the relevant information in the House Managers' possession or whether he will be required to seek discovery directly from governmental sources such as the Department of Justice and the Federal Bureau of Investigation.

3. Specific Discovery Requests

1. All information gathered by the House Impeachment Task Force (the "Task Force") in connection with its impeachment inquiry from any source, including, but not limited to, the following:

    a. All documents and information of any kind received by the Task Force from the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit, the Fifth Circuit Special Investigating Committee, Chief Judge Edith Jones or other members of the Judicial Council or Special Investigating Committee, or from Counsel to the Judicial Council or

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Special Investigating Committee in connection with the referral of Judge Porteous to the Judicial Council by the U.S. Department of Justice or otherwise relating to the Articles of Impeachment returned against Judge Porteous;

b. All documents and information of any kind received by the Task Force from the Judicial Conference of the United States or the Administrative Office of the United States Courts relating to complaint and discipline order entered by the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit and considered by the Judicial Conference prior to the certification to the Speaker of the House of Representatives or otherwise relating to the Articles of Impeachment returned against Judge Porteous;

c. All documents and information of any kind received by the Task Force from the U.S. Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) including, but not limited to, the following:

   i. All books, papers, records, reports, memoranda or any other document relating to the investigation of Judge Porteous or any matter relating to the Articles of Impeachment returned against Judge Porteous;

   ii. All memoranda of witness interviews, rough notes of witness interviews; and FBI Forms 302 relating to the investigation of Judge Porteous or any matter relating to the Articles of Impeachment returned against Judge Porteous;

   iii. All books, papers, records, reports, memoranda or any other document relating to the DOJ's decision to decline prosecution of Judge Porteous;

   iv. All books, papers, records, reports, memoranda or any other document relating to the DOJ's referral of the Judge Porteous to the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit;

d. All documents and information of any kind received by the Task Force as a result of the Grand Jury and Wiretap Disclosure Orders entered by the U.S. District Court for the Eastern District of Louisiana, or any other court, based upon motions filed by the House Judiciary Committee; and

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e. All documents and information of any kind received by the Task Force from any other source whether governmental, a third party record holder or a witness relating to the Articles of Impeachment returned against Judge Porteous;

2. A list of all the witnesses interviewed during the Task Force inquiry by any individual representing or working with the Task Force;

3. All memoranda, notes or other writings prepared or kept by any individual representing or working with the Task Force including, but not limited to, FBI Special Agent DeWayne Horner, during witness interviews. In particular, Judge Porteous is seeking any notes prepared or kept by any individual during that portion of any interview that was not made part of the formal deposition;

4. All information that in any way reflects upon the character, credibility or believability of any witness interviewed by, or who may be called to testify by, the House Managers including, but not limited to, information that reflects promises made to witnesses, consideration for witness testimony, instances of past misconduct by a witness, criminal record information, and any other information that could be used to impeach a witness on any grounds;

5. All books, papers, documents, photographs, or other tangible objects, or copies thereof, which the House Managers intend to use as evidence in their case in chief at trial or which are material to the preparation of Judge Porteous' defense or which were obtained from, directly or indirectly, or which belong to Judge Porteous;

6. All documents and other materials which contain information that is exculpatory in nature or otherwise favorable to Judge Porteous or that may lead to material or information that is exculpatory or favorable to Judge Porteous.

7. To the extent that the House Managers are unwilling to produce any part of the information requested in Items 1-6 and their various subparts, Judge Porteous asks that the House Managers prepare and provide an index identifying all of the information the House received during its inquiry and identifying the information that the House Managers refuse to produce, the source of that information and the grounds for their refusal to produce the information.

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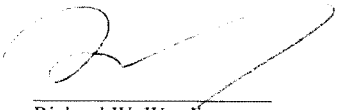
4. Conclusion

Based upon the foregoing, Judge Porteous respectfully asks that the Senate of the United States, through its Impeachment Trial Committee, to apply its precedent providing for broad disclosure in the context of impeachment trials, to grant his motion for discovery, and to order the House Managers to produce copies of the requested materials as soon as possible.

Respectfully submitted,



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

Submitted: May 28, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2010, a copy of the foregoing pleading was served by electronic mail on the House Managers, through counsel, at the following e-mail addresses:

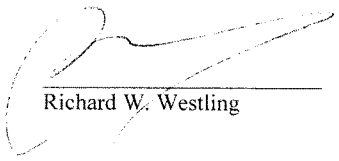
Alan Baron - abaron@seyfarth.com

Mark Dubester - Mark.Dubester@mail.house.gov

Harold Damelin - Harold.Damelin@mail.house.gov

Kirsten Konar - kkonar@seyfarth.com

Jessica Klein, Clerk - Jessica.Klein@mail.house.gov



Richard W. Westling

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May 6, 2010

By Electronic and Regular Mail

Alan I. Baron, Esquire
Mark Dubester, Esquire
Harold Damelin, Esquire
Special Impeachment Counsel
Congress of the United States
Washington, D.C. 200515

Re: Impeachment of Judge G. Thomas Porteous – Discovery

Dear Messrs. Baron, Dubester and Damelin:

I am writing to address your March 23, 2010 document production on behalf of the House Managers ("Managers"). After reviewing the 9,702 pages of discovery materials included in that production we have the following general comments and additional requests.

First, we note that a number of the Exhibits appear to be excerpts from larger collections of documents that were produced to the House Judiciary Committee by the original source of the documents. In some cases it appears that the Managers are withholding a portion of the materials received during the course of the Committee investigation. We are requesting that the Mangers produce these document collections in their entirety. In the event that the Managers are unwilling to produce this material, we ask that you provide us with a log of all material being withheld and the basis for the Managers' refusal to make this information available to Judge Porteous and his counsel.

Second, we note that among the documents produced there are a substantial number of pages containing redacted information. The documents have been redacted using both white and black redactions to obscure certain text. We ask that you produce the documents in un-redacted form and that, to the extent that the redactions were applied to the document by the original source, you identify those documents, their source, and the redactions that were present when the documents were received by the Task Force. This will allow us to pursue un-redacted documents from their original source when necessary.

Exhibit 1

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Third, it is clear that the Managers have not produced all of the information gathered during the course of the Committee investigation. To the extent that documents were received by the House that are not on the Exhibit List and have not been made available for our inspection at your offices, we ask that you identify those documents, their sources, and the reasons they have been withheld. While we believe that we are entitled to all of the material that the Committee reviewed as part of the investigation of Judge Porteous, we recognize that the Managers likely take a different position. We ask that you provide this information so we can determine whether to seek a ruling from the Senate Impeachment Trial Committee regarding production of this information or independently seek the documents from third parties.

To assist you in responding to our requests we are enclosing a table detailing the Exhibits that we believe are incomplete either due to the non-production of documents or to redaction of specific pages. Looking solely at the exhibit list we are unable to determine if all of the transcripts of the depositions taken during the Committee's investigation have been produced. To the extent that certain deposition transcripts were not identified as exhibits and have not been produced to date, we are seeking their production. Further, we understand that in many cases interviews took place with various witnesses in advance of their depositions. By this letter we are requesting a list of all of the witnesses interviewed during the Committee's investigation and any notes or memoranda of those interviews. We are seeking this information both for interviews that were not followed by a formal deposition and from interviews that took place as a precursor to a deposition.

We are continuing to evaluate your requests for stipulations and anticipate providing you with a preliminary response to your request shortly. Please let me know if you have any questions. With best regards, I remain,

Sincerely,

Richard W. Westling

RWW/nr

168799

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ATTACHMENT TO MAY 6, 2010 DISCOVERY LETTER - PAGE 1 OF 6

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
69b	PORT000000224 to PORT000000532	Department of Justice Document Production Two (excerpts) June 25, 2009 **309 pages**	Bates No. and CO from Ronald Welch indicates there are 309 pages of documents but the PDF contains only 85 pages. CO indicated the following is included: SF 86, FBI 302 reports in connection with background investigation, and other related documents. - 6/23/94 – Redacted Memo to Chief, Background Investigations, from Staff Assistant requesting background check on Porteous; - 6/24/94 – Redacted Memo from Director of FBI to SACs New Orleans re: instructions for background check – 5 pgs; - 6/30/94 – redacted request for Elsur Index; - 6/24/94 – redacted request for credit check; - Credit Bureau Report; - 7/15/94 – Redacted Notice of Personnel Investigations, Notice of Investigation complete – No SII record for SSN; - – Table of contents of this package indicates there are more than 151 pages to this report. - Table of Content from investigation: - Interview of Candidate....4 - - 7/8/94 – Redacted - Interview with supplement to standard form SF-86; Re-	309	85 w/ cover letter

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ATTACHMENT TO MAY 6, 2010 DISCOVERY LETTER - PAGE 2 OF 6

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
			interview of Porteous – 2 on 8/18/94 – Redacted (Black) 3 pgs. - 8/1/94 – WHITE redactions - Rhonda Danos – 1 pg - 7/5/94 WHITE redactions - Don Gardner -- 2 pgs - 8/1/94 WHITE & BLACK redaction - Louis Marcotte – 2pgs - Associate Attorneys ..... 66 – 1 8/1/94 – WHITE redactions - Robert Creely – 2 pgs - 8/19/94 Memo 6-174 – To Richard Hildreth from Redacted – General Background Investigation Unit – signed by Supervisory PSS. - 8/19/94 NOTE TO DOJ – Redacted (Black) Indicates partial investigations were furnished on 7/29/94 and 8/8/94 the rest is redacted. - 7/28/94 – Redacted – NOTE to DOJ re: Porteous background investigation is incomplete. PORT459		
69c	PORT00000533 To PORT00000750	Department of Justice Document Production Three (excerpts) July 2009 **52 pages**	- Cover letter indicates 52 pgs; - 6/23/93 - JP Sheriff's Office Inter-Office Memo – all names redacted except Marcotte and	52	45 w/ cover letter

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Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
			Porteous. Memo discusses bond reductions and splitting of bonds. - 10/21/94 – Intelligence Report – name redacted – C.I. #420 - -10/24/94 – Redacted – Intelligence Report - 10/26/94 – Redacted – Intelligence Report – - 10/26/94 – Redacted – Intelligence Report – CI #4245 - 10/27/94 – Redacted Intel Report - 10/28/94 – Redacted Intel Report - 10/21/94 – Redacted Intel Report; - 10/12/94 – Redacted Intel Report; - 10/5/94 – Redacted Investigation Report; - 10/7/94 – Redacted Investigative Report - 11/17/94 – Redacted Investigative Report - 11/17/94 – Redacted Investigative Report – requested transcript of 9/24/94 hearing; - 11/21/94 – Redacted Investigative Report – - 11/21/94 – Redacted Investigative Report - 11/29/94 – Redacted Investigative Report		
69d	PORT00000751-PORT00000761	Department of Justice Document Production Four (excerpts) July 20, 2009	Cover letter – In response to 10 questions: - 11/9/94 – MEMO – Source advised of	163	114 w/ cover letter

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Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
		163 pages	documentation of JPSO on at least two occasions Porteous reduced/split bonds (REDACTED BLACK) - 10/26/94 – Interviewed __ redacted material re: Wallace, Marcotte and Porteous(redacted by DOJ and then has black redaction all over interview notes) - 302 12/12/03 – Jeffrey Duhon – (BLACK & WHITE redactions) – 5 pages are blank - 7/22/02 – 302 Jeffery Duhon – WHITE REDACTIONS - 1/29/04 – 302 Jeffery Duhon – WHITE REDACTIONS - 8/5/03 – 302 Jeff Duhon – WHITE REDACTIONS - 11/13/02 – 302 Jeff Duhon – WHITE REDACTIONS - 12/16/2002 – 302 Jeff Duhon – BLACK &WHITE REDACTIONS - 7/24/02 – 302 Jeff Duhon - WHITE REDACTION - 10/1/04 – 302 Aubrey Wallace – BLACK & WHITE REDACTION - 2/25/04 – 302 Loretta Young- Williams – VP Regions Bank – BLACK & WHITE REDACTION		
69e	PORT00000773-PORT00000804	Department of Justice Document Production Five (excerpts) October	- Cover letter, cover page and description of deletion codes – 3 pgs	22	6 w/ cover letter

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ATTACHMENT TO MAY 6, 2010 DISCOVERY LETTER - PAGE 5 OF 6

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
		23, 2009 **22 pages**	- 10/2994 – FBI 302 redacted name of individual – 2 pgs -		
69f		Department of Justice Document Production Six (excerpts) November 13, 2009 **33 pages**	32 pages of records from the "Wrinkled Robe" investigation pertaining to Porteous: - 8/27/01 Affidavit supporting an application for an order authorizing Title III electronic surveillance or various telephone lines	33	33
69g		Excerpts from Norman Stotts - FBI Interview 12/18/02	Redacted with white – Most of the document is redacted – DOJ redaction	7	7
69h	1-3	Kevin Centanni - FBI Interview 7/7/04	Black redaction	3	3
72a	Pp 1, 5-6 JC202737, JC202741-JC202742	Excerpts from Louis Marcotte – FBI Interview March 2, 23, 24, 25 and 29, 2004	Black redaction – Information re: Porteous redacted.	3	3
72b	Pp 1-6 JC202818-202823	Louis Marcotte – FBI Interview 4/21/04	Black redaction – Portions of Porteous information redacted	6	6
72c	P 1 JC202695	Louis Marcotte – FBI Interview 4/23/04	No redactions	1	1
72c	Pp 1-10 JC202694-202693	Louis Marcotte – FBI Interview 4/1/04	Black redaction – Information relating to Porteous redacted	10	10
72e	Pp 1-3 JC202769-202771	Louis Marcotte – FBI Interview 4/6/04	Black redaction – redactions relating to Porteous information	3	3
72f		Louis Marcotte – FBI Interview 7/20/04	Black redaction – Re: Wallace & Duhon	2	2
72g		Louis Marcotte – FBI Interview 10/14/04	Black redaction – Most of the document is redacted	2	2
74a	P 1 JC202694	Lori Marcotte – FBI Interview 3/3/04	Black redaction – one Judge's name	1	1
74b	pp 1-3 JC202676-202678	Lori Marcotte – FBI Interview 3/25/04	Black redaction -	3	3

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ATTACHMENT TO MAY 6, 2010 DISCOVERY LETTER - PAGE 6 OF 6

Exhibit No.	Bates Number or Other ID Information	Managers' Description	Detailed Description / Notes Re: Redaction	Pages in Original	Pages Produced
74c	Pp 1-9 JC202676-202793	Lori Marcotte – FBI Interview 3/30/04	Black redaction – information regarding Porteous	9	9
74d	Pp 1-5 JC202679-202683	Lori Marcotte – FBI Interview 4/20/04	Black redaction	5	5
74e	Pp 1-2 JC202701-202702	Lori Marcotte – FBI Interview 11/3/04	Black redaction	2	2
74f	P 1 JC202667	Lori Marcotte – FBI Interview 4/5/04	Black redaction	1	1
80a	1-2	Jeffery Duhon – FBI Interview 7/22/02	White redactions – DOJ	2	2
80b	1	Jeffery Duhon – FBI Interview 7/24/02	White redactions – DOJ	1	1
80c	1	Jeffery Duhon – FBI Interview 12/16/02	White redaction – DOJ	1	1
80d	1	Jeffery Duhon – FBI Interview 12/16/02	White redaction – DOJ	1	1
80e	1	Jeffery Duhon – FBI Interview 8/5/03	White redaction – DOJ	1	1
80f	1-5	Jeffery Duhon – FBI Interview 12/12/03	White redaction – DOJ	5	5
80g	1-3	Jeffery Duhon – FBI Interview	White redaction – DOJ	3	3
84	Pp 1-5 &FBI delete codes	Aubrey Wallace – FBI Interview 10/1/04	White redactions – DOJ	7	7
85	MCC0026-0026, MCC0199-0200	Documents from the Metropolitan Crime Commission	Black redaction	6	6

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Congress of the United States
Washington, DC 20515

May 11, 2010

Richard Westling, Esq.
Ober Kaler Grimes and Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous - Discovery

Dear Mr. Westling,

This letter responds to your letter of May 6, 2010.

As you know, there are no formal "rules" that provide for discovery in an impeachment trial. Nonetheless, consistent with precedent, the House takes the position that it is appropriate that the House provide the following materials: 1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence. The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process. It is against this statement of principles that we address your specific requests.

Paragraph 1. You are correct that some of the exhibits are excerpts from larger document collections. In the spirit of cooperation and in order to expedite the trial preparation process, we will make the entire document collections from which these records were selected available for inspection and copying, if you so desire.

Paragraph 2. As you have noted, certain of the exhibits have been redacted by the House and the Department of Justice (DOJ). You are free to inspect unredacted versions of the documents that the House redacted.

It is apparent that the bulk of the DOJ redactions – over which the House had no control – consisted of deleting identifying information as to witnesses, sources, and other materials that relate to persons other than Judge Porteous. There is nothing in the context of those documents that suggests that any redacted materials would be relevant to Judge Porteous's defense. In any event, the House has not had access to and will not use unredacted versions of these documents. Thus, the House cannot accommodate your request in this regard.

Exhibit 2

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Paragraph 3. You have asked for "all of the materials the Committee reviewed as part of the investigation." This request is beyond the legitimate scope of discovery. Even a defendant in a criminal case where liberty is at stake is not entitled to replicate the investigation. Accordingly, we decline to produce materials responsive to this request.

In response to your request for information concerning depositions and other witness materials, we represent that all depositions have been produced. We decline to identify the names and identities of every person the House spoke to, where those individuals did not provide exculpatory information and will not be witnesses in this case. As stated previously, Judge Porteous is not entitled to replicate the House investigation.

If you have any questions, please do not hesitate to contact Mark H. Dubester, 202-226-2404, or, Harold Damelin, 202-226-0144, so we can discuss and try to resolve any issue you might have.

Sincerely,

Alan I. Baron
Special Impeachment Counsel

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In The Senate of the United States

Sitting as a Court of Impeachment

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

RESPONSE BY THE HOUSE OF REPRESENTATIVES
TO MOTION OF JUDGE G. THOMAS PORTEOUS, JR.
FOR DISCOVERY FROM THE HOUSE MANAGERS

The House of Representatives ("House"), through its Managers and counsel, respectfully responds to the Motion of Judge G. Thomas Porteous, Jr. for Discovery from the House Managers. First, it should be noted that the House has already produced, or is in the process of producing, all documents in its possession that it has identified as responsive to Judge Porteous's Discovery Requests 4, 5, and 6 – which includes all materials to be used at trial. Further, the House on its own initiative and prior to its receipt of Judge Porteous's discovery motion, has attempted to provide, and shall continue to provide, evidentiary materials in its possession that are not likely to be used at trial but are nevertheless sought by Judge Porteous's Discovery Request 1 (such as financial records and certain witness statements that were not marked as trial exhibits). That Request, however, is so broad and burdensome – seeking in substance that the House make available to Judge Porteous all information and all materials from all sources (regardless of their relevance to the Articles and without reference to the contents of the materials being sought) – that the House objects to that Request as drafted. The House also objects to

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Judge Porteous's Motion to the extent it seeks access to attorney work product of Impeachment Task Force legal staff, including Judge Porteous's request for a list of all witnesses interviewed by the Task Force (Discovery Request 2) and all memoranda or notes taken at any witness interview (Discovery Request 3).

In support of this response, the House states as follows:

I. FACTUAL BACKGROUND

The procedural record is clear: 1) the House has already provided all materials that it presently intends to use at trial and is promptly making further production as additional materials, if any, are identified; and 2) to date, counsel for Judge Porteous has reviewed additional documents at the House's offices on three separate occasions. As to this latter category, when counsel has requested copies of any documents reviewed, the House has complied promptly. Thus, the House has taken a broad view of discovery early on in this case precisely to avoid discovery disputes and ensure an expeditious trial.

The chronology of these disclosures – obscured in Judge Porteous's motion – is as follows:

1. The House made a near-complete disclosure of trial exhibits and trial witness statements to Judge Porteous on March 23, 2010, when it provided a disc of exhibits and accompanying exhibit list setting forth the evidence the House anticipates using at trial. That disc and exhibit list included deposition testimony and other witness statements of individuals who have been deposed or interviewed about the facts surrounding the Articles of Impeachment. As Judge

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Porteous notes, the materials amounted to approximately 9,700 pages. The House has not been tight-fisted about discovery. At the time of the March 23 production, the House also informed counsel for Judge Porteous that it had other materials available for inspection and copying that were not included as exhibits.

2. Specifically, the House made some of these additional materials (approximately two file drawers) available for inspection by Judge Porteous's counsel on April 9, 2010. That event is not mentioned in Judge Porteous's pleading. The documents included numerous financial records of Judge Porteous and of certain other witnesses. Counsel made no requests for copies of documents from that April 9 review.

3. By letter dated May 6, 2010, Judge Porteous requested that the House make certain exhibits available in unredacted form. The exhibits requested by Judge Porteous were all contained in the House's March 23 production with redactions either made by the House or by the Department of Justice prior to transmitting relevant documents to the House.[1] The House assembled the unredacted documents and responded to Judge Porteous in a letter dated May 14, stating that the documents were available for review.[2] Counsel reviewed the documents on

[1]As an example, the House had redacted materials to delete certain references to third parties, such as other state judges, where the conduct of those judges did not result in prosecutions and the information is not relevant to the Articles of Impeachment.

[2]The House explained to Judge Porteous's counsel that it only had the ability to remove the redactions that it had made, and it could not unredact any of the redactions made by the Department of Justice.

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May 20 and requested a complete set. On May 21, 2010, the House provided a complete set of the unredacted materials that had been reviewed by Judge Porteous's counsel the day before.

4. On May 21, 2010, the House also provided Judge Porteous with an updated exhibit list and an updated disc of exhibits, which included a small number of additional documents that were not contained in the March 23, 2010 production.[3]

5. On May 26, 2010, the House made additional materials (approximately a little more than a box of materials) available for inspection by Judge Porteous's counsel. The documents consisted generally of additional financial records for Judge Porteous and certain other witnesses. After that review, Judge Porteous's counsel informed House staff counsel that they would likely request copies of certain of those documents, but no specific request has yet been received.[4]

Thus, the House has strived, and shall continue to strive on an ongoing basis, to be as open as possible with Judge Porteous in providing him with relevant evidentiary materials in its possession.

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[3]It is inevitable in any litigation that an exhibit list will undergo changes over time, as exhibits are added, deleted, or edited as the case moves closer to trial. For example, the House is likely to use summary charts or time-lines that are based on the exhibits that have already been identified and produced. When such documents are prepared they will be added to the exhibit list and provided to counsel for Judge Porteous.

[4]As Judge Porteous has noted, the House has identified some additional materials that it will soon make available for inspection and copying and has so informed counsel for Judge Porteous.

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II. JUDGE PORTEOUS'S DISCUSSION OF THE PROCEDURAL BACKGROUND

In the "Introduction and Procedural Background" section of his discovery motion, Judge Porteous alludes to a variety of factual circumstances in an attempt to paint a picture suggesting that he has been kept in the dark about the evidence in this case, and to suggest a backdrop against which his discovery requests should be considered. An accurate consideration of the procedural background, however, compels precisely the opposite conclusion and demonstrates that Judge Porteous has been provided virtually complete information as to the evidentiary details of the House's case.

For example, Judge Porteous notes that there was no prior criminal trial where discovery would have been provided. This ignores the fact that there was a full-blown adversary hearing in the Fifth Circuit, at which ample discovery was provided by investigatory counsel, and at which Judge Porteous heard the witnesses testify and cross-examined them under oath. Judge Porteous also complains that he received discovery in the nature of witness statements from only a "handful" of witnesses who testified during the Impeachment Task Force hearings, yet it is essentially this same "handful" of witnesses who will testify at the Impeachment trial. Moreover, with the exception of the House having obtained court records of curatorships assigned by Judge Porteous to Robert Creely, and the transcript of the October 16, 1996 recusal hearing in the Liljeberg case, the documentary evidence relating to Articles I (the Liljeberg case) and III (Judge Porteous's bankruptcy) is largely unchanged.

Further, the House Impeachment Task Force held public hearings where the critical "handful" of witnesses testified and where Judge Porteous's current counsel had the opportunity

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to examine them. Judge Porteous attempts to minimize this event by claiming that his counsel was limited in his ability to cross-examine the witnesses at those hearings. That contention entirely obscures the facts that: 1) the House Impeachment Task Force provided counsel the extraordinary courtesy of permitting him to participate and examine witnesses at a House proceeding; 2) prior to those hearings, the House provided Judge Porteous's counsel with the Impeachment Task Force depositions of the witnesses who would be testifying, 3) though the House operated on a "five minute rule" for Members, Mr. Westling was initially provided ten minutes, and whenever he sought additional time – which he did on two occasions – such time was granted to him by Task Force Chairman Adam Schiff without any time limitation,[5] and 4) Judge Porteous now has personally heard the witness testimony under oath of virtually all the essential witnesses and has a transcript for use at the Impeachment trial.

Finally, the House, by virtue of the highly detailed and documented Impeachment Report, has provided Judge Porteous with what can only be described as a witness-by-witness, document-by-document preview of the House's case.

Thus, in light of the Fifth Circuit proceedings, the Impeachment Task Force hearings, the detailed Impeachment Report, and the extensive document productions made to date, Judge

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[5]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*, Ser. No. 111-43, Nov. 18, 2009, 111th Cong., 1st Sess., 189 (Mr. Westling: "Mr. Chairman, I am noticing my light is on. Could I have a few more moments?" Mr. Schiff: "Yes, of course, Counsel."); *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*, Ser. No. 111-46, Dec. 15, 2009, 111th Cong., 1st Sess., 51 (Mr. Westling: "Mr. Chairman, I note my light is on. May I proceed." Mr. Schiff: "Of course.").

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Porteous's contention that he is in some way uninformed of the factual nature and evidentiary detail of the House's case is simply meritless.

III. GENERAL PRINCIPLES

In its May 11, 2010 letter to counsel for Judge Porteous, the House stated its position clearly. It agreed to produce: "1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence." Additionally, in that same letter, the House made clear, as it reiterates in this Response, that it would not construe its discovery obligations narrowly: "The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process."

The House is aware of the Senate Impeachment Trial Committee's "Disposition of Pretrial Issues" in the Hastings Impeachment proceedings in which the Senate Impeachment Trial Committee urged the House to make "the fullest disclosure possible."[6] As described above, the House has done, and will continue to do, just that.

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[6] See Disposition of Pretrial Issues, Senate Impeachment Trial Committee (Judge Hastings), Apr. 14, 1989 at 9, reprinted in Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee Hastings, S. Hrg. 101-194, Pt. 1, 101st Cong., 1st Sess. at 289

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IV. JUDGE PORTEOUS'S SPECIFIC REQUESTS

Judge Porteous, though having broken up his requests into 7 categories, seeks nothing less than all "information" that has been provided to the House from all sources, whether or not that information has any conceivable relevance to the Articles actually filed, and includes what would be work-product of House counsel. The framing of the discovery requests truly misconstrues the purpose of discovery – to make Judge Porteous aware of the evidence the House will use against him – and instead seems to be premised on the principle that Judge Porteous is entitled to duplicate the House's investigation. Specifically, Judge Porteous is not entitled to know every individual with whom Task Force staff has spoken (Discovery Request 2), nor is he entitled to access to staff work product (Discovery Request 3).[7]

Thus, as described above, with regard to Judge Porteous's other discovery Requests, the House has already produced, or is in the process of promptly producing, documents responsive to Request 5 (evidence the House intends to introduce at trial), Request 4 (records relating to criminal convictions of potential witnesses to the extent any such responsive documents exist and have been identified), Request 6 (exculpatory materials), as well as documents generally responsive to Request 1 (various categories of documents gathered by the Impeachment Task Force related to this Impeachment).

(1989).

[7]To the extent Judge Porteous's Discovery Request 3 seeks any notes or memoranda by FBI Special Agent DeWayne Horner, no such documents exist. At no time during any witness interviews attended by Agent Horner did he take notes.

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V. CONCLUSION

Judge Porteous's pleading sets forth a procedural history that is simply belied by the facts of Judge Porteous's in depth involvement and knowledge of the facts and evidence that relate to his conduct. The House on its own initiative, prior to any requests by Judge Porteous or the issuance of a discovery schedule by the Senate Trial Committee, has undertaken substantial efforts to ensure that Judge Porteous receives all materials that relate to the House's presentation of evidence in this case and materials that would be exculpatory, and it shall continue to do so.

WHEREFORE, the House requests that the Senate Impeachment Trial Committee deny Judge Porteous's Motion to the extent it seeks the production of attorney work product materials, including the production of a list of all witnesses interviewed by Task Force staff (Request 2) and attorney notes or memoranda taken during witness interviews (Request 3). The House further requests that the Senate Impeachment Trial Committee deny Request 1 as overbroad and burdensome. The House will continue to provide discovery consistent with its positions stated in this pleading and in correspondence with counsel (generally tracking Judge Porteous's Requests 4, 5 and 6), and will continue to construe its obligations expansively.[8]

[8]The House will endeavor to cooperate with any principles of discovery the Committee states. As a matter of comity, the Committee should avoid issuing an "Order" to the House – a coordinate branch of Congress. In the Hastings case, the Senate in its "Disposition of Pretrial Matters," opted to state principles rather than seek to direct the House, and we urge that process here as well.

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Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

June 4, 2010

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In The Senate of the United States

Sitting as a Court of Impeachment

—

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

—

MOTION OF THE HOUSE OF REPRESENTATIVES FOR RECIPROCAL DISCOVERY

The House of Representatives ("House"), through its Managers and counsel, respectfully moves the Senate Impeachment Trial Committee to direct Judge Porteous to provide reciprocal discovery to the House. In support of this request, the House respectfully submits:

The House has taken upon itself the ongoing obligation to provide the following materials to Judge Porteous: "1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence."[1] To facilitate the trial preparation process, the House has in fact provided materials above and beyond the above-listed categories. As examples, it has made available large collections of financial records relating to both Judge Porteous and other witnesses, from which only a few pages were identified as potential trial exhibits, as

[1] See Letter from Alan I. Baron, Esq. to Richard Westling, Esq., March 23, 2010 (providing initial discovery) (attached to this pleading as "Attachment 1"); Letter from Alan I. Baron, Esq. to Richard Westling, Esq., May 11, 2010 (setting forth discovery principles) ("Attachment 2").

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well as testimony of numerous individuals who are unlikely to be called as witnesses at trial.

Moreover, the House, by way of the Report accompanying the Articles of Impeachment, has provided Judge Porteous with a detailed description of the essential features of the witness testimony that will be elicited in its case.[2] Indeed, Judge Porteous is personally knowledgeable of the testimony of many of the witnesses who are likely to be called at trial by virtue of their appearances before the Fifth Circuit Committee and/or at the Hearings before the House Impeachment Task Force. The Report also identifies specific documents that are likely to be used by the House to support the various Articles of Impeachment. Finally, the House, in its reply to a request by Senate Legal Counsel, has set forth its initial witness list.[3]

The House, by way of a letter to counsel for Judge Porteous, has requested "reciprocal" discovery that tracks the first three categories of materials that the House has already provided to Judge Porteous. Specifically, in a May 13, 2010 letter, the House requested that Judge Porteous provide: "1) any tangible evidence Judge Porteous intends to use at trial; 2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and 3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial."[4] Judge Porteous has not responded to this

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[2]See H.R. REP. NO. 111-427, *Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, Report of the Committee on the Judiciary to Accompany H. Res. 1031*, 111th Cong. 2d Sess (2010).

[3]See Letter from Reps. Adam Schiff and Bob Goodlatte to Sens. Claire McCaskill and Orrin Hatch, Apr. 13, 2010 ("Attachment 3").

[4]See Letter from Alan I. Baron, Esq. to Richard Westling, Esq., May 13, 2010 (regarding discovery) ("Attachment 4").

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letter (nor did he provide a witness list in his response to the initial inquiries of the Senate Legal Counsel).

We urge that the Senate Impeachment Trial Committee direct Judge Porteous to provide the requested materials to the House. Such disclosures will not only enhance the truth-seeking process so that the Senate may appropriately consider the evidence, but it will ensure that the trial proceeds without unnecessary delay or interruption. Such a direction would be consistent with the Senate's disposition of the House's request for reciprocal discovery in the Hastings impeachment proceeding.[5]

WHEREFORE, the House requests that the Senate Impeachment Trial Committee order Judge Porteous to provide to the House: 1) any tangible evidence Judge Porteous intends to use at trial; 2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and 3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial.

[5] See Disposition of Pretrial Issues, Senate Impeachment Trial Committee (Judge Hastings), Apr. 14, 1989 at 9, reprinted in Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee Hastings, S. Hrg. 101-194, Pt. 1, 101st Cong., 1st Sess. at 289 (1989) ("Attachment 5"), where the Senate Impeachment Trial Committeee ruled: "Judge Hastings should provide his reciprocal discovery to the House by May 10, including all documents, tapes, and other tangible evidence he intends to offer in evidence, and sworn, adopted, approved, or substantially verbatim statements, of witnesses that Judge Hastings intends to call."

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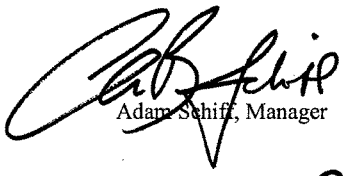
Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By



Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

May 28, 2010

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Attachment 1

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Congress of the United States

Washington, DC 20515

March 23, 2010

Via Hand Delivery
Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous –
Exhibit List and Exhibits

Dear Mr. Westling,

We look forward to working cooperatively with you to ensure that that the proceedings in the Senate may proceed expeditiously and without unnecessary delay. To that end, this is the first of what is likely to be several letters we will be sending you to address the trial preparation process.

Enclosed please find an Exhibit List that lists the documents (including transcripts and other materials) cited in the Committee Report as well as other exhibits that have been marked in anticipation of their potential use at trial. Also, please find a disc that contains electronic copies of all of the exhibits on the list. If additional exhibits are identified for use at trial, we will mark them and provide you copies.

The exhibits on the disc have been redacted to delete reference to personal identifying information (such as social security numbers) and, in some instances, to delete references to third parties. We will make available for your inspection the original unredacted materials at your request.

In addition, the House, through the Committee on the Judiciary's Impeachment Task Force, has obtained materials that were not marked as exhibits and have not been not copied. These generally include:

- Financial records, such as Judge Porteous's personal bank records, IRA records, various credit card records, and certain gaming records, of Judge Porteous. These records were originally obtained by the Department of Justice, and the Task Force obtained them either from the Fifth Circuit or from the Department of Justice.

- Financial records, such as credit card statements and business records, for some of the witnesses. These were originally obtained by the Department of Justice.

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- Other materials obtained from the Fifth Circuit or third parties.

It appears that the bulk of these records were made available to Judge Porteous in connection with the Fifth Circuit proceedings.

These materials are available for your inspection and copying upon your request. If you wish to review these materials, please contact Mark H. Dubester, 202-226-2404, or Harry Damelin, 202-226-0144, to arrange a time to review them.

Sincerely,

Alan Baron

Alan I. Baron
Special Impeachment Counsel

Enclosures

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Attachment 2

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Congress of the United States
Washington, DC 20515

May 11, 2010

Richard Westling, Esq.
Ober Kaler Grimes and Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous - Discovery

Dear Mr. Westling,

This letter responds to your letter of May 6, 2010.

As you know, there are no formal "rules" that provide for discovery in an impeachment trial. Nonetheless, consistent with precedent, the House takes the position that it is appropriate that the House provide the following materials: 1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence. The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process. It is against this statement of principles that we address your specific requests.

Paragraph 1. You are correct that some of the exhibits are excerpts from larger document collections. In the spirit of cooperation and in order to expedite the trial preparation process, we will make the entire document collections from which these records were selected available for inspection and copying, if you so desire.

Paragraph 2. As you have noted, certain of the exhibits have been redacted by the House and the Department of Justice (DOJ). You are free to inspect unredacted versions of the documents that the House redacted.

It is apparent that the bulk of the DOJ redactions – over which the House had no control – consisted of deleting identifying information as to witnesses, sources, and other materials that relate to persons other than Judge Porteous. There is nothing in the context of those documents that suggests that any redacted materials would be relevant to Judge Porteous's defense. In any event, the House has not had access to and will not use unredacted versions of these documents. Thus, the House cannot accommodate your request in this regard.

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Paragraph 3. You have asked for "all of the materials the Committee reviewed as part of the investigation." This request is beyond the legitimate scope of discovery. Even a defendant in a criminal case where liberty is at stake is not entitled to replicate the investigation. Accordingly, we decline to produce materials responsive to this request.

In response to your request for information concerning depositions and other witness materials, we represent that all depositions have been produced. We decline to identify the names and identities of every person the House spoke to, where those individuals did not provide exculpatory information and will not be witnesses in this case. As stated previously, Judge Porteous is not entitled to replicate the House investigation.

If you have any questions, please do not hesitate to contact Mark H. Dubester, 202-226-2404, or, Harold Damelin, 202-226-0144, so we can discuss and try to resolve any issue you might have.

Sincerely,

Alan I. Baron
Special Impeachment Counsel

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Attachment 3

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Congress of the United States
Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

Pretrial Motions. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;

- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;

- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the Liljeberg proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;

- Motion to permit or admit expert testimony; and

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- Motion relating to stipulations, if appropriate.

Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely – including his financial relationship with them prior to becoming a Federal judge, his handling of the Liljeberg case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true."[1] The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

[1] "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 169 (1989).

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substantial dispute.[2]

Witnesses. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

Article 1

1. Robert Creely [Immunity]
2. Jacob Amato [Immunity]
3. Leonard Levenson [Immunity]
4. Donald Gardner
5. Joseph Mole
6. Rhonda Danos [Immunity]

Article 2

7. Louis Marcotte
8. Lori Marcotte
9. Ronald Bodenheimer
10. Bruce Netterville [Immunity]
11. Mike Reynolds
12. Jeffrey Duhon
13. Aubrey Wallace

Article 3

14. Claude Lightfoot
15. FBI Special Agent DeWayne Horner
16. FBI Financial Analyst Gerald Fink
17. Richard Greendyke

Article 4

18. Former FBI Agent Cheyanne Tackett
19. Former FBI Agent Robert Hamill

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[2]See, e.g., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 170 (1989).

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Length of the case-in-chief. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Hearing.[3] Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the Liljeberg case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.[4]

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations – such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy – a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

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[3]These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

[4]Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are Liljeberg court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

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Article I. Judge Porteous has been aware of the details and substance of the Liljeberg allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the Liljeberg case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole – the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations – having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.[5] The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte – information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

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[5]In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

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We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

cc: Morgan Frankel
Senate Legal Counsel

Attachments

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Attachment 4

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Congress of the United States
Washington, DC 20515

May 13, 2010

By Electronic and Regular Mail

Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous—
Initial Discovery Request

Dear Mr. Westling:

The purpose of this letter is to request certain discovery from Judge Porteous.

The House formally requests that Judge Porteous provide discovery of the following materials: 1) any tangible evidence Judge Porteous intends to use at trial; 2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and 3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial. These categories correspond to the categories of materials that the House has stated it will produce to Judge Porteous.

If you have questions, please contact Mark H. Dubester, 202-226-2404, or Harry Damelin, 202-226-0144.

Sincerely,

Alan Baron

Alan I. Baron
Special Impeachment Counsel

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Attachment 5

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United States Senate
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE

DISPOSITION OF PRETRIAL ISSUES

Upon consideration of the written submissions of the parties on pretrial issues and the oral argument on April 12, 1989, the committee has authorized the chair to issue the following rulings on behalf of the committee:

Preliminary Witness Lists

First, on three occasions, beginning on August 10, 1988, the Committee on Rules and Administration asked the parties for preliminary lists of witnesses with a description of the general nature of the testimony that is expected from each witness. The Rules Committee expressly stated that neither side would be precluded, by the submission of this preliminary information, from requesting subpoenas for other witnesses. On September 6, 1988, the House submitted a list of twenty-three witnesses that it anticipates calling. The House briefly described the nature of each witness's proposed testimony. On January 17, 1989, the House supplemented that list with six additional witnesses. Judge Hastings did not provide to the Rules Committee a list of his proposed witnesses in these Senate proceedings. Neither has Judge Hastings provided to this committee a preliminary list of the witnesses that he intends to call before us, other than to refer to material which he had provided last year to a subcommittee of the House Committee on the Judiciary.

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It is imperative that Judge Hastings now provide his preliminary witness list without any further delay. The committee requires the list in order to complete its consideration of pretrial issues, including the fixing of an appropriate date to begin evidentiary hearings. Accordingly, Judge Hastings is directed to provide to the committee by noon on April 19, 1989, a preliminary witness list that identifies in good faith the witnesses that he intends to call before this committee. The witness list should also briefly state, in detail comparable to that already provided by the House for its anticipated witnesses, the nature of the testimony that Judge Hastings expects each listed witness would provide. This is to be a preliminary list. Judge Hastings may add, by showing good cause for not including them on the preliminary list, additional names when he submits his final witness list. In the absence of a showing of good cause, the committee may exclude the testimony of any witness who is not listed and described in the preliminary witness list.

The House has indicated that it may have additional witnesses. To the extent that those additional witnesses are now known to the House, the House should supplement its preliminary list by noon on April 19, 1989.

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Motion In Limine

Second, the House has moved in limine to exclude five categories of evidence as irrelevant.

The first category concerns the motivations of persons who investigated Judge Hastings in 1981 and then who prosecuted him in United States v. Hastings, Cr. No. 81-596-Cr-ETG. The third category concerns the motivations of persons who investigated the matters addressed by Grand Jury No. 86-3 (Miami) concerning the alleged disclosure by Judge Hastings of confidential wiretap information.

Judge Hastings correctly notes that the House has placed on its witness list several assistant United States attorneys and agents of the Federal Bureau of Investigation who would testify in connection with either the bribery and perjury allegations or the wiretap matter. Judge Hastings asserts that the House motion is premature. He also asserts that he should be able to inquire into the motivation and bias of the witnesses against him. As Judge Hastings has asserted a tenable basis for some degree of latitude in cross-examining the witnesses that the House will call, the committee denies at this time this portion of the House's motion. To the extent that Judge Hastings proposes to inquire into the motivations of persons who investigated and prosecuted him for a purpose other than impeaching witnesses that the House will call, the House motion is premature in

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the absence of a firm indication from Judge Hastings, through the filing of a witness list, that he intends to call any such witnesses. We wish to make clear nonetheless that our denial at this time of this portion of the House motion should not be understood to invite an open-ended inquiry into the motivations of federal prosecutors and investigators. Rather, any such inquiry must be limited to evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Hastings' guilt or innocence.

Categories two and four concern the motivations of persons who initiated, investigated, and considered the complaints that were filed against Judge Hastings in March, 1983, and September, 1986, with the Eleventh Circuit under the Judicial Conduct and Disability Act of 1980. Judge Hastings contends that this aspect of the House motion also is premature.

The issues that are presented by the articles concern Judge Hastings' conduct, not the conduct of members of the judicial branch or persons employed by it. Judge Hastings has made no showing that evidence in categories two and four would be relevant to the articles of impeachment. Moreover, a grant of the House motion with respect to categories two and four should help to focus the parties' preparation for trial on issues that will be germane to the Senate's consideration of the articles. The motion to exclude

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evidence of the matters described in categories two and four is granted.

The fifth category in the House motion in limine is cumulative evidence on Judge Hastings' general character and reputation. We agree with Judge Hastings that this portion of the House motion in limine is premature. We expect that Judge Hastings will be mindful of the limitations that the committee placed on the number of character witnesses, and the total length of character testimony, in the Claiborne proceedings, and that, in composing his witness list, Judge Hastings will recognize the need to avoid cumulative evidence. We can address at a later date any question which arises about the need to impose limits on that testimony.

Documentary Discovery

Third, Judge Hastings has moved for extensive pretrial discovery. He advocates that discovery be based on contemporary ideas about discovery in federal civil judicial proceedings. The House has proposed a scope of discovery that is modeled to a greater extent on federal criminal judicial proceedings. The House proposes to provide to Judge Hastings any exculpatory evidence that it possesses. The House also proposes that each party provide to the other party the documents that it proposes to offer in evidence, prior sworn, adopted, or approved statements of witnesses that each proposes to call, and substantially verbatim and

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contemporaneously recorded statements of witnesses that each intends to call. The discovery proposed by the House should be completed as promptly as possible. We reject, however, the divergent theoretical limits -- expansive in Judge Hastings' view and constricted in the House's view -- that each side has advocated.

The House has expressed a concern about one House of Congress directing another House to produce records. We need not address at this time whether the Senate has that power in an impeachment proceeding, because we think that it should be sufficient to state principles and a schedule to guide these proceedings:

(a) To the extent that the parties have had a disagreement about photocopying, we recommend to the House that the issue be resolved in Judge Hastings' favor and that the House provide to Judge Hastings copies of all documents that the House has no objection to providing on the basis of their content. To facilitate Judge Hastings' response to the House's proposed stipulations, a matter that will be discussed below, the House should provide those copies by April 21, 1989, a week from today's order.

(b) The House -- which has proposed to provide exculpatory materials, certain prior statements of witnesses, and documents and other tangible evidence that it intends to introduce in evidence -- has indicated that it has provided

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most but not all of that material to Judge Hastings. The House would like to defer further production until it receives equivalent material from Judge Hastings. We will be requiring comparable disclosure by Judge Hastings, but the production to Judge Hastings should not be delayed while that occurs. Again, because we will be requiring responses to the House's proposed stipulations, the House should provide this material to Judge Hastings by April 21.

(c) Concerning other documents, the sharing of information should be guided by a broader principle than that advanced by the House in its offer to provide exculpatory evidence and the prior sworn, adopted, approved, or substantially verbatim and contemporaneously recorded statements of witnesses. In addition to the interests of the House in its role as advocate for the articles of impeachment and the interests of Judge Hastings in defending against those articles, the Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make. We therefore ask the House -- for documents that it has obtained from elsewhere in the government that are responsive to a particularized request from Judge Hastings -- to determine whether there are specific objections, such as the need to honor promised confidences to people who may be at risk, to production to

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Judge Hastings. In the absence of specific objections by the House or by the governmental entity that provided the material to the House, which should be articulated in writing so that the parties and the committee may be apprised of them, the special constitutional process that we are now engaged in will be served best by the fullest disclosure possible. It may be that for some documents an appropriate course of action would be to provide them to the committee for an evaluation of their sensitive nature, if any, and a determination by the committee whether any restrictions should be placed on the terms of access to them. Again, because of the schedule that will be set forth below for responses to stipulations, the House should respond by May 3.

(d) Judge Hastings also has a burden that he has not yet met. It will be necessary for him to do more than simply demand everything that other people have. In order to facilitate the process that we are asking the House and the other branches to undertake, Judge Hastings should identify, with far greater particularity than he has to date, the records that are germane to issues in these proceedings. Also, if it would be of assistance to the holders of documents in determining their responses, he should articulate to them the basis for his requests. To enable the House to respond by May 3, Judge Hastings should submit his particularized requests by April 26.

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(e) Neither the Department of Justice nor the counsel or the members of the Investigating Committee of the Judicial Council of the Eleventh Circuit are before us. If Judge Hastings has requests for documents from either the Department, including the Federal Bureau of Investigations, or the Judicial Council, he should promptly make particularized requests to them by April 26. With knowledge of the committee's interest in the fullest disclosure possible, we would appreciate knowing of the Department's and the Council's responses at the earliest possible time.

(f) Judge Hastings should provide his reciprocal discovery to the House by May 10, including all documents, tapes, and other tangible evidence he intends to offer in evidence, and sworn, adopted, approved, or substantially verbatim statements of witnesses that Judge Hastings intends to call.

Depositions

Fourth, Judge Hastings has asked that the Senate utilize its subpoena power to enable him to take depositions in advance of the committee's hearings. He has attached to his most recent request a list, which he has denominated a provisional list, of twenty-four Department of Justice attorneys and Federal Bureau of Investigation officials and agents. The list is taken from a list of provisional witnesses that Judge Hastings had submitted last year to a subcommittee of the House Committee on the Judiciary.

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The committee knows of no precedent for the pretrial examination of witnesses in connection with a Senate impeachment trial. Nevertheless, the committee will give further consideration to Judge Hastings' request for depositions after receiving from him a statement that includes the following information: a list of proposed deponents; a proffer of the testimony he expects to elicit from each proposed deponent and the relevance of that testimony; whether the proposed deponent has testified or provided statements in prior proceedings and whether Judge Hastings has received or has had access to any transcripts or recorded statements; whether Judge Hastings has asked the proposed deponent to provide information voluntarily and, if he has, the response of the proposed deponent; and, if the committee provides for depositions but limits their number, what priorities Judge Hastings places among the depositions that he is requesting.

If Judge Hastings wishes to pursue his request for depositions, he should submit this statement by April 28, 1989.

It is the committee's hope and expectation that if either the House or Judge Hastings seeks an opportunity to obtain information from the Department of Justice, including the Federal Bureau of Information, that the Department and the Bureau will cooperate voluntarily to provide relevant information.

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Stipulations

Fifth, the House, on December 15, 1988, served an original and, on March 31, 1989, served a revised proposed stipulation of facts. The revised proposal reorganizes the original proposed stipulation of facts into fifteen categories. The House also served on December 15, 1988, a proposed stipulation of documents which asked that the parties stipulate that each of the listed documents is genuine. The proposed documentary stipulation also proposed other stipulations for designated categories of documents. The December 15, 1988 submission by the House on documentary stipulations stated the proposed stipulations did not preclude pertinent objections to the admissibility of the documents listed by the House based on matters not addressed in the stipulations.

On January 17, 1989, the House proposed that the Senate adopt a rule that any proposed stipulation of fact will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true. The House asked for a parallel rule on the authenticity of documents.

An early resolution of factual questions and questions about the authenticity and admissibility of documents that are not in dispute will enable the parties and the committee to focus their time and energies on matters that are truly in

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disagreement. Also, the committee has been directed by the Senate to report to it on facts that are uncontested.

Accordingly, the committee accepts the House proposals. We direct Judge Hastings to respond to the House's proposed revised stipulations of fact, filed on March 31, 1989, by admitting their truth or serving and filing a specific objection that includes a proffer as to why the proposed stipulation should not be taken as true. With respect to documents, we direct Judge Hastings to respond to the House's proposed documentary stipulations, filed December 15, 1988, by admitting the matters set forth in that submission and by admitting the admissibility of the documents listed by the House, or by serving and filing a specific objection that includes a proffer as to why the proposed stipulation concerning each document should not be taken as true and the particular document admitted into evidence.

Judge Hastings has had nearly four months to evaluate the House's proposed stipulations. We direct that Judge Hastings' response be submitted no later than May 10, 1989. This should be a reciprocal process. Although Judge Hastings' has not proposed stipulations of his own, he may do so by May 10. If Judge Hastings does submit proposed stipulations by that day, the House should respond to them by May 24. The parties should engage in this process with an

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eye towards resolving problems. Consequently, if a disagreement about a proposed stipulation can be resolved by redrafting the stipulation to be more accurate, or can be resolved by providing access to a specific document, then we would expect the parties to work together to settle differences between them.

Evidentiary Principles

Sixth, the parties have expressed an interest in the evidentiary principles that will govern these proceedings. The committee's task is to receive and report evidence to the Senate. The Senate reserves the power to determine the competency, relevancy, and materiality of the evidence received by the committee. The committee is not bound by the Federal Rules of Evidence, although those rules may provide some guidance to the committee. Members of the Senate sit both as judges of law and fact. Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence. In the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.

Final Pretrial Statements

Lastly, the parties should file final pretrial statements by a date that the committee will designate when it issues an order setting a date for the commencement of testimony. These statements should include a final list of

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witnesses with a brief statement of the nature of each witness's proposed testimony. The parties should also submit marked exhibits that each proposes to offer. Further, each party should set forth to the committee the legal principles that each believes is applicable to each article of impeachment, or, if appropriately grouped, set of articles. Although the committee will not reach conclusions of law, it is important for the committee, in determining the relevancy of evidence, to know from the parties the legal theories upon which each is proceeding. We will provide more detailed instructions to the parties about the contents of these pretrial statements.

Deferred Matters

The committee is continuing to consider Judge Hastings' application for defense funds. The committee is also continuing to consider a schedule for its evidentiary hearings. The committee expects to issue an order or orders on these matters within a week.

Jeff Bingaman
Chairman

Dated: April 14, 1989

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IN THE SENATE OF THE UNITED STATES
SITTING AS A COURT OF IMPEACHMENT

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

RESPONSE OF JUDGE G. THOMAS PORTEOUS, JR.
TO THE MOTION OF THE HOUSE MANAGERS MOTION FOR DISCOVERY

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and responds to the Motion of the House Managers for Discovery. In response Judge Porteous states as follows:

In their motion for discovery, the House Managers have requested that Judge Porteous provide them with: (1) any tangible evidence Judge Porteous intends to use at trial; (2) any sworn or adopted statements from witnesses whom Judge Porteous intends to call at trial; and (3) transcripts or substantially verbatim statements of witnesses whom Judge Porteous intends to call at trial.

Judge Porteous will provide the House Managers with the requested reciprocal discovery as it comes into his possession or is otherwise identified and provides the following specific responses to the motions numbered requests:

Request No. 1: Judge Porteous has not yet identified the tangible evidence he intends to use at trial, but will make the evidence available to the House Managers once it

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has been identified. Currently, there is a substantial amount of discovery outstanding in this matter, making it difficult, if not impossible, for Judge Porteous to make evidence decisions at this point.

Request No. 2: Judge Porteous is not in possession of any sworn or adopted witness statements from any witnesses he may call at trial.

Request No. 3: Judge Porteous is not in possession of any transcripts or substantially verbatim statements of any witnesses he may call at trial.

Judge Porteous understands that the House Manager's request is a continuing one and will provide any responsive materials if they are developed or identified during trial preparation.

Respectfully submitted,

Richard W. Westling
Chelsea S. Rice
Jackson B. Boyd
Anthony J. Burba
OBER, KALER, GRIMES & SHRIVER, P.C.
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Rémy Voisin Starns
Attorney At Law PLLC
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Counsel for G. Thomas Porteous, Jr.,
United States District Judge for the Eastern District of Louisiana

Submitted: June 4, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2010, a copy of the foregoing pleading was served by electronic mail on the House Managers, through counsel, at the following e-mail addresses:

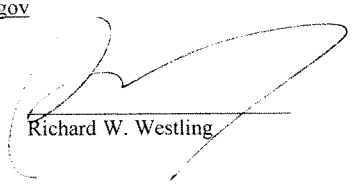
Alan Baron - abaron@seyfarth.com

Mark Dubester - Mark.Dubester@mail.house.gov

Harold Damelin - Harold.Damelin@mail.house.gov

Kirsten Konar - kkonar@seyfarth.com

Jessica Klein, Clerk - Jessica.Klein@mail.house.gov



Richard W. Westling

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ARLEN SPECTER, PENNSYLVANIA, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN
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JON KYL, ARIZONA
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TOM COBURN, OKLAHOMA

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE
WASHINGTON, DC 20510-6326

DISPOSITION OF DISCOVERY ISSUES

The Committee has a duty to receive evidence and to report a statement of facts, both uncontested and contested, for consideration by the full Senate in exercising its sole power to try all impeachments. In order for the Committee to fulfill this duty, the parties must cooperate in sharing information and other tangible evidence that will be made part of the Senate record or appears likely to lead to new, relevant evidence for the Senate proceedings. The parties have agreed to work together in the exchange of information and have come to agreement on several of the original discovery requests identified in the parties' motions. The Committee encourages this cooperation.

The remaining disputes largely concern the scope of Judge Porteous's discovery requests for information beyond the four Articles of Impeachment adopted by the House and for information that is the work product doctrine of the House.

The Committee seeks a fair discovery process which balances the need for Judge Porteous to obtain relevant information necessary for his defense with the orderly resolution of the Articles. Expanding these discovery proceedings to information not reasonably related to the four Articles of Impeachment would cause unnecessary delay and complication of the issues before the Senate. Furthermore, the Committee finds no basis for allowing Judge Porteous broad access to the work product of the House. Therefore, it is the Committee's view that discovery should be limited to information relevant to the four Articles of Impeachment and not subject to a reasonable claim of work product protection by the House.

Upon consideration of the written submissions of the parties on discovery issues, the Committee issues the following rulings:

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Judge Porteous has agreed to provide the House with all of the information requested by the House motion for reciprocal discovery. Accordingly, Judge Porteous should promptly provide the information requested by the House as it becomes available.

The House has agreed to provide Judge Porteous with some, but not all, of the information requested by Judge Porteous. In response to Request 1, the House should provide all information in its possession that is relevant to, or likely to lead to new evidence on, the adopted Articles of Impeachment. The Committee finds that Requests 2 and 3 would intrude into the work product of the House and concludes that disclosure is not justified at this time. With respect to Request 4, the House should provide Judge Porteous with all information relevant to and reflecting on the character, credibility, or believability of witnesses that the House intends to call at trial. The House has agreed to provide Judge Porteous with all information responsive to Requests 5 and 6 and should do so promptly. Lastly, the Committee finds that the House need not provide the index of information sought in Request 7.

The Committee encourages the parties to continue cooperation in discovery and other pretrial matters.

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

Dated: June 09, 2010

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Congress of the United States
Washington, DC 20515

June 15, 2010

Via Electronic Mail and Hand Delivery

Richard Westling, Esq.
Ober Kaler Grimes and Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Jonathan Turley, Esq.
The George Washington University Law School
2000 H. Street, N.W.
Washington, D.C. 20052

Re: Impeachment of Judge G. Thomas Porteous – Discovery

Dear Counsel:

Enclosed please find an updated Exhibit List and corresponding disc of exhibits. We have added 12 new exhibits, identified below, and we have also amended HP Exhibit 79, to add the witness certification to the end of the deposition transcript of Charlie Kerner. Please note that several of these newly-marked exhibits are documents or materials that Judge Porteous has seen before.

- HP Exhibit 6(c): Judge G. Thomas Porteous Jr.'s Reply Memorandum to the Report by the Fifth Circuit Special Investigatory Committee
- HP Exhibit 19: 12/08/03 FBI Interview of Robert Creely
- HP Exhibit 42: 12/08/03 FBI Interview of Rhonda Danos
- HP Exhibit 48: FBI Surveillance Video Recording (Judge Porteous and others entering and leaving Emerils Restaurant on March 11, 2002)
- HP Exhibit 49:[1] FBI Wiretap Recordings (March 11, 2002 telephone calls by LouisMarcotte to Judge Porteous's chambers re: lunch at Emerils)
- HP Exhibit 89(a)-(d): FBI Interviews of Ronald Bodenheimer
- HP Exhibit 333(a)-(b): Interviews of William Greendyke
- HP Exhibit 343: Documents produced by Claude Lightfoot to Grand Jury

[1] HP Exhibits 48 and 49 are enclosed on separate discs.

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In addition, please be advised that upon a further review of documents and materials in the House's possession, the House has identified additional materials – approximately 3 redwelds and some electronic files of FBI spread sheets of financial records – for your inspection.

As we have indicated, we have taken an expansive view of our obligations, and these materials may exceed the requirements of the Special Impeachment Trial Committee's June 9, 2010 Disposition of Discovery Issues. In conjunction with the additional materials on the exhibit list, we believe that with the production of these materials for your inspection (and copying if you desire), we have satisfied our discovery obligations in this case. However, we recognize that discovery obligations are ongoing, and if we identify additional discoverable materials in our possession, we shall inform you promptly of that fact and either provide them to you or permit you to inspect them.

If you have any questions about the updated Exhibit List and disc of exhibits, or the House's document production, please contact Kirsten Konar at 202-828-3526.

Sincerely,

Alan I. Baron
Special Impeachment Counsel

Enclosures

cc: Derron Parks (via e-mail) (w/o enclosures)
Tom Jipping (via e-mail) (w/o enclosures)
Rebecca Seidel (via e-mail) (w/o enclosures)
Justin Kim (via e-mail) (w/o enclosures)
Daniel C. Schwartz (via e-mail) (w/o enclosures)

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II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

a. Discovery Matters

ii. Depositions

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IN THE SENATE OF THE UNITED STATES
SITTING AS A COURT OF IMPEACHMENT

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

NOTICE OF JUDGE G. THOMAS PORTEOUS, JR.
REGARDING POSSIBLE FUTURE DEPOSITION REQUESTS

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and files this notice regarding possible future deposition requests with the Senate Impeachment Trial Committee.

Judge Porteous is filing this notice in order to provide the Senate Trial Committee with information regarding the possible need for future depositions in this matter. At this point, Judge Porteous suspects that he may seek to depose a limited number of witnesses as part of his pretrial preparation. However, filing a request for permission to subpoena and depose witnesses at this point is premature because a substantial amount of discovery is still outstanding and it is possible that production of the requested discovery will eliminate the need for one or more depositions. Accordingly, Judge Porteous is filing this notice in order to inform the Committee that he may still file for permission to subpoena witnesses and to take their depositions – a practice that was permitted by the Senate Impeachment Trial Committee in the Hastings impeachment trial process – at a later date.

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Finally, Judge Porteous seeks to raise an issue that may require additional consideration by the House Managers and the Committee in the event that the House Managers determine additional depositions are necessary. While the House Managers have independent subpoena power, Judge Porteous notes that for the House Managers to use that power in order to conduct pretrial depositions would place the House at a significant advantage and would be grossly unfair to Judge Porteous. Accordingly, Judge Porteous suggests that, consistent with the practice of the House in the Hastings impeachment trial, any pretrial depositions by the House should require approval of the Senate Impeachment Trial Committee prior to scheduling such depositions and that Judge Porteous' counsel should be permitted to participate in any depositions approved by the Committee.

Respectfully submitted,

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Submitted: May 28, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2010, a copy of the foregoing pleading was served by electronic mail on the House Managers, through counsel, at the following e-mail addresses:

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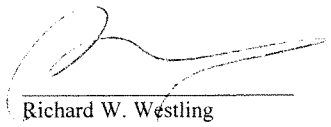

Richard W. Westling

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In The Senate of the United States

Sitting as a Court of Impeachment

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

RESPONSE BY THE HOUSE OF REPRESENTATIVES
TO NOTICE OF JUDGE G. THOMAS PORTEOUS, JR.
REGARDING POSSIBLE FUTURE DEPOSITION REQUESTS

The House of Representatives ("House"), through its Managers and counsel, respectfully responds to the Notice of Judge G. Thomas Porteous, Jr. Regarding Possible Future Deposition Requests. In support of this response, the House respectfully submits:

Judge Porteous has had both ample time and information to identify witnesses he might want to depose. If he seeks to depose a witness who, for example, he believes would have exculpatory testimony but would otherwise be unavailable, it is hardly conceivable that such a witness would be unknown to him at the present time.[1] As noted, Judge Porteous has been provided in depth knowledge of the House's case.[2] In light of the procedural posture of the case, Judge Porteous's contention – that he needs additional

[1]Of course, Judge Porteous has no right to depose any witnesses . See Disposition of Pretrial Issues, Senate Impeachment Trial Committee (Judge Hastings), Apr. 14, 1989 at 10, reprinted in Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee Hastings, S. Hrg. 101 194, Pt. 1, 101st Cong., 1st Sess. at 290 (1989) ("The committee knows of no precedent for the pretrial examination of witnesses in connection with a Senate impeachment trial.").

[2]See Response by the House of Representatives to Motion of Judge G. Thomas Porteous, Jr. For Discovery from the House Managers. Additionally, the House Managers in an April 13, 2010 letter to Senators McCaskill and Hatch responding to a series of questions from Senate Legal Counsel have previously provided a preliminary trial witness list.

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time to identify witnesses to be deposed because "substantial discovery" remains – does not provide a reasonable basis for any failure to identify witnesses to be deposed at this time.

In order to avoid any unnecessary delay, the House requests that Judge Porteous be directed to identify any witnesses he might want to depose and to submit a factual justification for the requested deposition.

The House does not foresee taking additional depositions absent compelling circumstances, such as an essential witness who might be unavailable at trial.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

June 4, 2010

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR AUTHORITY TO ISSUE OR, ALTERNATIVELY, ASSISTANCE IN ISSUING, DEPOSITION SUBPOENAS AND REQUEST FOR EXPEDITED CONSIDERATION

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and respectfully requests authority to issue, or, alternatively, assistance from the Senate, acting through the Senate Impeachment Trial Committee (the "Committee"), in issuing, deposition subpoenas. In support, Judge Porteous states as follows:

1. In connection with its impeachment proceedings, the House of Representatives (the "House"), acting through its Special Impeachment Counsel, undertook an extensive investigation into the allegations lodged against Judge Porteous. In addition to receiving significant volumes of documentary material from the Fifth Circuit and a variety of third-parties, including the Department of Justice, the Metropolitan Crime Commission, and other entities,[1] the House Impeachment Counsel obtained deposition testimony from a large number of key witnesses – including from most of the individuals that the House intends to call to testify at the evidentiary hearing.

[1] Access to these materials, which thus far House Impeachment Counsel has denied, is the subject of separate motions that Judge Porteous filed on June 27, 2010.

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2. Specifically, during their investigation, House Impeachment Counsel "interviewed over 70 individuals and took over 25 depositions." *See* H. Rpt. 111-427, Report of the House Judiciary Committee concerning the Impeachment of Judge Porteous (dated March 4, 2010), at 7. While the identity of all the individuals that the House Impeachment Counsel deposed is unknown, it is apparent from their most recent Exhibit List that the House Impeachment Counsel were permitted to take depositions of at least the following 26 people: Robert Creely (on 8/28/2009, HP Ex. 16); Jacob Amato, Jr. (on 10/14/2009, HP Ex. 24); Leonard Levinson (on 8/24/2009 & 1/6/2010, HP Ex. 30 & 31); Don Gardner (on 9/22/2009, HP Ex. 36); Rhonda Danos (on 8/25/2009 & 12/3/2009, HP Ex. 46 & 47); Louis Marcotte (on 10/13/2009, HP Ex. 68); Lori Marcotte (on 8/26/2009, HP Ex. 76); Jeffrey Duhon (on 7/23/2009, HP Ex. 78); Charles Kerner (on 12/3/2009, HP Ex. 79); Aubrey Wallace (on 7/24/2009, HP Ex. 83); Ronald Bodenheimer (on 8/27/2009, HP Ex. 86); Bruce Netterville (on 8/26/2009, HP Ex. 92(a)); Claude Lightfoot (on 9/24/2009, HP Ex. 123); T. Patrick Baynham (on 9/23/2009, HP Ex. 158); Timothy Young (on 9/23/2009, HP Ex. 159); Peter S. Koeppel (on 9/21/2009, HP Ex. 183); Richard Windhorst (on 9/22/2009, HP Ex. 184); Ernest Souhlas (on 9/23/2009, HP Ex. 185); Jody Rotolo (on 9/25/2009, HP Ex. 192); Sharon Konnerup (on 8/26/2009, HP Ex. 194); Leonard Cline (on 8/26/2009, HP Ex. 195); Diane Lamulle (on 9/26/2009, HP Ex. 197); William Hedrick (on 1/7/2010, HP Ex. 166); Kenneth A. Bradley (on 9/21/2009, HP Ex. 181); Richard Chopin (on 9/22/2009, HP Ex. 182); and T. Allen Usry (on 10/14/2009, HP Ex. 163).

3. While the House, through its Impeachment Counsel, has had the opportunity to take literally dozens of depositions in order to prepare, organize, and

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refine its prosecution case, Judge Porteous has not yet been able to take even one deposition in support of his defense. It is in light of this stark imbalance that Judge Porteous now requests authority to issue or, alternatively, assistance from the Senate in issuing, deposition subpoenas for a limited number of witnesses.

4. Judge Porteous seeks this authority and/or assistance so that he may take depositions of the following 10 individuals[2] – all of whom the House Managers have had an opportunity to depose and most of whom the House Managers have indicated that they intend to call to testify against Judge Porteous.[3] For context, each individual's name is followed by a short description of that person's relationship to the allegations charged in the Articles of Impeachment.

a. Jacob Amato, Jr.

i. Mr. Amato is an attorney with whom Judge Porteous is alleged to have engaged in a corrupt relationship. Mr. Amato represented Liljeberg Enterprises in connection with a lawsuit brought by Lifemark Hospitals of Louisiana, Inc., over which litigation Judge Porteous presided as a federal district court judge. Mr. Amato (and/or his law firm) is referenced by name in Articles of Impeachment I and IV.

ii. In an attempt to secure his deposition without Senate assistance, on June 28, 2010, counsel for Judge Porteous contacted counsel for Mr. Amato and inquired whether he would appear voluntarily for a deposition. On June 29, 2010, Mr. Amato's counsel informed Judge Porteous's counsel that Mr. Amato will not agree to appear voluntarily for a deposition.

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[2] Judge Porteous respectfully reserves the right to supplement this request and seek authority and/or assistance to take additional depositions, should such be warranted based on the deposition testimony and/or defense counsel's investigation and trial preparation.

[3] *See* Preliminary Designations by the House of Representatives of Witnesses, Requests for Subpoenas, Requests for Immunity and Stipulations, dated June 8, 2010.

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b. Robert Creely

i. Mr. Creely is an attorney with whom Judge Porteous is alleged to have engaged in a corrupt relationship. Mr. Creely (and/or his law firm) is referenced by name in Articles of Impeachment I and IV.

ii. In an attempt to secure his deposition without Senate assistance, on June 28, 2010, counsel for Judge Porteous contacted counsel for Mr. Creely and inquired whether he would appear voluntarily for a deposition. On June 29, 2010, Mr. Creely's counsel informed Judge Porteous's counsel that Mr. Creely will not agree to appear voluntarily for a deposition.

c. Louis Marcotte, III

i. Mr. Marcotte, who is the brother of Lori Marcotte, was an employee and/or part owner of Bail Bonds Unlimited, and is referenced by name in Articles of Impeachment II and IV. Mr. Marcotte pleaded guilty to conspiracy to violate the Racketeering Influenced and Corrupt Organizations ("RICO") Act, based upon predicate crimes of mail fraud and public bribery, and, as a part of his plea agreement, has agreed to cooperate with the government.

d. Lori Marcotte

i. Ms. Marcotte, who is the sister of Louis Marcotte, was an employee and/or part owner of Bail Bonds Unlimited, and is referenced by name in Articles of Impeachment II and IV. Ms. Marcotte pleaded guilty to conspiracy to commit mail fraud and, as a part of her plea agreement, has agreed to cooperate with the government.

e. Rafael Goyeneche

i. Mr. Goyeneche is the president of the Metropolitan Crime Commission and participated in that organization's 1994 investigation into Judge Porteous.

f. DeWayne Horner

i. Mr. Horner was a Special Agent with the Federal Bureau of Investigation, who worked out of the New Orleans field office and was assigned to the Public Corruption Squad.

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Mr. Horner participated in the Department of Justice's investigation into Judge Porteous.

g. Joseph Mole

i. Mr. Mole is an attorney who represented Lifemark Hospitals of Louisiana, Inc. in its lawsuit against Liljeberg Enterprises, over which litigation Judge Porteous presided as a federal district court judge.

h. Claude Lightfoot

i. Mr. Lightfoot is an attorney who represented Judge Porteous in connection with the bankruptcy proceedings described in Article of Impeachment III.

i. Bobby Hamil

i. Mr. Hamil was a Special Agent with the Federal Bureau of Investigation in 1994 and participated in the background investigation of Judge Porteous relating to his nomination to the federal bench. Mr. Hamil was present for various interviews related to that investigation.

j. Cheyanne Tackett

i. Ms. Tackett was a Special Agent with the Federal Bureau of Investigation in 1994 and participated in the background investigation of Judge Porteous relating to his nomination to the federal bench. Ms. Tackett was present for various interviews related to that investigation.

5. Given the allegations set out in the House's Articles of Impeachment, the relevance of these individuals' testimony is obvious. Judge Porteous seeks to elicit from these witnesses exculpatory and/or contradictory testimony concerning the House's Articles of Impeachment, including its honest services article (Article I) and conflicts of interest article (Article II). In addition, some of these witnesses should be able to shed light on what information about Judge Porteous's previous conduct as a state court judge was known to investigators prior to his confirmation to the federal bench.

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6. Moreover, permitting Judge Porteous to take these depositions will promote both the Congress's and Judge Porteous's interest in ensuring a fair, efficient, and equitable process in at least three ways.

7. First, allowing the depositions will enhance the efficiency of the parties' presentation of evidence at the evidentiary hearing and reduce the potential that the hearing will be unduly delayed. In particular, depositions will assist the defense in determining the relevant information known by each witness, thereby permitting Judge Porteous's counsel to better plan and streamline their direct- and cross-examinations. While many of the individuals that Judge Porteous is seeking to depose have testified previously, that testimony was elicited either solely or primarily by government attorneys (including Justice Department lawyers, Fifth Circuit investigators, and House Impeachment Counsel) in connection with their investigation and prosecution of Judge Porteous. Accordingly, there is no assurance that those examinations elicited all relevant exculpatory and/or contradictory testimony. Indeed, it would be inequitable in the extreme to limit Judge Porteous's pretrial witness preparation to only that testimony elicited by his prosecutors. Depositions will also enable the Committee and the parties to determine more quickly which witnesses will require immunity orders and, thus, afford the Committee more time to obtain such orders. Depositions will further assist the defense in responding to the House Managers' extensive proposed stipulations – of which there are more than 300.

8. Second, granting Judge Porteous's request to take pretrial depositions will serve the interests of equity and due process. As noted above, the House Managers have utilized the extensive powers and resources available to them prodigiously. In particular,

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they have used the House's subpoena power to take at least 28 depositions of 26 different people in preparing their case. Judge Porteous, however, has not had the opportunity to take even a single deposition in connection with his defense. Core constitutional concepts of fairness and due process, which this Committee has committed itself to,[4] simply cannot countenance such disparity.

9. Third, allowing the requested depositions comports with past precedent. In the 1989 impeachment trial of Judge Alcee Hastings, the defense requested an opportunity to take a series of pretrial depositions. The Committee entertained this request and advised the defense to identify those individuals that it wished to depose, describe the testimony that it expected to elicit from each, and note whether the individuals had been asked to provide information voluntarily and, if so, their responses. *See* Hastings Senate Impeachment Trial Committee Disposition of Pretrial Issues, First Order (S. Hrg. 101-194, pt. 1, at 289-90). Hastings's counsel responded with a list of 16 witnesses that he proposed to depose. (*Id.* at 457-47.)

10. The House Managers responded (through their counsel, Mr. Baron) to the proposed deposition list by stating that they "do not oppose Respondent's request for depositions except to the extent that any such depositions exceed the scope of the charges contained in the Articles of Impeachment...." (*Id.* at 469; *see also id.* at 572-73 (Statement of House Manager Bryant at 5/18/1989 Committee Hearing: "Mr. Chairman, we don't mind if [the defense] deposes all these people; it is fine with us.") The House

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[4] *See* Recording of Committee Meeting held on April 13, 2010, http://www.senate.gov/general/impeachment_hearing_porteous_041310.htm (Senator and Committee Chair McCaskill stating that the "guiding force of this matter has to be due process"; Senator and Committee Vice-Chair Hatch stating that "we must proceed with the utmost seriousness and dedication to fairness").

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Managers then proceeded to submit their own request for three pretrial deposition subpoenas, which they needed "in order to prepare effectively for the presentation of evidence in this impeachment case...." (*Id.* at 473.) At a subsequent Committee hearing, House Impeachment Counsel (Mr. Baron) explained that he sought to depose these three individuals because one of them "could be a very important witness" but that he "can't tell for sure, because she will not talk to us." (*Id.* at 558.) As to the other two proposed deponents, Mr. Baron explained that the House Managers sought to take their depositions because Judge Hastings had listed them as potential witnesses and Mr. Baron "want[ed] to find out what [they were] going to say. That is part of my pretrial preparation. I do not like to be surprised." (*Id.* at 561.)

11. Judge Porteous concurs with Mr. Baron – he too does not want to be surprised. That is precisely why permitting Judge Porteous an opportunity to take depositions in this matter is so crucial. To deny that opportunity would place Judge Porteous at a severe disadvantage vis-à-vis the House Managers, who have had an unlimited opportunity to take all of the depositions that they wished. Moreover, the disadvantage is exacerbated in this case since Judge Porteous was never criminally charged. Unlike Judges Hastings and Nixon, whose Senate impeachment trials followed extensive criminal trials, in connection with which they were afforded more fulsome discovery rights and an opportunity to examine and cross-examine exhaustively the witnesses called against them, Judge Porteous has not yet had a full and fair opportunity to question the witnesses which will be called against him.

12. Finally, because new counsel has only recently been added to this case and because the evidentiary hearing is fast approaching, Judge Porteous cannot proceed apace

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to request that these witnesses appear voluntarily, wait for a response, and then seek Senate assistance when they refuse. Given the truncated timeframe set by the Committee in this matter, Judge Porteous simply lacks the time necessary to pursue such a process, comply with the Committee's other pretrial deadlines, and prepare for the evidentiary hearing that is set to begin in two-and-a-half months Thus, in an effort to avoid additional delay, Judge Porteous seeks the immediate assistance of the Senate in resolving this issue.

WHEREFORE, Judge Porteous respectfully requests that the Senate grant him authority to issue or, alternatively, assist him by issuing, deposition subpoenas for the individuals identified above. To the extent that it is required, Judge Porteous also requests that the Senate assist him in obtaining immunity orders for those witnesses who refuse to testify at such depositions without immunity.

Respectfully submitted,

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

Dated: June 29, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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Kirsten Konar – kkonar@seyfarth.com

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/s/ Daniel T. O'Connor

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In The Senate of the United States

Sitting as a Court of Impeachment

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

THE HOUSE'S OPPOSITION TO
JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR AUTHORITY TO
ISSUE OR, ALTERNATIVELY, ASSISTANCE IN ISSUING, DEPOSITION
SUBPOENAS AND REQUEST FOR EXPEDITED CONSIDERATION

The House of Representatives ("House"), through its Managers and counsel, respectfully submits to the Senate Impeachment Trial Committee ("Committee") this Opposition to Judge Porteous's above-captioned motion seeking to take depositions of ten witnesses.

I. OVERVIEW

An impeachment trial is not simply a variant of the civil litigation process. Accordingly, Judge Porteous has no inherent right to take any depositions in connection with this Impeachment proceeding. Moreover, Judge Porteous has not satisfied the narrow criteria pursuant to which depositions were permitted in the Hastings Impeachment proceedings, that is, for witnesses who have not previously testified and whose testimony is central to the case of the party seeking to take the deposition. To the contrary, many of the witnesses who Judge Porteous seeks to depose have testified on multiple occasions, including circumstances where they were called by Judge Porteous, cross-examined by Judge Porteous or his counsel, or where Judge Porteous's counsel was

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provided the opportunity to examine them and declined to do so. Indeed, Judge Porteous's assertion that he "has not yet had a full and fair opportunity to question the witnesses which [sic] will be called against him" is patently inaccurate. Moreover, three of the ten witnesses have extremely limited roles – namely, identifying and authenticating their 1994 write-ups of interviews with Judge Porteous. As to these witnesses, Judge Porteous has been provided the write-ups of the interviews, and the contents of their trial testimony is thus well-known to Judge Porteous. Judge Porteous's Motion should therefore be denied.

II. JUDGE PORTEOUS'S MOTION SHOULD BE DENIED BECAUSE THE WITNESSES HAVE EITHER ALREADY TESTIFIED OR ARE NOT SUFFICIENTLY CENTRAL TO HIS CASE

In support of his request for depositions, Judge Porteous cites to certain arguments made by counsel in the Hastings Impeachment.[1] Specifically, Judge Porteous somewhat disingenuously cites to certain positions of the parties in that case, but fails to discuss the actual ruling of the Senate Committee, which, in substance (and with one narrow exception), rejected the parties' requests for depositions where prior witness testimony was available.

The pertinent language of the Senate's ruling is as follows:

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[1]Even this discussion of the procedural history is incomplete. The position of the House, as stated by its Manager (Rep. Bryant), made it clear that the House's request for depositions was in response to Judge Hastings's request: "Let me also say, we are not urging the Senate either to grant them [witness depositions] or not grant them. We are pointing out that there is no authority to insist upon them. If you choose to grant them, very well, we would like to have our three granted as well, is all I am saying." Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ["Hastings Hearing Report"], S. Hrg. 101-194, Pt. 1 at 558 (1989) (statement of Mr. Bryant).

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> In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.[2]

The Hastings Committee permitted certain depositions. In approving one of the House depositions, the Committee noted that the witness "has never previously testified."[3] Other requests by the House for witness depositions were denied because "there is no indication that either of these witnesses is sufficiently central to these proceedings. . . ."[4] The Committee approved one deposition sought by Judge Hastings "because Judge Hastings has argued that [the witness's] testimony may be especially central to his defense."[5] The Committee further informed Judge Hastings that he could supplement his deposition requests, but in doing so, Judge Hastings "should be mindful of whether or not he has access to the individual's prior testimony."[6]

The narrowness of that Order is underscored by a consideration of the Hastings Hearing where the Hastings Committee consider the parties' respective deposition requests. At that Hearing, the Hastings Committee focused on two points in particular, as

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[2]Impeachment Trial Committee Disposition of Pretrial Issues Fourth Order ["Fourth Order"], May 24,1989 at 5-6, published in Hastings Hearing Report, at 601, 605-06 (emphasis added). That Order is attached to this Opposition as "Attachment 1."

[3]Fourth Order at 8, Hastings Hearing Report at 608.

[4]Fourth Order at 7, Hastings Hearing Report at 607.

[5]Fourth Order at 6, Hastings Hearing Report at 606.

[6]Fourth Order at 7, Hastings Hearing Report at 607. That Order also required a showing by Judge Porteous as to whether the witnesses would provide him information voluntarily.

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reflected in the subsequent order. First, the Hastings Committee focused on the extent to which the depositions would permit the moving party to affirmatively advance its case.[7] That concern is entirely antithetical to the request by Judge Porteous, namely, that he should be permitted to depose the House's witnesses – not for the purposes of advancing his case, but, essentially to have a dry run at cross-examination. Second, the Hastings Committee drilled down on whether prior transcripts for the given witnesses were available. As Vice Chairman Specter stated, after inquiring whether a given witness had testified: "That is an important fact, at least in my mind. If someone has testified before, I would be disinclined to use compulsory process [to obtain a deposition] on her."[8]

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[7]Thus, nearly the entire colloquy associated with the deposition motions consisted of the Senate seeking proffers from both the House and Judge Hastings of what they expected the witnesses to testify to and how that testimony would affirmatively advance their cases. See Hastings Report at 557-81. Thus, for example, Vice Chairman Specter asked Mr. Baron as to one witness: "What would you expect her to testify to?" Id. at 558. Chairman Bingaman discussed with Judge Hastings's attorney how the witnesses would "prove the [Judge Hastings's] theory or to develop the theory . . ." Id. at 563. As to another witness, Vice Chairman Specter asked: "What would expect to prove through him." Id. at 571. As to Department of Justice and FBI officials, Chairman Bingaman asked: "What is your either [sic] offer of proof or hope for proof?" Id. at 574. As to another witness, Senator Specter asked: "[W]e are waiting to hear what relevance there is to anything, to an offer of proof." Id. at 575. Judge Porteous juxtaposes Mr. Baron's statements in Hastings in which he explains why the House sought a deposition of a potential House witness (that is, to know what the witness would say before the House were to call him) to support the contention that Judge Porteous should be entitled to depose the House's witnesses in this case, where such depositions have no possible relevance to the proof of Judge Porteous's case. These different reasons for a deposition are night and day.

[8]Hastings Report at 563. See also: "Vice Chairman: Hasn't he testified before at Judge Hastings' criminal trial?" Id. at 562; "The Chairman: [Y]ou have got a lot of testimony by most of these people. Most of these are not new names. It seems that that should give you some inclination of what you expect to face when you get into the trial." Id. at 562; "[Judge Hastings's attorney]: [O]ne problem is that [the witness] has never testified anywhere." Id. at 566; "The Chairman: Do you have that transcript? [Judge Hastings's attorney]: I do, indeed." Id. at 567.

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Thus, the principles that emerge from the Hastings Impeachment, individually and collectively, compel the denial of Judge Porteous's deposition requests. As described in detail below, as to seven of the witnesses, there is "already . . . a sufficient basis for trial preparation in . . . previous testimony," and, as to the remaining three, "there is no indication that [they] are sufficiently central to these proceedings." Finally, Judge Porteous advances no credible contentions and fails to proffer any claim that that any of the witnesses have evidence that would affirmatively support his defense. Certainly, Judge Porteous has not demonstrated a "strong showing of need" for depositions, that is, the need to depose: 1) central witnesses, 2) who have never testified or who have refused to cooperate, and 3) who are alleged to have relevant evidence "that is especially central to his defense." As described below, none of the witnesses listed by Judge Porteous satisfy these criteria.

III. JUDGE PORTEOUS HAS NOT DEMONSTRATED ANY NEED TO DEPOSE THE WITNESSES WHO HE HAS LISTED

The following witness-by-witness discussion sets forth the notice that Judge Porteous presently has of the anticipated trial testimony, as well as the numerous witnesses whom Judge Porteous or his counsel have actually cross-examined, been given the opportunity to cross-examine, or have called as a witness. As is clear, in light of the detailed notice that has been provided to Judge Porteous of the precise contours of the witnesses' testimony, Judge Porteous cannot meet the "need" showing that was required in the Hastings Impeachment proceedings:

1) Jacob Amato. Mr. Amato has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task

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Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. Judge Porteous was present during Mr. Amato's House testimony. All transcripts have been provided to Judge Porteous's attorneys, and Judge Porteous will be able to assist his attorneys in the examination of Mr. Amato at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Mr. Amato.

2) Robert Creely. Mr. Creely has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. Judge Porteous was present at Mr. Creely's House testimony. All transcripts have been provided to Judge Porteous's attorneys, and Judge Porteous will be able to assist his attorneys in the examination of Mr. Creely at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Mr. Creely.

3) Louis Marcotte. Mr. Marcotte has been interviewed by the FBI on numerous occasions on matters that involved Judge Porteous, and he testified before the House Impeachment Task Force. Judge Porteous's attorneys were provided the opportunity to cross-examine Mr. Marcotte in his House testimony. Judge Porteous was present at Mr. Marcotte's House testimony. The House transcript and the FBI "302s" constituting the write-ups of Mr. Marcotte's interviews have been produced to Judge

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Porteous. Judge Porteous is fully aware of Mr. Marcotte's testimony and will be able to assist his attorneys in the examination of Mr. Marcotte at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Mr. Marcotte.

4) Lori Marcotte. Ms. Marcotte has been interviewed by the FBI on numerous occasions on matters that involved Judge Porteous, and she testified before the House Impeachment Task Force. Judge Porteous's attorneys were provided the opportunity to cross-examine Ms. Marcotte in her House testimony. Judge Porteous was present during Ms. Marcotte's House testimony. The House transcript and the FBI "302s" constituting the write-ups of Ms. Marcotte's interviews have been produced to Judge Porteous. Judge Porteous is fully aware of Ms. Marcotte's testimony and will be able to assist his attorneys in the examination of Ms. Marcotte at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Ms. Marcotte.

5) Rafayel Goyeneche. Mr. Goyeneche participated in an interview of Judge Porteous in November of 1994. This interview occurred as part of Mr. Goyeneche's investigation of a complaint that Judge Porteous, in his final days on the state bench, had set aside the conviction of a Marcotte employee (Aubrey Wallace) as a favor to Louis Marcotte. In that interview, when asked about his relationship with Louis Marcotte, Judge Porteous had admitted going to Las Vegas with Louis Marcotte, but denied that Louis Marcotte had paid for his trip. This interview was

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written up by Mr. Goyeneche and was maintained in the files of the Metropolitan Crime Commission. It has been provided to Judge Porteous. If Mr. Goyeneche were called as a witness, he would identify the write-up of the interview. There is nothing unusual or surprising about this testimony, which would warrant Judge Porteous taking Mr. Goyeneche's deposition.

6) FBI Special Agent DeWayne Horner. Agent Horner has testified twice (before the Fifth Circuit and the House Impeachment Task Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. All transcripts of his prior testimony have been provided to Judge Porteous's attorneys. Agent Horner will testify primarily as a summary witness as to financial records or certain background information concerning the Wrinkled Robe investigation, to the extent relevant. No reasons exist to permit Judge Porteous to take the extraordinary step of deposing FBI Agent Horner on these issues.

7) Joseph Mole. Mr. Mole has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. All transcripts of his prior testimony have been provided to Judge Porteous's attorneys. Mr. Mole will testify about the Liljeberg trial -- facts about which Judge

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Porteous is well aware. No reasons exist to permit Judge Porteous to depose Mr. Mole.

8) Claude Lightfoot. Mr. Lightfoot has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task Force). He was called as a witness by Judge Porteous and questioned by him before the Fifth Circuit, and his attorney had the opportunity to cross-examine Mr. Lightfoot before the House. All transcripts of his prior testimony have been provided to Judge Porteous's attorneys. Mr. Lightfoot will testify about his representation of Judge Porteous in Judge Porteous's bankruptcy proceedings – facts about which Judge Porteous is well aware. No reasons exist to permit Judge Porteous to depose Mr. Lightfoot.

9) Bobby Hamil. Mr. Hamil was an FBI Agent who participated in interviews of Judge Porteous as part of the FBI background investigation in 1994. These interviews were written up by Mr. Hamil or his partner Cheyanne Tackett (and reviewed by Mr. Hamil), and were made part of the background check files. The entire background check, including the write-ups of these interviews, have been provided to Judge Porteous. If Mr. Hamil were called as a witness, he would identify the write-ups of the interviews as being true and accurate. There is nothing that is unusual or surprising about this, as to warrant Judge Porteous taking Mr. Hamil's deposition.

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10) Cheyanne Tackett. Ms. Tackett was an FBI Agent who participated in at least one interview (with Bobby Hamil) of Judge Porteous as part of the FBI background investigation in 1994.[9] The interview was written up by Ms. Tackett (and reviewed by Mr. Hamil) and included in the background check. The entire background check, including the write-up of the interviews with Judge Porteous, have been provided to Judge Porteous. If Ms. Tackett were called as a witness, she would identify the write-up of the interviews as being true and accurate. There is nothing that is unusual or surprising about this testimony, as to warrant Judge Porteous taking Ms Tackett's deposition.

IV. CONCLUSION

Requests for depositions, which were deemed "unprecedented" in 1989, now have only the very limited precedent of the Hastings Impeachment to support them. Moreover even to the extent that this Committee refers to the Hastings Committee's reasoning for guidance, it is apparent that Judge Porteous has not and cannot meet the criteria for depositions that were set forth in Hastings. Judge Porteous has been provided detailed notice of the anticipated Impeachment trial testimony of all the witnesses whom he seeks to depose, which is more than sufficient to permit him to prepare his defense. Indeed, Judge Porteous's requests for depositions of witnesses who have previously testified or are otherwise not central to his defense are fundamentally inconsistent with the requests that were actually approved by the Hastings Committee, and a fair reading of the Hastings Committee's Order compels that Judge Porteous's motion be denied.

[9]It is likely the House will not call both Mr. Hamil and Ms. Tackett. That decision will be made closer to trial.

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WHEREFORE, because Judge Porteous has failed to demonstrate a "strong showing of need" for these witness depositions – indeed, because the procedural history demonstrates he has no need for them – the House requests that Judge Porteous's Motion for Depositions be Denied.

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Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

July 7, 2010

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Attachment 1

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United States Senate
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
DISPOSITION OF PRETRIAL ISSUES
FOURTH ORDER

Upon consideration of the submissions of the parties and after hearing from them at the pretrial conference of May 18, 1989, the chair, in consultation with the vice chair, issues the following rulings on behalf of the committee:

Stipulations

Senate Resolution 480 of the 100th Congress, which was agreed to on September 30, 1988, requested the parties to work together to stipulate to evidentiary matters that are not in dispute and to report to the Senate on the stipulations to which they had agreed. On December 15, 1988, the House served proposed documentary and factual stipulations. On February 20, 1989, the parties reported to the Senate that they had reached no agreement on any stipulations.

On January 17, 1989, by which time it may have become apparent that a voluntary stipulation process would not be productive, the House proposed that the Senate "adopt a rule that would hold that any proposed stipulation of fact filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true." The House also requested that the Senate "adopt a parallel rule addressing

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the authenticity of documents, which would establish that any proposed stipulation regarding the admissibility of a document filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true." Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration, at 2-3.

On March 31, 1989, the House renewed its proposals on admissions concerning facts and documents, and resubmitted its stipulation of facts in revised form. In a filing with the committee on April 2, 1989, Judge Hastings stated his opposition to the House's proposals for stipulations prior to trial. A Further Memorandum on Pre-Trial and Trial Procedures Necessary for a Trial that is Fair to Respondent, at 31-32.

The committee heard oral argument by the parties on April 12, 1989, and issued its first order on pretrial issues on April 14, 1989. In that order, the committee adopted the House proposal that any proposed stipulation of fact be accepted as true unless the opposing party files an objection, including a proffer as to why the proposed stipulation should not be taken as true. A like rule was adopted for the stipulations as to documents. By its second order, dated April 21, 1989, the committee extended to May 17, 1989 the date for the filing of Judge Hastings' response to the House

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stipulations. The second order also extended until May 17, 1989, the date for Judge Hastings to file his own stipulations, which, like those of the House, would be accepted as true unless a specific objection was filed. Judge Hastings chose not to file his own stipulations.

Judge Hastings' Response to Stipulations Proposed by the House, which was received by telecopy on May 18, 1989, does not comport with the committee's order. Judge Hastings has in large part failed to respond to the stipulations proposed by the House. Although his response makes certain generalized objections, a few specific objections, and several generalized concessions, the committee in most cases is unable to determine Judge Hastings' position with respect to particular House stipulations. Instead, Judge Hastings, without having asked the committee to reconsider the April 14, 1989 order at any time between its issuance and the May 17, 1989 date for compliance, argues that he should not be required to take part in this process of identifying those matters that are not truly in contest. While the committee appreciates the inevitable burdens which these proceedings impose on all concerned, it believes that these burdens can best and most efficiently be discharged by complying with its orders, rather than by reiterating at length the difficulties of compliance.

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The committee continues to believe that both parties as well as the Senate will benefit from a narrowing of the issues to those matters which are truly in dispute. The committee accordingly will review the stipulations proposed by the House and give careful consideration to any specific objections that it is able to identify in Judge Hastings' May 18, 1989 response and in any supplement that he may file to that response by June 1, 1989. Upon completion of its review, the committee will issue a ruling that sets forth the matters which shall be deemed to be found as true as a matter of record for purposes of the committee's evidentiary proceedings and its report to the Senate of matters that are not in dispute.

If Judge Hastings wishes to participate further in this process of distinguishing contested from uncontested issues, he may submit an additional response to the House's proposed stipulations on or before June 1, 1989. That response shall set forth for each proposed fact and each document his specific objection, or lack of objection, to each particular stipulation. In so doing, Judge Hastings should respond to each factual and documentary stipulation proposed by the House: for example, that a particular document is authentic or is a business or public record, or that a particular fact is true. He need not address whether a particular document or fact is relevant and admissible in evidence.

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Although the House has referred to its "proposed stipulation[s] regarding the admissibility of a document," see page 2 supra, we agree with both parties that documentary admissions need go no further than the genuineness of the documents and, for those categories specifically identified by the House, their status as records of regularly conducted activities or public records, see Proposed Stipulations of Documents, filed December 15, 1988, at 1. Admissions concerning facts also need go only to their truth and not to their relevance.

Depositions

By its April 14, 1989 order, the committee advised Judge Hastings that it would consider his request to take pretrial depositions if he provided a list of, and certain information concerning, his proposed deponents. Judge Hastings responded with a Request for Specific Depositions, filed on May 10, 1989, in which he asked that subpoenas be issued for sixteen individuals. The House, on May 16, 1989, filed a request for the issuance of deposition subpoenas, naming three individuals.

In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition

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could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.

For persons whom Judge Hastings designates as "Participants in Borders's Scheme," the committee declines to issue the requested subpoenas for Rebecca Sutton Nesline and Peter Chaconas. No showing has been made that either Rebecca Sutton Nesline or Peter Chaconas has knowledge of any matter relevant to the Articles of Impeachment. With respect to Joseph Nesline, before deciding whether a threshold showing has been made which might justify the issuance of a subpoena, the committee requests that the House make available to the committee the information in the House's possession concerning Mr. Nesline's competency as a witness.

The committee will grant Judge Hastings' request for the issuance of a subpoena to William Dredge for pretrial testimony. Although Mr. Dredge's testimony before the Eleventh Circuit Investigating Committee is available to Judge Hastings' counsel, the committee has decided to permit a pretrial examination of Mr. Dredge because Judge Hastings has argued that Mr. Dredge's testimony may be especially central to his defense. The committee requests that the parties confer with each other on arrangements for a pretrial examination of Mr. Dredge and that they advise the committee about available dates for that examination so that a subpoena

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may be issued for a suitable time.

Concerning the FBI and Justice Department officials for whom Judge Hastings requests the issuance of deposition subpoenas, Judge Hastings is ordered, on or before June 1, 1989, to provide the committee with a list of the three individuals, in order of priority, whom he deems most important to depose. In compiling that list, he should be mindful of whether or not he has access to the individual's prior testimony. He should also furnish to the committee at that time any supporting information, including documentation, which supports his claim that these persons possess knowledge relevant to the Articles of Impeachment, and shows that he is in fact unable to obtain information voluntarily from those persons. The committee will then determine whether it will issue subpoenas for their pretrial examination.

With respect to the House requests, the committee declines to issue subpoenas for Marilyn Carter and Alan G. Ehrlich, both of whom have given previous testimony which is available to the House for its trial preparation. In contrast to Mr. Dredge, whose pretrial examination we will allow, there is no indication that either of these witnesses is sufficiently central to these proceedings to warrant the issuance of subpoenas for their pretrial examination. The committee has decided that a subpoena shall issue for Joanne Tyson Colt, who was a law clerk in Judge Hastings' chambers

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in October of 1981, who has never previously testified, and who has refused to be interviewed by the House. The requested subpoena shall issue for her pretrial testimony after counsel for the parties have advised the committee about available dates for Ms. Colt's pretrial examination.

Conduct of Evidentiary Hearings

Pursuant to the committee's second pretrial order, issued on April 21, 1989, the committee heard from the parties at the May 18, 1989 pretrial conference on various proposals concerning the conduct of the evidentiary hearings which shall begin on July 10, 1989. To the extent that Judge Hastings' submissions to the committee should be understood to be a request to postpone those hearings, that request is denied.

One of the issues that the parties addressed, at the committee's request, was whether the evidentiary proceedings should be bifurcated to permit the taking of each party's evidence first on the bribery and perjury articles and second, after receiving all the evidence on those matters, on the wiretap disclosure article. Judge Hastings objects to bifurcation because it would require him, if he testifies, to divide his testimony into two parts. We will respect Judge Hastings' objection and will not bifurcate the evidentiary hearings. The committee will accommodate the interest of the House in deferring, if it so wishes, the portion of its

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opening statement on the wiretap disclosure issue to the point in the presentation of its evidence when it is prepared to present its case on that issue.

At the May 18, 1989 conference, the parties also briefly discussed whether it would be appropriate to permit introduction of prior testimony, taken in United States v. Borders, United States v. Hastings, and before the Eleventh Circuit Investigating Committee, in place of taking live testimony before this committee. The committee believes that the use of such prior recorded testimony is desirable in certain circumstances, particularly, for example, where the testimony is not that of a key witness whose credibility is at issue, and encourages its use consonant with fairness to the parties and the development of a coherent record for use by the Senate.

Accordingly, both parties are directed to file and serve, no later than June 14, 1989, an identification of the prior testimony which, to the best of their knowledge, they in fact intend to offer into evidence. That identification shall: (1) specify the proceedings from which the proffered testimony is drawn, (2) append a copy of the proffered testimony, and (3) briefly state why the party believes that it would be appropriate to submit that particular testimony by way of prior recorded testimony rather than through a live witness. Each party shall in its pretrial statement on

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June 21, 1989, state, for each such proffer of prior testimony by the opposing party, whether or not it objects to introduction of that prior testimony and, if so, the specific nature of its objections.

The parties were also invited to suggest ways in which the evidentiary proceedings could be structured to permit the taking of evidence within a three-week period of time. In response, the House suggested that the committee adopt the procedure, used by United States District Judge Pierre Laval in the Westmoreland v. CBS defamation case, of dividing a predetermined number of hours between the parties, leaving each side free to determine how its case can best be presented within the available time. Judge Hastings has not responded to the particulars of the House proposal or offered any specific proposals of his own.

The committee believes that guidelines, fairly and flexibly applied, must be adopted to facilitate realistic trial preparation and to enable the Senate and the parties to focus on matters that will be important to the Senate's disposition of the Articles of Impeachment. In framing their final pretrial statements, due on June 21, 1989, and in preparing for the evidentiary proceedings which will commence on July 10, 1989, the parties should operate within guidelines premised on the availability of eighty trial hours during the course of three weeks of hearings. Reserving several hours for miscellaneous matters, the parties should

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anticipate that they will each have thirty-eight hours in which to present their evidence on all matters, dividing their time as each sees fit between direct and cross-examination. In addition, each party may present an opening statement of no longer than one hour, which, if either party wishes, may be divided into two portions.

The parties should address in their final pretrial statements of June 21, 1989, and be prepared to discuss at the pretrial conference on June 22, 1989, the amount of time which they intend to allocate to direct testimony, whether by prior or live testimony, and whether their preparation has shown that some modification of these guidelines is necessary. The committee is mindful that the foregoing guidelines may need adjustment, both before commencement of the evidentiary proceedings and in the course of those proceedings, and that there must, and will, be flexibility in their application.

An additional order providing further details about the required content of the final pretrial statements will be issued shortly.

Jeff Bingaman
Chairman

Arlen Specter
Vice Chairman

May 24, 1989

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CLAIRE McCASKILL, MISSOURI, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN

AMY KLOBUCHAR, MINNESOTA
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MIKE JOHANNS, NEBRASKA
JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510–6326

MEMORANDUM FOR THE RECORD

Thursday, July 15, 2010

With due notice, the Committee met to deliberate upon pre-trial matters.

The Committee adopted, by the favorable vote of all eight Members present, two resolutions directing the Senate Legal Counsel to apply to the United States District Court for the District of Columbia for two immunity orders: one for Jacob Amato, Jr., and one for Robert Creely. The orders will immunize any testimony Amato or Creely may give as witnesses before the Committee or the full Senate from use in prosecutions other than for perjury, giving a false statement or otherwise failing to comply with the court order.

It was moved, seconded, and unanimously agreed to that the Chairman and Vice Chairman are authorized to issue subpoenas on behalf of the Committee.

It was moved, seconded, and unanimously agreed to that the natural quorum be reduced to one Member for the purpose of the pre-trial examination of a witness at which sworn testimony is heard and evidence taken.

The two motions voted upon are reflected in the adoption of two procedural rules, appearing at 156 Cong. Rec. S5988-02 (daily ed. July 19, 2010).

Erin P. Johnson

Chief Clerk

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get low-cost capital into the hands of small businesses—shoe stores, retailers, cleaners, grocery stores—that can then start the hiring of one or two or three extra people. All of that is going to add up to more consumer demand. As people have paychecks, they can go spend them, increasing demand.

This is economics 101. It is very simple. It is bold, it is simple, and I believe it will work. It is voluntary. It is for healthy banks only—for community banks only. It has nothing to do with Wall Street, hedge funds or bailouts. It has everything to do with job creation on Main Street in America, and more than 100 small business organizations are supporting this initiative.

I thank the Members of the Senate, both Democrats and Republicans, who have been very supportive. We are grateful for the wonderful testimony and endorsements we have received from these very powerful organizations and we look forward, after we have the vote on unemployment sometime tomorrow, to getting back to the business of ending this recession. We have all had about as much of it as we can take.

We want to move to stronger times, to happier times. We are only going to do that by giving small business substantial and targeted tax cuts and a lending program that they can work for them and the businesses they want to serve and service every day on Main Streets throughout America.

EXHIBIT 1

SMALL BUSINESS ACCESS TO CREDIT COALITION

(February 17, 2010)

DEAR SENATOR: Access to credit is a critical issue facing small businesses today. The undersigned organizations, representing millions of small business owners in every industry sector, were very disappointed to learn that only one provision related to expanding small business access to credit was included in the draft legislation offered by Senators Baucus and Grassley, the "Hiring Incentives to Restore Employment Act." Furthermore, none of the provisions aimed at improving the Small Business Administration (SBA) lending programs are currently being considered in Majority Leader Reid's latest proposal. We are concerned that if the Senate fails to listen to the needs of small businesses and address the credit crisis, a tremendous opportunity to help create new, sustainable jobs in 2010 and beyond will be lost.

We urge your support for appropriations to extend the SBA loan provisions of the American Recovery and Reinvestment Act (ARRA) through the end of December 2010. The depletion of funds last fall is proof that the SBA programs were, and continue to be, critically important for our nation's creditworthy entrepreneurs. An additional $354 million in appropriations is needed to fund the extension of the higher guaranty percentages and waiver of borrower fees for the balance of the fiscal year.

Additionally, we urge your support for an increase in the maximum loan size and the maximum guaranteed portion of SBA loans. Senators Landrieu and Snowe have introduced legislation that would increase the maximum size of SBA 7(a) and 504 loans from $2 million to $5 million. This legislation would also provide a commensurate increase in the statutory maximum guaranteed portion of SBA 7(a) loans. Moreover, the CBO has determined that their legislation, S. 2869, will have no impact on spending or revenue. These levels are recommended by the Administration, have bi-partisan support and we urge your support as well.

By including these provisions in upcoming legislation aimed at spurring new job creation, there is the potential to leverage an additional $16 billion in SBA lending in 2010. According to Federal Highway Administration data, federal spending on highway programs can generate about 34,100 jobs for every $1 billion spent. Small businesses can generate the same rate of job creation, except that small businesses have the ability to create new, sustainable jobs in every local community. Therefore, by acting on these recommendations, the Senate will help increase small business lending that will result in over 545,000 sustainable new jobs in the next year.

We urge you to act quickly so that we can continue to realize the SBA lending momentum we saw in 2009. Small businesses cannot be the engine of our economy if they continue to face unrelentingly tight credit markets. The Senate must include these important provisions in the job creation bills currently pending in order to restart the flow of credit to America's small businesses or else these entrepreneurs will be left to sit on the sidelines.

Respectfully,

American Apparel & Footwear Association; American Bankers Association; American Foundry Society—California Chapter; American Hotel & Lodging Association; American International Automobile Dealers Association; Associated Builders & Contractors; California Association for Micro Enterprise Opportunity; California Association of Competitive Telecommunications Companies; California Cast Metals Association; California Chapter of the American Fence Contractors Association; California Employers Association; California Fence Contractors Association; California Hispanic Chamber of Commerce; California Metals Coalition; California Public Arts Association, Inc.; Council of Smaller Enterprises (Ohio); Engineering Contractors Association; Entrepreneurs Organization Los Angeles; Fashion Accessories Shippers Association; Flasher/Barricade Association; Golden Gate Restaurant Association; Greater Providence (RI) Chamber of Commerce; Heating, Air Conditioning & Refrigeration Distributors International; Independent Community Bankers of America; Independent Electrical Contractors; Independent Waste Oil Collectors and Transporters; International Council of Shopping Centers; International Franchise Association; Main Street Alliance; Marin Builders' Association; Marine Retailers Association of America; Monterey County Business Council; Napa Chamber of Commerce; National Association for the Self-Employed; National Association of Development Companies; National Association of Government Guaranteed Lenders; National Association of Manufacturers; National Association of Women Business Owners—Inland Empire; National Association of Women Business Owners—Los Angeles; National Automobile Dealers Association; National Cooperative Business Association; National Council of Chain Restaurants; National Council of Textile Organizations; National Federation of Filipino American Associations; National Gay & Lesbian Chamber of Commerce; National Marine Manufacturers Association; National Ready Mixed Concrete Association; National Restaurant Association; National Small Business Association; North American Die Casting Association—California Chapter; North Carolina Bankers Association; Northern Rhode Island Chamber of Commerce; NPES—The Association for Suppliers of Printing, Publishing and Converting Technologies Oakland Metropolitan Chamber of Commerce; Oregon Small Business for Responsible Leadership; Peninsula Builders Exchange of California; Plumbing-Heating-Cooling Contractors of California; Recreation Vehicle Industry Association; Recreational Vehicle Dealers Association; Rhode Island Small Business Summit Committee; Sacramento Asian Chamber of Commerce; San Francisco Builders Exchange; San Francisco Chamber of Commerce; San Francisco Small Business Advocates; San Francisco Small Business Network; Small Business Association of Michigan (SBAM); Small Business Association of New England (SBANE); Small Business California; Small Business Majority; Small Manufacturers Association of California; South Carolina Small Business Chamber; Spa and Pool Industry Education Council of California; SPI: The Plastics Industry Trade Association; The Financial Services Roundtable; The Hosiery Association; Travel Goods Association; Tree Care Industry Association; Urban Solutions—San Francisco; U.S. Chamber of Commerce; U.S. Hispanic Chamber of Commerce.

Mr. MERKLEY. Mr. President, I again thank my colleague for her leadership. We together as a Senate need to stand with our small businesses so we can revive our communities, restore our economy and create jobs for our families. I thank the Senator again for the terrific job she is doing.

MORNING BUSINESS

Mr. MERKLEY. Mr. President, I ask unanimous consent the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

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

IMPEACHMENT TRIAL COMMITTEE RULES

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

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

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

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

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

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

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

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

RULE 1—DELEGATION OF AUTHORITY

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

RULE 2—QUORUM FOR RECEIVING EVIDENCE

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

RULE 3—SUBPOENAS

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

RULE 4—QUORUM FOR THE TAKING OF PRETRIAL TESTIMONY

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

HONORING OUR ARMED FORCES

CAPTAIN DAVID A. WISNIEWSKI

Mr. GRASSLEY. Mr. President, I rise to pay tribute to a brave and patriotic son of Iowa who gave his life for his country, CPT David Anthony Wisniewski. He graduated from Woodbury Central High School in Moville, IA, before attending the Air Force Academy. It had been his dream to be an Air Force pilot since visiting Offutt Air Force Base as a young child and he died doing what he loved. By all accounts, David Wisniewski was a remarkable man and his numerous accomplishments include the saving of many lives during his several tours of duty in support of the global war on terrorism. In reference to the reason for his service, I understand that he would end letters to his parents with the reminder that, "I do this so you can sleep safe at night." That is an excellent reminder for all of us to never take for granted the tremendous cost of our freedom. I find that words fail me in trying to describe the debt of gratitude we owe to the courageous and selfless Americans like Captain Wisniewski. We can never begin to repay the debt, but we can honor it by honoring David's memory and by fully appreciating our way of life and the sacrifices made to preserve it. Of course, his loss will be felt very deeply by his parents, Chet and Beverly Wisniewski, and all his family and friends. My prayers go out to them in this difficult time. They are no doubt very proud of their son, and all Iowans can be proud to call him one of our own.

ADDITIONAL STATEMENTS

TRIBUTE TO LENA ARCHULETA

• Mr. BENNET. Mr. President, I would like to recognize a treasured Coloradan, Mrs. Lena Archuleta, a champion of Hispanic rights who is celebrating her 90th birthday this year. Lena represents the true spirit of commitment to the greater good. Her dedication to education and public service demonstrates the change that we can inspire through hard work, sympathy, and kindness.

Lena was born in Raton, NM, in 1920. She was awarded a scholarship at the University of Denver where she studied Spanish and education and later received a master's in library science. In 1951, she joined the Denver Public Schools' Department of Library Services were she maintained her belief that a high-quality education should be accessible to all students regardless of gender, race, or nationality. This belief led Lena to work with the Denver Public Schools' Federal Project to promote and jumpstart programs for bilingual education. In 1974, she used her vast experience in the education field to become the principal at Fairview Elementary and the first Hispanic principal in Denver public schools' history. In addition to this honor, she later became the first Hispanic woman appointed to a central administrative position. Mrs. Archuleta dedicated and accumulated 17 years to New Mexico and Colorado classrooms, as well as 14 years as a school administrator.

While I am pleased to have the honor of recognizing Mrs. Archuleta and her great accomplishments, this is not the first time her dedication and commitment to serving others has been recognized and I doubt that it will be the last. In 1963 the Latin American Educational Foundation appointed her to be the first woman to serve as president of its board of directors. In 1986, she was inducted into the Colorado Women's Hall of Fame as the first Hispanic inductee. In addition to these and other honors, both regional and national, Denver's Lena Lovato Archuleta Elementary School was named after her in 2002. This was perhaps, the most fitting of all of her honors as this elementary school nurtures the same environment of discovery and lifelong learning that Mrs. Archuleta herself created and passed along to fellow educators, students, and community members. Truly representative of her spirit and life's work, Mrs. Archuleta didn't merely accept the honor, she went on to raise $20,000 for the school's library.

Mrs. Lena Archuleta continues to recognize and nurture the skills of her students and those around her. Through continued volunteer work with organizations such as the AARP in Colorado, she inspires others to achieve their goals using entrepreneurship, dedication, and compassion. Working in schools, Lena has inspired many of us through her example. She has shown Coloradans that with humility, devotion, and empathy we can improve the lives of others. For these reasons, today, we recognize Mrs. Lena Archuleta.•

TRIBUTE TO THE REVEREND HARRY BLAKE

• Ms. LANDRIEU. Mr. President, I wish to recognize the career of Reverend Harry Blake, pastor of Mount Canaan Baptist Church of Shreveport, LA. After 15 years as the president of the Louisiana Missionary Baptist State Convention, Reverend Blake is retiring. He has been a friend and outstanding leader for many years.

Pastor of Mount Canaan Baptist Church for almost 44 years, Reverend Blake has also served in various capacities for a number of local and national organizations. Most recently, he was appointed vice president for the Southwest Region of the National Baptist Convention, USA, Inc., having previously served as general secretary. He has also held prominent roles in the Thirteenth District Baptist Association, and within the Louisiana Baptist State Convention, he has served on the Congress of Christian Education and the Evangelical Board.

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

July 27, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire C. McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous, Jr.

Dear Senator McCaskill and Senator Hatch:

On behalf of Judge G. Thomas Porteous, Jr., I am writing to request that the Senate Impeachment Trial Committee (the "Committee") permit the depositions scheduled for August 2, 2010, to be recorded by audiovisual means (*i.e.*, videotaped), in addition to stenographically.

In its July 19, 2010 Order, the Committee found that Judge Porteous had "demonstrated 'a strong showing of need' for taking pretrial depositions of the following four witnesses: (1) Jacob Amato, Jr.; (2) Robert Creely; (3) Louis Marcotte, III; and (4) Lori Marcotte." (*See* Disposition of Judge G. Thomas Porteous, Jr.'s Motions to Compel and for Depositions, at 2.) Accordingly, the Committee set the depositions of these four individuals for August 2, 2010. (*Id.* at 3.) The Committee's Order did not, however, specify the method by which the depositions would be recorded.

To confirm this and other logistical issues in advance of the depositions, counsel for Judge Porteous contacted the Committee staff earlier today and was advised to submit a letter requesting that the depositions be videotaped. Accordingly, we now submit this letter.

We ask that the Committee allow the depositions to be videotaped as a routine and beneficial practice under the federal rules. (*See* Federal Rule of Civil Procedure 30(b)(3)). Such videotape would protect against a witness becoming unavailable and would create a more accurate record for both the parties and the Senate.

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Counsel for Judge Porteous conferred with counsel for the House concerning this request, who stated that they oppose the request but declined to give a basis for that opposition.

Respectfully,

Jonathan Turley DTO

Jonathan Turley
Counsel to Judge G. Thomas Porteous, Jr.

cc: Alan I. Baron, Esq., House Impeachment Counsel
Mark Dubester, Esq., House Impeachment Counsel
Harry Damelin, Esq., House Impeachment Counsel
Kirsten Konar, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Legal Counsel

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CLAIRE McCASKILL, MISSOURI, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN

AMY KLOBUCHAR, MINNESOTA
SHELDON WHITEHOUSE, RHODE ISLAND
TOM UDALL, NEW MEXICO
JEANNE SHAHEEN, NEW HAMPSHIRE
EDWARD E. KAUFMAN, DELAWARE

JIM DeMINT, SOUTH CAROLINA
JOHN BARRASSO, WYOMING
ROGER F. WICKER, MISSISSIPPI
MIKE JOHANNS, NEBRASKA
JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510–6326

MEMORANDUM FOR THE RECORD

Monday, August 2, 2010

With due notice, Chairman McCaskill, Vice Chairman Hatch, Sen. Tom Udall, and Sen. Mike Johanns each individually presided over the taking of the pre-trial deposition testimony of Jacob Amato, Jr., Louis Marcotte, Lori Marcotte, and Robert Creely, respectively. The depositions took place pursuant to the Committee's July 19, 2010, order finding that Judge Porteous demonstrated a strong showing of need for the pre-trial deposition testimony of these four witnesses.

Three hours were allotted for the pre-trial deposition of each witness, including approximately 30 minutes of time reserved for cross examination by the House Managers. All four depositions took place in the U.S. Capitol Visitors Center.

Erin P. Johnson

Chief Clerk

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II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

a. Discovery Matters

iii. Motion to Compel

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION TO COMPEL INSPECTION OF NON-PRIVILEGED MATERIALS COLLECTED AND MAINTAINED BY THE HOUSE OF REPRESENTATIVES AND REQUEST FOR EXPEDITED CONSIDERATION

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and files this Motion to Compel the House of Representatives (the "House") to Allow Judge Porteous Inspection of Non-Privileged Materials Collected and Maintained by the House[1] during its investigation and impeachment of Judge Porteous. In support, Judge Porteous respectfully submits as follows:

Through previous counsel, Judge Porteous moved for the production of certain discovery from the House of Representatives. (*See* Motion, filed by Judge Porteous on May 28, 2010.) In response, the Senate Impeachment Trial Committee (the "Committee") ordered the House to "provide all information in its possession that is relevant to, or likely to lead to new evidence on, the adopted Articles of Impeachment." (*See* Disposition of Discovery Issues, dated June 9, 2010, hereinafter "June 9, 2010 Order".) Based on their review of documentation and communications with Special

[1] During its investigation, the House acted through its Special Impeachment Counsel. As such, those terms are used interchangeably in this motion.

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Impeachment Counsel, Judge Porteous's new counsel has determined that the Special Impeachment Counsel have failed to comply with the June 9, 2010 Order and are continuing to withhold relevant non-privileged materials. In fact, they not only have failed to produce to Judge Porteous non-privileged materials responsive to the June 9, 2010 Order, but the Special Impeachment Counsel have also refused even to describe the categories or sources of these withheld documents, so that Judge Porteous can seek a ruling as to the discoverability of specific documents or categories of materials.

For years, state investigators, federal investigators, the Fifth Circuit, and Congress have collected documents and statements regarding the allegations against Judge Porteous. It appears all of these files have been provided to the Special Impeachment Counsel for the purpose of informing the House's prosecution of Jude Porteous. Special Impeachment Counsel have confirmed that they are withholding from Judge Porteous's counsel a portion of these files but have failed to articulate the basis for that withholding other than the fact that they have not been ordered to provide the material.

This gamesmanship directly contradicts the Committee's stated goals regarding evidence and the prior practice of the House and the Senate (and, indeed, of Mr. Baron himself as previous counsel for the House) in Impeachment trials. Moreover, this is particularly inappropriate and ironic in light of the fact that the Articles of Impeachment against Judge Porteous are based in significant part on Judge Porteous's alleged failure to disclose fully all relevant facts.

Accordingly, Judge Porteous moves the Committee to compel the House Impeachment Counsel to allow Judge Porteous inspection of the non-privileged materials in the House's possession or, in the alternative, to provide a list of the materials in its

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possession for further consideration and review by the Committee should Judge Porteous seek specific materials from the list and Special Impeachment Counsel continue to refuse such access.

In light of the relatively short trial schedule (and the lack of any prior criminal indictment or trial record in this case), the timely and full provision of such discovery to Judge Porteous is a vital component to a fair process.[2] As such, Judge Porteous requests an expedited ruling on this matter.

Factual Background

Judge Porteous was impeached by the House of Representatives on March 11, 2010, on the basis of four articles of impeachment. Of these four articles, three are based on his alleged failure to disclose information concerning conflicts of interest, including one article specifically based on Judge Porteous's alleged failure to disclose information to Congress. Witnesses called by the House Judiciary Committee in advance of voting on those articles also testified that a critical issue in this case would be determining what Congress knew at the time of Judge Porteous's confirmation. In all four articles of impeachment, the House charges that certain alleged misconduct was concealed by Judge Porteous.

In response to the Committee's June 9, 2010 Order, the House provided Judge Porteous with a compact disc containing a variety of exhibits, which are largely a replication of the materials used by the House Managers during the House impeachment

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[2] As further evidence of the need for expedited consideration, earlier this month the Committee disqualified the only defense counsel who has previously worked in the case and had knowledge of the underlying claims and witnesses. New counsel has moved to secure files from the prior counsel while avoiding exposure to material that may be tainted by the representation of witnesses in this case. That process is continuing and not yet complete.

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proceedings. On June 24, 2010, Special Impeachment Counsel also made available for review, but has not produced, approximately eleven banker boxes of material. This material contains obviously relevant documents that were not included in the House's earlier productions, which counsel for Judge Porteous are working with House counsel to obtain.

During Judge Porteous's counsel's review of this material, the Special Impeachment Counsel confirmed that they were withholding other files from both production and inspection. On Friday, June 25, 2010, Judge Porteous's counsel demanded inspection of this withheld material. Special Impeachment Counsel responded by stating that they would not allow such inspection because it was not ordered by the Committee. Special Impeachment Counsel also refused to identify or list the material that they are withholding from the defense. Thus, the Special Impeachment Counsel have insisted that they will unilaterally decide what material in possession of the House can be used to challenge the articles of impeachment voted out of the House.

ARGUMENT

1. The Documents That Special Impeachment Counsel Are Withholding Are Relevant.

The House of Representatives established the Office of the Special Impeachment Counsel specifically for the sole purpose of investigating and impeaching Judge Porteous. The materials collected by Special Impeachment Counsel relate only to the House's investigation and impeachment of Judge Porteous. Thus, unlike civil litigation where one party seeks a small subset of documents out of a wide universe of mostly non-relevant material, Judge Porteous's inspection of the non-privileged materials collected by the Special Impeachment Counsel does not raise concerns about privacy or irrelevance.

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Outside of privileged materials, all materials in the Special Impeachment Counsel's possession logically should touch upon the investigation and/or impeachment of Judge Porteous, making them relevant or likely to lead to relevant or exculpatory evidence. Thus, there is no basis for limiting Judge Porteous from seeing all non-privileged documents in the possession of the Special Impeachment Counsel, including documents pertaining to uncharged offenses; in fact, documents of that type, if there are any, may well provide important exculpatory evidence critical to Judge Porteous's defense.

The Committee's own stated standard for the evidence that should be produced – namely, information that is "relevant to, or likely to lead to new evidence on, the adopted Articles" – is a broad and exacting mandate. Only Judge Porteous's counsel can determine what materials in the Special Impeachment Counsel's possession may lead to evidence relevant to Judge Porteous's defense. The suggestion by the House Managers that they will produce that which they determine is relevant is not a workable, appropriate, or necessary standard. The House Managers are not neutral participants in this proceeding, and they should be not be expected to act as such. If interpreted with any sense of reason, the Committee's stated standard should allow for inspection of all non-privileged materials in the Special Impeachment Counsel's possession.

In order to expedite the resolution of this issue, avoid needless costs, and avoid claims by the Special Impeachment Counsel that such a request would cause undue burden, Judge Porteous moves only for the immediate right of inspection as opposed to outright and full production. As such, Judge Porteous's request does not require extra work on the part of the Special Impeachment Counsel: all they have to do is make

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available for inspection and copying the documents that have already been generated and collected by others. In fact, the burden will be on Judge Porteous's counsel.

It is unclear why the Special Impeachment Counsel opposes the relief requested, particularly since they have provided no basis for their opposition other than noting that they have not yet been instructed to provide the material. This is particularly alarming given the clear intent of the Framers to prevent easy or impulsive acts of impeachment. Critically, this is not some ordinary commercial litigation where lawyers skirmish for tactical advantage by resisting disclosures or delaying discovery. The removal of a federal judge is a serious constitutional matter – and one which has taken place fewer than twenty times in our nation's history. This constitutional process is designed to give members of the Senate a full and proper record upon which to render verdict. The Senators – as well as the accused and the public – have a right to see the full record of evidence assembled against the accused. Only with such full disclosure can the Senators and the public be satisfied that any conviction or acquittal was based on a fair and full disclosure of the facts.

2. Special Impeachment Counsel Are Breaking From Precedent By Withholding Descriptions of the Withheld Materials.

As an alternative to providing open access to the Special Impeachment Counsel's files, if they continue to refuse it, Judge Porteous has requested that the Special Impeachment Counsel generally describe the source, types, and volume of the documents being withheld.[3] Special Impeachment Counsel's refusal to do so directly contradicts the

[3] Counsel for Judge Porteous is cognizant that the Committee previously declined to order the House to produce a detailed index of all of the materials being withheld by the House, in response to a request by Judge Porteous's former counsel. (*See* Committee Order, dated June 9, 2010.) Special Impeachment Counsel appears to refuse to provide

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House's (indeed Mr. Baron's) disclosure of the same information in prior impeachment trials.

In connection with the impeachment trial of Judge Alcee Hastings, in March 1989, the Office of Senate Legal Counsel for the United States Senate, in considering various discovery requests made by Judge Hastings, sent a letter to counsel for the House of Representatives that stated:

> In helping the committee to understand the parameters of the discovery issue, could the House describe the nature of the materials that were made available to it by the Judicial branch and the Department of Justice?

(Letter dated March 24, 1989 at 2, attached as Exhibit 1 to this filing.) In response, and apparently without needless litigation or other consternation, Special Impeachment Counsel for the House of Representatives, Alan I. Baron, submitted a letter which stated:

> In response to the March 24, 1989 letter from Senate Legal Counsel, the House Managers submit Exhibit A attached hereto, which is a description of the materials made available to the House in this impeachment proceeding.

(Report and Recommendation of the House Managers on Pending Pre-Trial Matters, dated March 31, 1989, page 3, attached as Exhibit 2 to this filing.) Exhibit A to Mr. Baron's March 31, 1989 letter listed seven detailed sources of information from which the House received information in the Hastings impeachment proceedings. (*Id.* at Exhibit A, attached as Exhibit 2 to this filing.) Even more explicitly, on April 4, 1989, the House

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even a more general description of the documents, which would allow the parties to confer reasonably about the documents in question. In light of the significance of these issues, their immediacy in terms of the trial, and the only very recent assumption of full responsibility for defending all of the Articles of Impeachment, Judge Porteous's new counsel urge the Committee to consider the request for full inspection or a general description of the documents, as opposed to a general index.

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Managers, led by Mr. Baron, submitted three detailed lists to the Senate Committee and the defense with the following titles:

1. "Documents Provided Judge Hastings by House;"
2. "Documents in House Files in which Judge Hastings Has Been Granted Access;"
3. "Documents in House Files Not Made Available."

(Pages 197-199 of Hastings Report, attached as Exhibit 3 to this filing.) The third list is precisely the material that Judge Porteous seeks and has requested from the Special Impeachment Counsel in the current action, if House Impeachment Counsel will not permit a full and open inspection of all of the House's relevant, non-privileged files. Nevertheless, Mr. Baron's reasonable approach in the Hastings trial has seemingly been abandoned in favor of a more confrontational, uncooperative, and unfair approach in the instant matter. Because the Committee has relatively little precedent to guide its decisions in this trial, it should welcome and embrace such a clear parallel. Mr. Baron and his staff should, at the very least, provide the same type of information in this matter that they provided in the Hastings matter.

What is particularly notable is that the Hastings impeachment followed an criminal indictment and a full trial in a federal court. Substantial evidence had already been presented in the public record, and had been tested under the beyond-a-reasonable-doubt standard. Thus, as in the impeachment of Judge Walter L. Nixon, Jr., the House and Senate were able to benefit from a detailed trial record. In fact, during Judge Nixon's impeachment trial, the House Managers, again through Mr. Baron, opposed the defense's discovery requests and deemed certain requests as "inappropriate" because the impeachment trial followed:

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> four years of contested proceedings including a criminal indictment, pre-trial discovery, a two-week jury trial, a post-trial evidentiary hearing, an unsuccessful appeal and petition for writ of certiorari, a motion to vacate the conviction, additional discovery in connection with said motion, a two-day evidentiary hearing on the motion to vacate . . .

(House of Representatives' Response to Judge Nixon's Discovery request at 2-3, attached as Exhibit 4.) In that case, Mr. Baron concluded that given the above described "circumstances," discovery should be limited but still stated that he would provide the same information provided in Judge Hastings's trial. (*Id.* at 3.) Notably, Mr. Baron agreed to make available for inspection "subpoenaed records produced by third parties" and FBI "investigative files." (*Id.* at 5-6.)

In this case – where there is no prior indictment, no Court-ordered discovery, and no previous trial – the material already available to Judge Porteous is substantially less than that which was available to Judges Hastings and Nixon. If anything, discovery in this matter, if it is to follow precedent and any notions of due process, should be broader than that afforded in the Hastings and Nixon proceedings. In this case, the Special Impeachment Counsel obviously will have a more difficult time convicting Judge Porteous in light of the questionable charges alleging a denial of honest services and conflicts of interest. As a result, they appear to be making up for evidentiary shortcomings through tactical maneuvers that would deny Judge Porteous access to evidence and time necessary for a proper defense. Such tactics would be condemned in a standard criminal case, and should be anathema in a federal impeachment trial. There is no public purpose to allowing such concealment. Accordingly, the Senate should order access – so as to guarantee that both the Senators and the accused are given a full record before the rendering of final votes on the Articles of Impeachment.

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WHEREFORE, Judge Porteous respectfully requests that the Senate order the House to allow for inspection of all non-privileged materials collected and maintained by the House Mangers in connection with the investigation and impeachment of Judge Porteous.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
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1155 F Street, N.W., Suite 700
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(202) 508-6000

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

Dated: June 27, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl

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Exhibit 1

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MICHAEL DAVIDSON
KEN U. BENJAMIN, JR.
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United States Senate

OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, DC 20510-7250

March 24, 1989

The Honorable John Bryant
The United States House of Representatives
Washington, D.C. 20515

Professor Terence J. Anderson
The University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33214

Dear Representative Bryant and Professor Anderson:

As you are aware, at its organizational meeting on March 17, the committee appointed under Impeachment Rule XI determined that it would meet with representatives of the parties during the week of April 10 to consider matters that should be addressed prior to hearing the testimony of witnesses. In order to make the committee's meeting that week as productive as possible, the chairman and vice chairman will meet with you on April 4 to review the status of outstanding issues in light of your prior submissions and the memoranda that each side should submit by March 31.

A review of the parties' prior submissions indicates that the following matters should be considered in your March 31 filings:

1. The Parties' Witness Lists

The House provided to the Committee on Rules and Administration, at the committee's request, a provisional list of 23 witnesses with a brief general description of the nature of the anticipated testimony of each witness. Subsequently, the House supplemented its list by adding six more names. Before the Rules Committee, Judge Hastings declined to provide a list of his witnesses, initially on the ground that the House should first be required to list its witnesses. Subsequently, he referred the Rules Committee to a provisional list that he had presented earlier to the House, and stated that he has "identified more than 200 witnesses who may have information that is relevant...." One question for Judge Hastings' side is whether he is now prepared to provide a provisional list and description of anticipated testimony so that the committee may have a firm basis for scheduling its hearings and acting on several pretrial matters, including the motion of the House in limine to exclude evidence.

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2. The Motion of the House In Limine to Exclude Irrelevant Evidence

The House has moved to exclude evidence offered to prove motivations of persons who investigated and prosecuted Judge Hastings, the motivations of persons involved in the Judicial Branch investigations of Judge Hastings, and cumulative evidence on his general character and reputation. A response from Judge Hastings to the motion is needed.

3. Dredge

Judge Hastings has indicated an interest in calling William Dredge as a witness as part of a "rainmaking" defense. House counsel has offered to contact the F.B.I. for assistance in locating Dredge and obtaining his presence. Judge Hastings' witness list will indicate whether he proposes to call Dredge. If Dredge is on the list, can we confirm that the House will assist in obtaining Dredge's presence? Judge Hastings states that the testimony of an additional three to five witnesses would be required if Dredge testifies. Who are they?

4. Borders

Judge Hastings states that "William Borders is a central witness. If he agreed to and did testify truthfully, his testimony would fully exonerate the judge." Borders has previously asserted his privilege against self-incrimination. If Borders is on Judge Hastings' witness list, should the committee commence a proceeding leading to a grant of immunity? If immunity is granted, should it be determined early in the proceedings whether Borders will testify with immunity and, if he will not, should enforcement proceedings be authorized at an early date?

5. Judge Hastings' Discovery Request

Judge Hastings has requested extensive discovery. The House has responded by describing the nature of the documents that it would provide: materials that the House intends to use at trial; statements of witnesses to be called at trial that have been sworn, adopted, or approved by them; transcribed statements of witnesses who will be called at trial; and any exculpatory evidence. The House is asking for reciprocal discovery. What is Judge Hastings' response to the House's offer and request? In helping the committee to understand the parameters of the discovery issue, could the House describe the nature of the materials that were made available to it by the Judicial Branch and the Department of Justice? In conjunction with this request, it will be

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helpful for the parties to address any questions which should be considered in relation to grand jury material to which the House has been granted access.

6. Stipulations of Documents and Facts

The House, at the request of the Senate, has proposed stipulations concerning documents and stipulations of fact. Judge Hastings has declined to date to enter into stipulations. The House has proposed that the Senate adopt procedures by which stipulations of fact filed with the Senate would be accepted as true unless the opposing party files a written objection including a proffer as to why the proposed stipulation of fact should not be taken as true. The House suggests that a similar procedure be adopted concerning documents. What is Judge Hastings' response to those proposals? To help the committee understand the promises and the difficulties of the stipulation process, I would like to suggest that each party select, for illustrative purposes, ten of the proposed stipulations and an equal number of documents and be prepared to discuss the procedures that would be best suited to resolving any disputes about them.

7. House Depositions After Commencement of Senate Proceedings

Judge Hastings has objected to the use of the House's subpoena power to compel testimony after the exhibition of the articles of impeachment. The House should respond to that objection.

8. Rules of Evidence

Judge Hastings has filed a memorandum on rules of evidence. What is the response of the House, and can the parties now identify any significant evidentiary questions that the committee will need to resolve?

* * * *

This list is not intended to exclude the discussion of other evidentiary questions that either side believes should be addressed at this time. Pending the organization of the committee's administrative staff, please transmit to my office your communications to the committee, including your March 31 filings.

Sincerely,

Michael Davidson

Michael Davidson

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Exhibit 2

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IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re	)
	)
	)
IMPEACHMENT OF	)
JUDGE ALCEE L. HASTINGS	)

REPORT AND RECOMMENDATIONS OF THE HOUSE MANAGERS ON PENDING PRE-TRIAL MATTERS

On August 3, 1988, the House of Representatives presented to the Senate 17 Articles of Impeachment against United States District Judge Alcee L. Hastings. Since that time, in response to directives from the Senate Committee on Rules and Administration dated August 10, September 8, and December 12, 1988, the parties have had several opportunities to address issues which should be resolved pre-trial in order to facilitate the trial of this impeachment. The following is a summary of the issues raised by the parties, the position of the House Managers with regard to each of those issues, and the recommendation of the House Managers of an appropriate mechanism to resolve each issue.

1. RULES OF EVIDENCE. In a memorandum submitted to the Senate Rules Committee on September 6, 1988, Judge Hastings requested clarification on the application of rules of evidence in this impeachment trial. Respondent stated that either the common-law rules or the Federal Rules of Evidence would be appropriate and suggested that the Federal Rules of Evidence offered the advantage of providing a comprehensive and readily accessible body of materials.[1]

(a) Position of the House Managers.

The House Managers believe that the guiding principle for making determinations about the admissibility of evidence should be the relevancy of the proffered evidence to the charges in the Articles of Impeachment. Once relevancy is established, the Committee should then be flexible in its willingness to admit evidence into the record. Many of the rules of evidence that tend to exclude evidence are intended to prevent a lay jury from giving undue weight to unreliable evidence, a factor not applicable

[1] See Memorardum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered at 6, reprinted in S. Rep. No. 542, 100th Cong., 2d Sess. 106 (1988) (hereinafter "S. Rep. 100-542").

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in a Senate trial.[2] Moreover, because the Committee is charged with the responsibility of preparing a record for the full Senate to review, the Committee should err on the side of admitting rather than excluding relevant evidence, for it will be easier for the Senate to disregard evidence which that Body feels was wrongfully admitted than to attempt to remedy an inappropriate exclusion of evidence. With these caveats in mind, the House Managers agree that the Federal Rules of Evidence are a useful touchstone to which the Committee should look for guidance in the conduct of the impeachment trial of Respondent.

In addition, it should be noted that it is unlikely that the distinction between the common law rules and the Federal Rules of Evidence will make any practical difference in the admissibility of evidence in this trial. The House Managers know of no significant evidence which would be affected by the selection of either set of rules as the preferred source of guidance in making evidentiary rulings.

(b) Recommendation.

The House Managers believe that this matter is ready to be resolved without further briefing by the parties and recommend that it be discussed at the April 4, 1989 meeting with the Chairman and Vice-Chair, and resolved at the meeting of the Committee during the week of April 10, 1989.

2. DISCOVERY. In his September 6th memorandum to the Senate Rules Committee, Judge Hastings also raised the question of discovery.[3] His position was developed in Respondent's First Request for Production of Documents and Other Tangible Material filed December 28, 1988. In that request, Respondent asked the House of Representatives to deliver to his counsel copies of all documents relating to the matters alleged in the Articles of Impeachment or the Answer to the Articles of Impeachment, which fall into the following six categories: 1) all documents received by the House of Representatives from the Judicial Conference of the United States or the Judicial Council of the Eleventh Circuit pertaining to the judiciary's investigations of these matters; 2) all documents and other materials, including rough notes,

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[2] S. Comm. on Rules and Admin., 93rd Cong., 2d Sess., Impeachment, 245-250 (Comm. Print 1974) (Professor Stephen R. Goldstein).

[3] See Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered at 7, reprinted in S. Rep. 100-542 at 107.

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interview notes, memoranda, and transcriptions, which reflect statements by any person who could testify concerning these matters; 3) documents and other materials gathered by or submitted to grand juries in connection with inquiries into conduct of Judge Hastings which is the subject of the Articles of Impeachment; 4) all documents and other materials obtained by the House of Representatives from the Department of Justice or other Executive Branch sources, including the FBI and the Bureau of Alcohol, Tobacco, and Firearms; 5) all documents or materials gathered by the House of Representatives and its agents concerning these matters; and 6) all documents which are material to Judge Hastings' defense, are exculpatory, or which may lead to exculpatory materials.

(a) Position of the House Managers.

The position of the House of Representatives was initially stated in a memorandum submitted to the Senate Rules Committee.[4] It is fully set forth in the Response of the House Managers to Respondent's First Request for Production of Documents and Other Tangible Material filed with the Senate January 17, 1989. In summary, the House Managers believe that there should be no surprises at trial. Therefore, in spite of the fact that formal discovery is unprecedented in impeachment cases, the House Managers are prepared to provide to Respondent copies of materials falling into the following four categories: 1) any document, tape or other tangible evidence the House Managers intend to use at trial; 2) any statement of a witness to be called at trial that is sworn, or adopted or approved by the witness; 3) any transcribed statement by a witness to be called at trial which is a substantially verbatim recital of an oral statement by the witness and was recorded contemporaneously with the making of such statement; and 4) any exculpatory evidence. The overwhelming majority of the documents falling into these four categories has already been provided to Respondent. The House Managers' further production of materials, however, is conditioned on the imposition of a reciprocal rule requiring Respondent to provide to the House all documents or materials in his possession which fall into the first three categories listed above.

In response to the March 24, 1989 letter from Senate Legal Counsel, the House Managers submit Exhibit A attached hereto, which is a description of the materials made available to the House in this impeachment proceeding.

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[4] See Reply of the House Managers to the September 8, 1988 Letter from the Senate Committee on Rules and Administration at 9-12, reprinted in S. Rep. 100-542 at 109-112.

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(b) Recommendation.

The House Managers believe that the issue of discovery has been fully briefed by the parties and is ready for resolution. The House Managers recommend that this matter be discussed at the April 4, 1989 meeting and argued at the meeting of the Committee during the week of April 10, 1989. At that time a date should be set for the parties to exchange pertinent documents and materials pursuant to the Committee's ruling on this matter.

3. STIPULATIONS. In an early memorandum submitted to the Senate Rules Committee, the House Managers stated their intention to request admissions as to matters of fact and the genuineness of documents.[5] This proposal was further refined in a later memorandum submitted to the Senate Rules Committee.[6] On December 15, 1988, the House Managers submitted their Proposed Stipulation of Documents and their Proposed Stipulation of Facts. Although Judge Hastings has not specifically responded to the proposed stipulations, his counsel has indicated in meetings with Senate Legal Counsel and in a memorandum to the Senate Rules Committee that he does not intend to agree to any stipulation of facts and that stipulations to the genuineness of documents cannot be made until the documents have been inspected.[7] Although the documents have been available for inspection since the end of January 1989, Respondent has declined to inspect any documents.

(a) Position of the House Managers.

The House has proposed two procedures to expedite the presentation of evidence at trial, one addressing stipulations of facts and the other addressing the genuineness of documents. The House proposal would require that any proposed stipulation regarding the admissibility of

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[5] See Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration at 13.

[6] See Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration at 2-3, reprinted in S. Rep. No. 1, 101st Cong., 1st Sess. 76-77 (1989) (hereinafter "S. Rep. 101-1").

[7] See Statement on Behalf of Untied States District Judge Alcee L. Hastings COncerning Procedures Necessary for a Fair Trial in the Senate in the Present Case of Impeachment at 8, reprinted in S. Rep. 101-1 at 105.

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a document and any proposed stipulation of fact filed with the Senate will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true. It is the position of the House that such procedural rules should be adopted by the Committee, and a date set by which written objections must be filed. In the event that a party files written objections to proposed stipulations, a smaller committee, consisting of one or two Committee members, should be designated by the Chairman to review the matter and rule on whether there is a reasonable basis for the objection.

In the Proposed Stipulation of Facts, the House Managers list the facts in roughly chronological order. In the spirit of attempting to facilitate the stipulation process, the House has reorganized and reduced its proposed stipulations to those facts that, as far as the House is aware, are beyond any dispute. The House Managers' Revised Stipulation of Facts is attached hereto as Exhibit B. In brief, the revised stipulations are reorganized into 15 categories: facts based upon 1) airline records, 2) telephone records, 3) telephone messages, 4) hotel records, 5) court decisions, 6) the record of United States v. Romano, 7) the record of United States v. Borders, 8) the record of United States v. Hastings, 9) Judge Hastings' trial testimony, 10) geographical information, 11) Nagra body recordings, 12) other tape recordings, 13) FBI reports, 14) the 1985 wiretap application and progress reports, and 15) miscellaneous proof.

It has also been suggested by Senate Legal Counsel that the parties review and consider the system for facilitating an agreement on stipulations utilized in United States v. American Telephone & Telegraph Co.[8] In that complex and protracted litigation, Judge Harold Green required the parties to review each others' Statements of Contentions and Proof, and advise their opponents which portions of those statements might be stipulated to in their present form or with suggested language changes. The parties exchanged proposed language changes in an effort to negotiate an agreement on the stipulations. Where the party objected to a stipulation, the basis of that objection had to be stated. Where the objection was based on a need for further information, the precise additional discovery had to be indicated. Where the opposing party refused to provide such discovery, a Magistrate reviewed the matter. A Special Master was selected to oversee the stipulation process.

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[8] 83 F.R.D. 323 (D.D.C. 1979) and 88 F.R.D. 47 (D.D.C. 1980).

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It is the position of the House Managers that such a process is ill-suited for the present case. This case is not nearly so complex. In addition, the stipulations proposed by the House are well documented and in most instances have never been contested. The present case does not require the sophisticated scheme utilized in the AT&T case and it is likely that the implementation of such a process would be time consuming and unnecessarily complicated.

The House Managers believe that their Revised Stipulations of Fact and proposed admissions in the absence of a reasonable objection are more likely to facilitate the process given the nature of the stipulations being sought, and Respondent's stated unwillingness to stipulate.

(b) Recommendation

The question of what procedures should be adopted to facilitate stipulations requires no more briefing and should be discussed at the April 4, 1989 meeting with the Chairman and Vice-Chair, and resolved at the meeting of the Committee during the week of April 10, 1989. If the rules proposed by the House are adopted, the Committee should then set a date by which any objections to stipulations must be filed.

4. SCOPE OF THE EVIDENCE TO BE PRESENTED. On January 17, 1989, the House of Representatives filed a Motion in Limine to Exclude Irrelevant Evidence and a supporting memorandum. This motion requested that the Senate exclude all evidence offered to prove the motivations of the persons in the Executive and Judicial Branches who investigated, prosecuted or considered matters which are the subject of the Articles of Impeachment, and that the Senate limit evidence on the topic of Respondent's general character and reputation consistent with the Claiborne precedent. Judge Hastings has not responded to the Motion in Limine.

(a) Position of the House.

By its Motion in Limine the House is attempting to exclude the presentation of evidence at trial that is irrelevant under any circumstances. The motion is not intended to address topics for which the determination of relevance would depend on the context in which they are raised. The Senate clearly has the power to limit the scope of the evidence presented in an impeachment trial and the exercise of that power is essential to a fair and expeditious trial of this impeachment. The request of the House Managers is supported by Senate precedent, and

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particularly by the decision of the Rule XI Committee with regard to a similar motion made by the House Managers in the impeachment trial of Judge Claiborne.[9]

(b) Recommendation.

At the April 4, 1989 meeting with the Chairman and Vice-Chairman, a briefing schedule should be established for the submission of Judge Hastings' response to the House Managers' Motion in Limine. The House Managers suggest that Judge Hastings' response be filed in time for argument on the motion at the meeting of the Committee during the week of April 10, 1989.

5. SUBPOENA POWER. Although Respondent has made no formal request, he has indicated that he will seek authority from the Senate to issue subpoenas or to have subpoenas issued on his behalf. In his January 17, 1989 Memorandum to the Senate Rules Committee, Respondent indicated that he wishes to have witnesses subpoenaed for pre-trial discovery purposes as well as for trial.[10] In addition Respondent has questioned the propriety of the House's exercise of its subpoena power subsequent to the adoption of the Articles of Impeachment on August 3, 1988.[11]

(a) Position of the House Managers.

As a general rule, the House takes no position on the issuance of subpoenas on behalf of Respondent. The House would note that Respondent has made no showing that he has been unable to conduct pre-trial discovery prior to this time without reliance upon subpoenas. In view of the possibility that such pre-trial discovery may be used to delay the trial, or to delve into irrelevant matters, the House suggests that the procedure adopted for the issuance of subpoenas include an opportunity for the House to voice its objections prior to the issuance of any subpoena.

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9 See Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Comm., 99th Cong., 2d Sess. 690-91 (Part 1) (1986), cited in the House Managers' Memorandum in Support of Motion in Limine to Exclude Irrelevant Evidence at 4-8.

10 See Statement on Behalf of United States District Judge Alcee L. Hastings Concerning Procedures Necessary for a Fair Trial in the Senate in the Present Case of Impeachment at 5-6, reprinted in S. Rep. 101-1 at 102.

11 Id. at 4-5, reprinted in S. Rep. 101-1 at 101.

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With regard to the continuing power of the House to issue subpoenas, the Managers believe that the House retains independent authority to issue subpoenas even after the adoption of Articles of Impeachment and their presentation to the Senate. Very recently, one court recognized the House of Representatives' authority. The House Managers applied to the United States District Court for the Southern District of Florida for the original tape recordings from the wiretap in the bribery conspiracy case in order to make the tapes available for the Senate trial.[12] Judge Hastings opposed the application on the ground that only the Senate could apply for the original tape recordings. On March 20, 1989, the Court granted the request of the House, finding that the Senate rules do not prescribe the exclusive procedure for the obtaining of evidence.[13]

Despite the independent authority of the House to issue subpoenas, however, the House Managers will request the Senate to issue any additional subpoenas needed for the presentation of documents and witnesses at the trial of these Articles of Impeachment.[14]

(b) Recommendation.

A schedule should be established for the submission of any requests for subpoenas and the filing of objections to such requests. Such a schedule should address both pre-trial and trial subpoenas, although requests for trial subpoenas might best be included in pre-trial statements submitted by the parties prior to trial. This schedule should be discussed and established at the April 4, 1989 meeting with the Chairman and the Vice-Chairman.

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[12] The House Managers already have copies of some of the tapes, to which Respondent has been granted access.

[13] See Order, dated March 20, 1989, attached hereto as Exhibit C.

[14] For the information of the Committee, the House has issued subpoenas subsequent to the adoption of the Articles of Impeachment in this case for two purposes. Senate Legal Counsel requested the House to undertake the gathering of original documents to be introduced at trial, and the House has used subpoenas to obtain such originals. The House also issued three subpoenas for the purpose of depositions. Ultimately, two depositions were taken. The transcripts will be provided to Respondent pursuant to category (2) of the discovery proposal of the House Managers referenced above.

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6. **WITNESSES**. On two occasions the Senate Committee on Rules and Administration directed the parties to provide a preliminary list of witnesses with summaries of their proposed testimony. The House Managers provided such lists with specific proffers of testimony.[15] In his submissions to the Senate Rules Committee, Judge Hastings provided general descriptions of the categories of witnesses he might call.[16] In addition, he referred the Senate Rules Committee to lists of witnesses attached to his First Request for Production of Documents and Other Tangible Materials. These lists are of the witnesses called at Judge Hastings' criminal trial, at William Borders' criminal trial, before the Eleventh Circuit Investigating Committees, before the House Subcommittee on Criminal Justice, and of other persons "having pertinent information."[17]

The Senate Committee on Rules and Administration also requested that the parties identify any witnesses who might assert testimonial privileges and thereby require the implementation of procedures to grant immunity. The House has stated that it has no present intention of calling any such witnesses. Judge Hastings alluded to William Dredge and William Borders as potentially troublesome witnesses. However to date Respondent has not stated an intention to call either Dredge or Borders as witnesses.

In addition, in the March 24, 1989 letter from Senate Legal Counsel, the parties were asked to address whether the Committee should commence a proceeding leading to a grant of immunity for William Borders, and the timing of such a proceeding and any subsequent proceedings if immunity is obtained.

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[15] See Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration at 9-13, reprinted in S. Rep. 101-1 at 60-63. For further additions, see Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration at 3-4, reprinted in S. Rep. 101-1 at 64.

[16] See Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case at 17-20, reprinted in S. Rep. 101-1 at 65-68. See also Comments on Behalf of United States District Judge Alcee L. Hastings on the Views Expressed by the House Managers in their Memorandum Submitted on September 6, 1988 at 8-9, reprinted in 101-1 at 69.

[17] See Addenda C, D and E to Respondent's First Request for Production of Documents and Other Tangible Material.

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(a) Position of House Managers.

The House suggests that the parties be required to provide to the Committee specific witness lists with proffers of the proposed testimony by each witness. A preliminary list should be submitted in the near future and a final list should be included in pre-trial statements from the parties. Witnesses who are not on the final witness list should be allowed to testify only if the party offering the witness makes a showing of "good cause" for failing to include the witness in the pre-trial statement. The House Managers make this proposal with the understanding that both the preliminary and final witness lists would not include those witnesses who may be called during rebuttal or surrebuttal.

In response to the inquiry posed in the March 24, 1989 letter from Senate Legal Counsel, if Judge Hastings indicates his intention to call William Dredge at trial, the House Managers will attempt, through the FBI, to locate and produce Dredge.

Finally, it is the position of the House Managers that if Judge Hastings intends to call William Borders at trial, he must indicate his intent in his preliminary witness list. If Borders is named on the preliminary list, the Committee should then commence a proceeding such as a deposition to determine whether a grant of immunity will be necessary and, if it is required, the Committee should take the steps necessary to obtain the immunity. The House Managers believe that in order to avoid any undue delay of the trial, these proceedings should be commenced as early as possible. In addition, the House Managers believe that if Borders refuses to testify even with a grant of immunity, enforcement proceedings should be authorized as early as possible.

(b) Recommendation.

A schedule for the submission of preliminary witness lists should be established at the April 4, 1989 meeting with the Chairman and Vice-Chairman. The procedures to be followed with respect to the possible testimony of William Borders should also be discussed and established at the April 4, 1989 meeting.

7. PRE-TRIAL STATEMENT. To date, there has been no discussion of pre-trial statements. However, in the Senate impeachment proceeding of Judge Harry Claiborne, the Rule XI Committee adopted such a procedure.

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(a) Position of House Managers.

The House Managers recommend that the Committee require the parties to submit pre-trial statements one week prior to the beginning of the presentation of evidence. As in the Claiborne proceeding, the pre-trial statements would include a final list of witnesses to be called at trial, a summary of their proposed testimony and a summary of the evidence the parties intend to introduce in support of or in defense to the 17 Articles of Impeachment. In addition, the pre-trial statement should contain a list of the exhibits each party intends to introduce at trial. The exhibits could then be pre-marked, exchanged by the parties and filed with the Committee in advance of trial.

(b) Recommendation.

This proposal should be considered at the meeting of the Chairman and Vice-Chair on April 4, 1989.

8. SCHEDULING OF TRIAL. The Committee should also consider the scheduling of the trial and any procedures that will facilitate a smooth and expeditious presentation of the evidence.

(a) Position of the House Managers.

The House Managers recommend that the Committee schedule the trial in a manner that allows for the presentation of evidence during at least three consecutive days per week, and for five consecutive hours per day (preferably in the afternoon). The House Managers recommend this procedure for two reasons. First, the majority of witnesses to be called will have to travel to Washington, D.C. to testify. In order to ensure that their testimony is completed during one trip, consecutive days and hours of testimony are necessary. Second, significant blocks of trial time are required to ensure a coherent and meaningful presentation of the evidence to the benefit of the Committee and the parties.

In addition, the House Managers are available to present evidence during the one week per month that the Senate is out of session.

(b) Recommendation.

The House Managers ask that the issue of scheduling be discussed at the April 4, 1989 meeting with the Chairman and Vice-Chair.

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Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron /LCP
Alan I. Baron
Special Counsel

Managers of the House of Representatives

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John Conyers, Jr.
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March 31, 1989

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DOCUMENTS MADE AVAILABLE TO THE HOUSE OF REPRESENTATIVES IN THIS IMPEACHMENT PROCEEDING

1. Materials accompanying the Certificate of the Judicial Conference of the United States concurring in the determination of the Judicial Council of the Eleventh Circuit that impeachment of Judge Hastings may be warranted. These materials include the Report of the Eleventh Circuit Investigating Committee, 28 volumes of testimony taken by the Eleventh Circuit Investigating Committee and approximately 2800 exhibits. The House has provided Respondent with either copies of or access to these materials.

2. Record of the Eleventh Circuit Investigating Committee appointed to investigate the disclosure of confidential wiretap information. The House received these materials from Respondent.

3. Working files of John Doar, Counsel to the Eleventh Circuit Investigating Committee. These materials are described in the two orders attached as Addenda A and B to Respondent's First Request for Production of Documents and Other Tangible Material.

4. Records of Grand Jury 81-A (MIA) (investigating the bribery conspiracy) and Grand Jury 86-3 (MIA) (investigating the unauthorized disclosure of wiretap information). The House has provided both records to Respondent.

5. Records of the United States District Court for the Southern District of Florida, In the Matter of the Application of the United States of America for an Order Authorizing the Interception of Wire Communications, Misc. No. 412-Hastings, the wiretap which Respondent was supervising. Respondent has received copies of these materials.

6. Department of Justice investigative and trial files pertaining to the bribery conspiracy case and the investigation into the disclosure of confidential wiretap information. Many documents are duplicative of those contained in categories 1 and 2 above.

7. FBI investigative files and tape recordings, falling into five general categories of documents. Many documents are irrelevant to the charges contained in the Articles of Impeachment or are duplicative of documents contained in categories 1 and 2 above. The FBI redacted the documents prior to providing them to the House. Respondent has been granted access to all tape recordings. The five categories are:

[redacted]

— EXHIBIT A —

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i) documents pertaining to the bribery conspiracy case and the investigation of the unauthorized disclosure of wiretap information, including FBI 302s, teletypes, investigative reports, surveillance records, forensic reports, administrative memoranda, transcripts of tape recordings and newspaper articles.

ii) documents pertaining to the FBI background check prior to Respondent's appointment to the Federal bench.

iii) documents pertaining to an FBI investigation of an alleged terrorist organization believed to have made threats to numerous people, including Respondent.

iv) documents pertaining to other FBI investigations that are irrelevant to the charges in the Articles of Impeachment.

v) documents pertaining to requests by the Eleventh Circuit Investigating Committee for FBI assistance in locating witnesses and documents, and conducting investigations.

NOTE: The House produced a 14 volume Statement of Information that contains all the documentary evidence it relied upon in support of Articles I through XV and XVII. The documents reproduced in the Statement were selected from the categories of documents listed above (excluding category 5) and from those independently gathered by the Subcommittee on Criminal Justice. The House Managers have provided Respondent with a copy of the complete Statement of Information.

In addition, the House has published the materials relied upon in support of Article XVI in Appendix IV to the hearings of the Subcommittee on Criminal Justice in this matter. A copy of that appendix has been provided Respondent.

Finally, the House Managers will provide Respondent with any document in its possession that falls into any of the four discovery categories proposed by the House, if the document has not already been provided.

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Exhibit 3

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SUBMISSION BY MANAGERS, APRIL 4, 1999, ON DOCUMENTS THAT THE HOUSE HAS (OR HAS NOT) PROVIDED TO JUDGE HASTINGS

I. DOCUMENTS PROVIDED JUDGE HASTINGS BY HOUSE

1. House of Representatives' Statement of Information
[14 volumes, containing evidence relied upon by House for Articles I-XV and XVII. Provided May 9, 1988.]

2. 11th Circuit Investigating Committee Report
[768 pages, including appendices of evidence. Provided September 27, 1987.]

3. 11th Circuit Investigating Committee hearing transcripts
[28 volumes of hearing testimony. Provided April 25, 1988.]

4. 11th Circuit Investigating Committee exhibits
[Excluding those listed below in category II. Copied overwhelming majority of the approximate 2800 exhibits. Provided April 25, 1988.]

5. Trial transcript of United States v. Borders
[Provided April 25, 1988.]

6. Record of Grand Jury 81-A (MIA)
[Investigation of bribery conspiracy. Provided May 9, 1988.]

7. Record of Grand Jury 86-3 (MIA)
[Investigation of wiretap leak. Provided May 9, 1988.]

8. Court documents relating to Title III wiretap application
[Includes all progress reports and court orders. Provided May 9, 1988.]

9. Diary of Assistant U.S. Attorney Roberto Martinez
[Relates to wiretap leak. Provided May 17, 1988.]

10. MMAP Conference Schedule dated Sept. 6-7, 1985
[Provided May 17, 1988.]

11. Kevin Gordon Plea Agreement
[Gordon was one of the targets on the wiretap investigation. Provided May 17, 1988.]

12. FBI documents pertaining to wiretap investigation
[Redacted by House to protect individual privacy. Provided December 1988.]

13. Miscellaneous Material printed in Appendix V to Subcommittee Hearings
[includes, for example, U.S. Judicial Conference certification, correspondence and staff interview of Dudley Williams (former law partner of William Borders). Provided Feb. 1989.]

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II. DOCUMENTS IN HOUSE FILES TO WHICH JUDGE HASTINGS HAS BEEN GRANTED ACCESS

Judge Hastings has been granted access to the following documents and was told we would copy any pages he designated.

1. 11th Circuit Investigating Committee Exhibits that were difficult to copy

These exhibits were listed for Judge Hastings. Access granted April 25, 1988.

a) Nos. 1-29 (Borders' message pads)

b) No. 3001 (Hastings' 1981 court diary)

c) No. 3002 (Betty Ann Williams' 1981 court diary)

d) No. 3003 (Courtroom deputy's 1981 diary)

e) Nos. 3004-5 (Hastings' message pads)

f) No. 3006 (Betty Ann Wiliams' 1981 desk calendar)

g) No. 3007 (" " " 1982 " ")

h) No. 3008 (" " " 1983 " ")

i) No. 3009 (1981 diary containing Hastings' personal travel and appointments)

j) No. 3010 (Jan.-April 1983 diary containing Hastings' personal travel and appointments)

k) No. 4500 (used men's purse)

l) Nos. 1103-1653 (Hemphill Pride disciplinary file)

m) No. 4500-A (new men's purse)

2. United States v. Hastings trial transcript

3. United States v. Borders trial exhibits

4. United States v. Romano trial transcript

Access granted April 25, 1988

Judge Hastings has also been provided access to all FBI tapes relating to the bribery conspiracy and wiretap disclosure.

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III. DOCUMENTS IN HOUSE FILES NOT MADE AVAILABLE

1. Working files of John Doar, Counsel to the 11th Cir Investigating Committee
We reviewed all the items listed in Exhibit 1 to the Sept. 25, 1987 Judicial Council Resolution and Exhibit 2 to the October 9, 1987 Judicial Council Resolution. We did not copy all of the documents.

2. FBI investigative files, falling into five general categories of documents
Many documents are irrelevant to the charges contained in the Articles of Impeachment or are duplicative of documents already provided to Judge Hastings. The FBI redacted the documents prior to providing them to the House.

The five categories of documents are:

i) documents pertaining to the bribery conspiracy case and the investigation of the unauthorized disclosure of wiretap information, including FBI 302s, teletypes, investigative reports, surveillance records, forensic reports, administrative memoranda, transcripts of tape recordings and newspaper articles.

ii) documents pertaining to the FBI background check prior to Respondent's appointment to the Federal bench.

iii) documents pertaining to an FBI investigation of an alleged terrorist organization believed to have made threats to numerous people, including Respondent.

iv) documents pertaining to other FBI investigations that are irrelevant to the charges in the Articles of Impeachment.

v) documents pertaining to requests by the Eleventh Circuit Investigating Committee for FBI assistance in locating witnesses and documents, and conducting investigations.

NOTE: We have also reviewed, but at this time do not have copies of, Department of Justice investigative and trial files pertaining to the bribery conspiracy case and the investigation into the disclosure of confidential wiretap information.

NOTE: We will provide Judge Hastings with any documents listed above that fall into the 4 discovery categories proposed by the House Managers.

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Exhibit 4

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

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE
TO JUDGE NIXON'S DISCOVERY REQUEST

The House of Representatives, through its Managers and counsel, responds as follows to the discovery requests of Respondent, Judge Walter L. Nixon, Jr.

Preliminary Statement

As set forth below, the House strongly objects to portions of Respondent's discovery requests. Respondent essentially seeks to duplicate the House's impeachment investigation and gain equal access to every shred of information gathered or reviewed by the House, including information that did not give rise to impeachment articles and will not be at issue before the Senate. Respondent's requests are overbroad and seek the privileged work product of Congress.

A person under investigation by the House or Senate, whether in regard to confirmation to hold public

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office, impeachment to determine fitness to continue to hold office or some other special investigative context, is not entitled to learn everything that Congress discovers about him. As a matter of fairness and due process, a person subject to Congressional inquiry should be entitled to know the charges and specific proof against him. But no broader right of discovery should be afforded to a person under investigation. To grant further access would intrude upon the Congressional investigative prerogative and interfere with Congress' ability to seek the truth. Sources of information will be far less forthcoming if it is understood that everything brought to the attention of Congress will be turned over to the subject of the investigation.

In addition, the wide-open discovery sought by Respondent, as if this were civil litigation only recently filed, is inappropriate given the nature of this proceedings. The impeachment of Judge Nixon comes before the Senate after four (4) years of contested proceedings including a criminal indictment, pre-trial discovery, a two-week jury trial, a post-trial evidentiary hearing, an unsuccessful appeal and petition for writ of certiorari, a motion to vacate the conviction, additional discovery in connection with said motion, a two-day evidentiary hearing

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on the motion to vacate, and lengthy evidentiary hearings in the House whereby Respondent was made fully aware of the facts giving rise to the impeachment charges against him. Even Respondent's own counsel admits that the impeachment articles contain "nothing new."

Under these circumstances, the House Managers assert that discovery in the Senate proceedings should be limited to (1) documents intended to be offered in the case-in-chief; (2) statements that are sworn or adopted by witnesses who will testify at trial; (3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and (4) exculpatory materials.

Accordingly, as set forth below, the House shall provide Respondent all materials falling within the aforementioned categories. Moreover, in the spirit of compromise sought by the Chairman and Vice Chairman during their June 1 meeting with counsel, and to avoid burdening the Committee with discovery squabbles, the House agrees to provide voluntarily the additional material described below. With these concessions by the House, Respondent will obtain the same access to material as that afforded to Judge Alcee L. Hastings of Florida, who is currently facing impeachment charges before a separate Senate Committee.

Request No. 1: All statements, affidavits, transcripts of

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witness statements, and interview memoranda, and memoranda including or referring to statements of witnesses, which have been acquired by Special Impeachment Counsel staff or other investigators or counsel from any other federal agency in connection with any investigation of Judge Nixon.

Response to Request No. 1: The House objects to this request, which is far too broad and seeks the internal, privileged work product of the House and its agents. The House agrees to provide all statements, affidavits and transcripts of witnesses scheduled to testify at trial in these proceedings. However, the House declines to provide materials concerning persons not scheduled to testify. The House also refuses to provide interview memoranda that constitute internal, investigative work product of the House. Exculpatory materials, if any, and from any source, will be provided.

Request No. 2: All documentary materials which have been acquired by the Impeachment Counsel staff, by subpoena or through voluntary production, in the course of the investigation.

Response to Request No. 2: The House objects to this request. Again, Respondent seeks to follow in the footsteps of the House's investigation and gain access to materials that will not be introduced into evidence during the case-in-chief against him. However, in the spirit of compromise requested by the Chairman and Vice-Chairman of the Committee, the House will make available to Respondent

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all subpoenaed records produced by third parties that Respondent would otherwise have an independent right to review, by virtue of his status as an account holder at a bank or similar status. The House declines to produce materials, gained during its investigation through voluntary production by third parties, that will not be introduced in the case-in-chief against Respondent. However, exculpatory materials, if any, and from any source, will be provided.

Request No. 3: All transcripts of grand jury testimony of the Special Grand Jury empaneled on July 18, 1984 in Hattiesburg, Mississippi and any other grand jury (including any grant jury in the Southern District of Mississippi or the Northern District of Florida) that has heard testimony relating to any allegations concerning Judge Nixon.

Response to Request No. 3: The House will provide Respondent with copies of all grand jury testimony of witnesses scheduled to testify at trial. No other grand jury testimony will be provided. Respondent has no right to probe into the secret, grand jury testimony of witnesses who will not testify at trial against him. However, exculpatory materials, if any, and from any source, will be provided.

Request No. 4: With respect to each grand jury identified in connection with the previous paragraph, all documentary exhibits and other materials received by the grand juries referred to in the proceeding paragraph.

Response to Request No. 4: The House will provide

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Respondent with any grand jury materials that will be used in the case-in-chief against him. No other grand jury exhibits or documents will be provided. However, exculpatory materials, if any, and from any source, will be made available to Respondent.

Request No. 5: FBI and Justice Department investigative files that have been reviewed by the Special Impeachment Counsel staff since March of 1988, including the memoranda recommending prosecution of Paul "Bud" Holmes of Hattiesburg in 1985, Wiley Fairchild of Hattiesburg in 1984, and Judge Nixon in 1985.

Response to Request No. 5: The House will provide Respondent with any materials that will be used in the case-in-chief against him. Moreover, in the spirit of compromise requested by the Committee, to the extent acceptable to the FBI the House will make available that agency's investigative files as was done in pre-trial discovery in the impeachment proceedings involving Judge Alcee L. Hastings. No other materials sought in this request in the possession of the House will be produced. However, any exculpatory materials, from any source, will be provided to Respondent.

Request No. 6: The identity of any expert witness consulted by the House Managers or the House Impeachment Counsel staff in connection with this proceeding, and, if the expert witness is expected to testify in this proceeding, all writings and correspondence between that expert witness and the House Managers

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and the House Impeachment Counsel staff.

Response to Request No. 6: The House has consulted with Professors Andrew Kaufman of Harvard Law School and Steven Lubet of Northwestern University School of Law. Respondent is familiar with these gentlemen and had the opportunity to cross-examine them during Subcommittee hearings. If these experts are scheduled to testify, the House will provide the requested correspondence in the spirit of compromise requested by the Committee, so long as Respondent provides the House with reciprocal material concerning any expert who may be scheduled to testify on behalf of Respondent. Any exculpatory material will be provided to Respondent.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (REK)
Alan I. Baron
Special Counsel

Managers of the House of Representatives

Jack Brooks
Don Edwards
Benjamin L. Cardin
F. James Sensenbrenner
William E. Dannemeyer

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In The Senate of the United States

Sitting as a Court of Impeachment

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

THE HOUSE'S CONSOLIDATED OPPOSITION TO
JUDGE G. THOMAS PORTEOUS, JR.'S MOTION TO COMPEL AND
MOTIONS FOR ASSISTANCE IN SECURING DISCOVERY

The House of Representatives ("House"), through its Managers and counsel, respectfully submits to the Committee this consolidated opposition and response to the three motions filed by Judge Porteous on June 27, 2010, related to pre-trial discovery in this case.[1]

I. OVERVIEW

The Senate Impeachment Trial Committee ("Committee") set a deadline for filing discovery motions in this matter of May 28, 2010. Nevertheless, a month after that deadline passed, Judge Porteous has filed three motions related to discovery matters. These motions should be denied on both procedural and substantive grounds.

Judge Porteous's Motion to Compel is nothing more than a rehash of document requests that he previously sought in his May 28, 2010 Motion for Discovery from the House Managers.

[1]This Opposition addresses: (1) Judge G. Thomas Porteous, Jr.'s Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives and Requested for Expedited Consideration ("Motion to Compel"); (2) Judge G. Thomas Porteous, Jr.'s Motion for Assistance in Securing Discovery from the Department of Justice ("Motion for Assistance"); and (3) Judge G. Thomas Porteous, Jr.'s Motion for Assistance in Securing Discovery from the Metropolitan Crime Commission ("Motion for Assistance").

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The Committee already carefully considered and ruled upon Judge Porteous's initial discovery motion, granting the motion in part, but denying it with respect to several overly broad and unreasonable requests. Apparently dissatisfied with the Committee's Disposition of Discovery Issues ("Disposition"), Judge Porteous in his Motion to Compel now repeats his requests, thereby seeking to have the Committee address an issue previously resolved. To this end, Judge Porteous has advanced nothing new to support the relief he seeks.

Judge Porteous has also filed two Motions for Assistance in Securing Discovery. The first seeks assistance in securing discovery from the Department of Justice ("DOJ"). The second seeks assistance in securing discovery from the Metropolitan Crime Commission ("MCC"). These requests are also without merit as a matter of both process and substance. As to the request related to the DOJ, Judge Porteous is asking the Senate to request that the DOJ and the FBI devote substantial resources to review and make available an immense collection of documents that cannot reasonably be seen as relevant to his defense. Moreover, it is foreseeable that this sweeping and untimely request, if granted, would be a prelude to further requests for continuances and litigation over process that is far-removed from the factual issues in this case. As to the request related to the MCC, it is apparent that Judge Porteous has not even reviewed the MCC materials that have been made available from the House, nor has Judge Porteous asked the House if it has produced all MCC documents. Instead, Judge Porteous has moved straight to a request for the Senate to chase down what are irrelevant and likely non-existent materials, again, with no showing of specificity or need.

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As discussed in greater detail below, Judge Porteous's three discovery motions should be denied.

II. HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION TO COMPEL

A. JUDGE PORTEOUS HAS ALLEGED NOTHING NEW TO WARRANT THE COMMITTEE REVISING ITS DISCOVERY DISPOSITION

There is nothing whatsoever in Judge Porteous's pleading which warrants the Committee revisiting its prior discovery Disposition. Indeed, substantial portions of the two pleadings are nearly identical. For example, Judge Porteous's Motion to Compel argues:

> What is particularly notable is that the Hastings impeachment followed an [sic] criminal indictment and a full trial in a federal court. Substantial evidence had been presented in the public record, and had been tested under the beyond-a reasonable-doubt standard. Thus, as in the impeachment of Judge Walter L. Nixon, Jr., the House and Senate were able to benefit from a detailed trial record. . . .
>
> In this case – where there is no prior indictment, no Court-ordered discovery, and no previous trial – the material already available to Judge Porteous is substantially less than that which was available to Judges Hastings and Nixon.[2]

This is the identical argument Judge Porteous made in his initial request for discovery, in which he sought limitless access to the House files:

> In each of the three prior cases involving a Rule XI committee, the House of Representatives returned Articles of Impeachment against a district judge after that judge had been indicted and tried at a criminal jury trial. . . . As a result, in those cases, by the time the issue of discovery arose before the Senate Impeachment Trial Committee, the parties had developed a record at a federal criminal trial and had been involved in extensive discovery prior to the return of the Articles of Impeachment. Thus, before

[2] Motion to Compel at 8-9.

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> appearing before the Senate Impeachment Trial Committee each of these judges had the opportunity to cross-examine the government's witnesses, inquire in to the validity of documents presented as evidence against them, and call witness on his own behalf.[3]

Though Judge Porteous's Motion to Compel has cited to additional sources in connection with describing prior Impeachment proceedings, the essence of Judge Porteous's instant argument is no different from that made in his prior discovery motion.[4] Apparently, Judge Porteous concluded that the Committee did not understand his arguments the first time they were raised. That is not the case.

The Committee considered Judge Porteous's May 28, 2010 initial discovery motion, and in its Disposition dated June 9, 2010, it carefully addressed his discovery requests. There is simply no basis to allow Judge Porteous a "do-over" and permit him to re-argue points that have already been raised and decided simply because he is dissatisfied with this Committee's Disposition.

B. AS A MATTER OF SUBSTANCE, JUDGE PORTEOUS HAS ALLEGED NOTHING TO WARRANT THE COMMITTEE REVISING ITS DISCOVERY DISPOSITION

Furthermore, as a factual matter, Judge Porteous's Motion to Compel alleges nothing new that would justify the Committee to revisit its Disposition.

The House has set forth the background associated with discovery both in prior pleadings and in correspondence it has provided to the Committee, but the salient facts include the following:

---

[3]Motion of Judge G. Thomas Porteous, Jr. For Discovery From the House Managers (May 28, 2010), at 1-2.

[4]Accordingly, the House relies upon and incorporates by reference its reply to that argument, set forth in Response by the House of Representatives to Motion of Judge G. Thomas Porteous, Jr. For Discovery from the House Managers (June 4, 2010), at 5-7.

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1. The House provided Judge Porteous with an exhibit list on March 23, 2010 and an accompanying disc containing the exhibits. These materials account for nearly the entirety of the House's case, and Judge Porteous received them six months prior to trial. When these materials (which include witness testimony) are reviewed in conjunction with the highly detailed Impeachment Report, it is evident that Judge Porteous has been provided with what is close to a line-by-line preview of the House's case. There is no credible contention that Judge Porteous will be surprised at trial or that he does not know the evidence that he needs to address.[5]

2. On April 9, 2010, Judge Porteous's attorneys reviewed materials in the House's possession (document review 1). These included, generally, financial records of Judge Porteous and third parties (such as credit card records of some of the witnesses, and bank records of Judge Porteous's secretary, Rhonda Danos).[6] Although invited to do so, the attorneys made no request to copy any portion of these records.

3. On May 20, 2010, Judge Porteous's attorneys reviewed additional materials in the House's possession (document review 2). These consisted of complete and un-redacted sets of materials, from which only a subset had been marked as a trial exhibit. After their review, Judge Porteous's

[5]In that March 23 letter, the House also apprised Judge Porteous's counsel that it had additional materials obtained from third parties that it would make available for inspection and copying.

[6]A significant portion of these materials consisted of financial records that were the bases of various summary charts that were introduced at the Fifth Circuit Hearing. All of these underlying financial records were themselves made a part of the official record in the Fifth Circuit, pursuant to Judge Porteous's request.

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attorneys requested a complete copy set of these materials. The House provided the materials the next day.

4. On May 26, Judge Porteous's attorneys reviewed additional materials identified by the House, generally consisting of Marcotte-related credit card and business records. Again the attorneys made no request to copy any of these records (document review 3).

5. The House identified what it believes to be a final collection of discoverable materials, and so informed both Messrs. Turley and Westling by way of a letter dated June 15, 2010. Also included was an updated exhibit list and updated disc of exhibits. The House also sent new counsel a letter dated June 22, 2010, making available the documents that were previously inspected (document reviews 1 and 3), and reiterating that a collection of documents referenced in the June 15 letter was still available for inspection and copying. On June 24, 2010, new counsel reviewed the materials that were previously part of document reviews 1 and 3 as well as the new materials (document review 4). As of June 27, 2010 – the date that Judge Porteous filed his Motion to Compel – Judge Porteous's attorneys had not sought copies of any of these materials that counsel reviewed on April 9, May 26, or June 24.[7]

[7]On June 30, 2010, Judge Porteous's attorneys sent an email to the House seeking to continue their review of documents in the House's possession and to make arrangements for copying.

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The House has complied in good faith with the Committee's Disposition of Discovery Issues, and discovery is now complete.[8] Nothing in Judge Porteous's Motion to Compel provides any reason to conclude otherwise. Simply put, nothing has transpired since the issuance of the Committee's Disposition and Judge Porteous's filing of his Motion to Compel that provides any basis for the Committee to reconsider its Disposition or to support the conclusion that relevant materials covered by that Disposition have not been produced. Though Judge Porteous objects to the House making the determination of relevance associated with the production of documents,[9] that is precisely the burden that the Committee has required of the House, and the Committee has every reason to expect that the House has complied and will continue to comply with this obligation in a conscientious manner. It is also the burden placed upon counsel in civil and criminal litigation.[10] The House knows what is relevant to the four Articles of Impeachment, and Judge Porteous has never articulated any other factual theories that may constitute defenses that fall outside any reasonable understanding of the scope of those Articles.

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[8]The House recognizes the on-going nature of its discovery obligations, and if it locates or obtains additional discoverable materials, it will produce them to Judge Porteous promptly.

[9] "Only Judge Porteous's counsel can determine what materials in the Special Impeachment Counsel's possession may lead to evidence relevant to Judge Porteous's defense." Motion to Compel at 5.

[10]As a practical matter, it is nearly always the case that a party producing discovery makes commonsense decisions as to whether materials are discoverable under a "relevance" standard, and it is never the case that one party is provided access to all materials in the other party's possession solely on the claim that that the producing party cannot be trusted to determine what may be relevant to its case. No litigant is permitted access to the opposing party's warehouse of files so that it may pick and choose what materials it wants, on the argument that presumably, every document in the warehouse "touches upon" the case.

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Indeed, Judge Porteous's discovery position should be evaluated in light of the fact that he has offered no competing version of facts, and he has been unable to articulate or explain exactly what it is that he is looking for to support his defense. It is apparent that his view of discovery is essentially that he be given the right to "fish" through document collections to see what he can come up with.[11] As but one example, Judge Porteous seeks materials that relate to "uncharged offenses" because such materials "may" lead to exculpatory information – a contention that is not only speculative in the extreme, but runs contrary to common sense. In any event, counsel for the House recognizes its obligation to turn over any exculpatory materials that come into its possession. In essence, Judge Porteous would have the Committee revisit the relevance standard and replace it with a standard that would permit him access to inspect all materials that "touch upon" the investigation – even materials that are irrelevant to the Articles. He equates "discovery" with unlimited access to the House's files. And, as discussed in the next Sections, Judge Porteous's two motions for Committee assistance likewise reflect little more than a desire to see what else may be out there in the possession of third parties. The Committee rightfully rejected these arguments as to the

[11]Judge Porteous in fact admitted before the Fifth Circuit Special Committee significant aspects of the factual allegations in two of the four Articles of Impeachment, such as his receipt of monies from Creely and Amato prior to taking the Federal Bench, his solicitation and receipt of cash from Amato while the Liljeberg case was pending, and his receipt of the payment of various expenses from Creely in connection with his May 1999 trip to Las Vegas (Article I). These are fully discussed in the Report. Judge Porteous has also admitted that several aspects of the bankruptcy petition were not true, though he has testified that these false statements were either by innocent mistake or otherwise without the intent to defraud (Article III). Notwithstanding the blanket denial in Judge Porteous's Answer to the Articles of Impeachment, numerous critical facts are likely to be uncontested.

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scope of discovery, and Judge Porteous has provided no grounds to suggest that the Committee should revisit that decision.

Relying on his own views of discovery, Judge Porteous contends in his Motion that the House has "withheld" documents. If by the use of that term Judge Porteous seeks to imply that the House has failed to produce documents that the House should produce pursuant to the Committee's Disposition, then the House denies that allegation and again stresses that there is nothing in Judge Porteous's pleading that suggests otherwise. If Judge Porteous simply uses that term to suggest that the House has not produced irrelevant documents, then his use of the term "withheld" to describe that practice adds nothing to his claims.[12]

Further, it is difficult to take seriously Judge Porteous's attempts to litigate discovery when he has not made even a cursory effort to actually obtain documents that have been made available to him prior to filing his Motion to Compel. For example, the

[12]Indeed, Judge Porteous's reliance on loaded phrases and ad hominem attacks serves primarily to highlight the lack of real substance to his claims. For example, Judge Porteous asserts: "[the House's position is] gamesmanship . . . ;" "[the House's position is] particularly alarming . . . ;" "[implying the House is] skirmish[ing] for tactical advantage . . .; " "[implying the House] appear[s] to be making up for evidentiary shortcoming through tactical maneuvers that would deny Judge Porteous access to evidence and time necessary for a proper defense. Such tactics should be condemned in a standard criminal case, and should be anathema in a criminal trial." Even though this is decidedly not a criminal case, Judge Porteous's final comment in particular betrays ignorance of discovery in criminal cases, where witness statements are not ordered to be produced until after the witness testifies, where third party non-testifying witness statements are not typically produced or required to be produced (unless they are exculpatory), where the Government does not provide a published report describing its case, and where the Government's obligation to produce information "material to the preparation of the defense" has never been interpreted as permitting a defendant the right to rummage through the prosecutor's files because the prosecutor cannot be trusted to make such a determination himself and because, presumably, everything in the prosecutor's files "touches upon" the investigation. See Fed. R. Crim. Pro. 16. Discovery in this case is accordingly far broader – not narrower as Judge Porteous implies. Judge Porteous describes the law as he wishes it were, not as it is.

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House marked as a trial exhibit only certain pages of the documents obtained from the Metropolitan Crime Commission (the "MCC"), but made available to Judge Porteous's counsel all documents that it obtained from the MCC. Significantly, Judge Porteous has not sought to copy the remainder of the MCC documents or even to inquire of the House whether Judge Porteous has been provided all materials from the MCC. Instead, Judge Porteous has filed a motion seeking the United States Senate to intervene with a public interest "good government" group in New Orleans.

Because Judge Porteous has failed to justify having the Committee take the extraordinary step of revisiting its Disposition, Judge Porteous's Motion to Compel should be denied.

III. THE HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE DEPARTMENT OF JUSTICE

It should be made clear at the outset that all relevant Wrinkled Robe materials the House has received from the Department of Justice have been given to or made available for inspection by Judge Porteous.

Judge Porteous has requested that the Senate Committee assist him in seeking eight categories of documents from the Department of Justice. The House objects to that request as it relates to the last six categories – generally involving the Wrinkled Robe investigation – because of the lack of any meaningful showing of relevance, the sheer breadth of the requests, the inexcusable delay in making them, and above all, the inevitable delay in these proceedings which would result from acceding to this request.[13]

[13]The first two categories of materials sought from the Department suffer from some of the same defects, though the requests are at least somewhat narrower in scope and have facial relevance to Article IV. As a practical matter, the House does not object if the Senate were to request the Department of Justice to search for additional materials in the

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The Wrinkled Robe investigation involved the convictions of approximately 20 individuals for corruption at the Jefferson Parish, Louisiana courthouse, including two state court

judges and law enforcement personnel, arising from the provision and receipt of things of value from bail bondsman Louis Marcotte and his sister Lori Marcotte. The investigation commenced in or about 1999, with search warrants and wiretaps subsequently being executed. Because Judge Porteous had been on the Federal Bench since 1994, he was not a target in that investigation (though his relationship with the Marcottes was described in the FBI's affidavit in support of its request for wiretaps). There are thus relatively few materials relating to Judge Porteous that were obtained by the FBI in that investigation, and those that did relate to him – including some calendars from the Marcottes' bail bonds business that reflected meals with Judge Porteous in the mid to late 1990s and other evidence related to meals (such as credit card records) – were obtained by the House and have been made available to Judge Porteous.

The breadth of Judge Porteous's request related to the Wrinkled Robe materials is simply staggering. He seeks all material from that investigation that "relates to the setting, modifying, and/or splitting of bail bonds" and which relates to "Louis Marcotte, and Lois [sic] Marcotte." Each of these two categories would appear to encompass the

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nature of rough notes, for example, related to the FBI's interviews with Judge Porteous, Louis Marcotte and/or Robert Creely, in that Judge Porteous's statements are at issue, and Louis Marcotte and Robert Creely are likely witnesses. Those would be the only interviews that would conceivably be relevant. As a factual matter, the House has been advised that such notes do not exist. Accordingly, the House respectfully suggests that a letter to the DOJ and the FBI asking if such materials exist might be a better way of dealing with this issue. The House reiterates that it does not possess those materials. Furthermore, it is the House's understanding that it has been provided by the DOJ the complete background investigation, which the House, in turn, has provided to Judge Porteous.

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entirety of the investigative materials. Another of the requests – for material that "relates to gifts, money, or other items of value received by judges, magistrates, or other judicial officers in the Jefferson Parish Courthouse" seeks review of massive amounts of evidence that can have no conceivable relevance to this Impeachment.

Granting Judge Porteous's request, in the absence of any coherent showing by Judge Porteous of potential relevance of the documents or a description with some precision of what exactly Judge Porteous is looking for, virtually guarantees procedural delay and opens the door to additional litigation. The access sought by Judge Porteous would almost certainly require that the DOJ and the FBI devote substantial resources – hundreds of hours – to the task of locating, organizing and reviewing materials prior to making them available to Judge Porteous. In particular, the FBI (as well as, in all likelihood, the Assistant United States Attorneys assigned to the case) would need to review materials to protect source information, wiretap information, grand jury information, and financial record information. The DOJ/FBI would not only need to search hundreds of boxes of hard copy records, but computerized and electronically stored materials as well. If DOJ were to agree to that task, and if the conduct of the trial were to await its completion and counsel's review, these proceedings would grind to a halt.

Moreover, as noted at the outset of this Section, Judge Porteous has failed to provide any compelling explanation as to why such documents are even relevant to his defense. Whether state judges were or were not prosecuted cannot possibly be relevant to whether Judge Porteous committed the acts alleged in Article II. Similarly, whether the usable evidence available to DOJ supporting the prosecution of other judges was greater

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or lesser than the evidence against Judge Porteous cannot possibly be relevant to whether Judge Porteous committed the acts alleged in Article II. This Impeachment is thus quite unlike the Hastings Impeachment. In that case, Judge Hastings sought the FBI to produce documents related to its investigation of Judge Hastings. In this case, Judge Porteous explicitly seeks that the FBI produce records that are nearly entirely related to the investigation of third parties. What Judge Porteous seeks is little more than the proverbial "fishing" expedition, and the Senate should not bait the hook for that effort.

Furthermore, Judge Porteous's Motion for Assistance marks the first time that the House has been made aware of Judge Porteous's desire to review documents in the FBI's possession. We note that in Judge Porteous's discovery letter of May 6, 2010, counsel did not seek from the House its assistance in obtaining access to the massive collection of Wrinkled Robe documents in the DOJ's or FBI's possession or otherwise inquire as to those documents. In the same vein, Judge Porteous's discovery motion filed on May 28, 2010 did not seek access to documents in the DOJ's or FBI's possession, nor did it seek the Committee's assistance in obtaining those documents. Only on June 27, 2001, one month after the filing deadline for discovery motions, did Judge Porteous for the first time state that he needed the "immediate assistance of the Senate in procuring these materials" – the existence of which has been known to Judge Porteous for years.[14] If these documents were truly important and relevant, Judge Porteous would have sought access to them months ago. Instead, the untimely and sweeping nature of the request, made late in the day, unsupported by any reasonable showing of relevance or specificity,

[14]The mere substitution of counsel does not justify or explain Judge Porteous's decision at this stage of the proceedings – three months subsequent to the House making its first document production – for the defense.

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on the heels of prior requests for continuance and delays, only underscores the request's lack of merit. Accordingly, Judge Porteous's request for Committee assistance should be denied.

IV. THE HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE METROPOLITAN CRIME COMMISSION

In 1994, the Metropolitan Crime Commission of New Orleans, responding to a complaint, investigated Judge Porteous's actions in setting aside the conviction of a Marcotte employee, Aubrey Wallace, in the last days of Judge Porteous's tenure on the state bench. Ultimately, the MCC concluded that the judicial action was improper but that there was nothing it could do because Judge Porteous was by that time a Federal Judge.

The MCC provided a portion of its investigative files to the Department of Justice, and the Department has since provided those materials to the House. Separately, in 2009, the MCC provided directly to the House what the House believes to be the MCC's complete file. The House has marked a portion of the MCC documents as exhibits for potential use at the Impeachment trial, and has made the remainder of the MCC documents available for Judge Porteous's defense team to review. Significantly, as of June 27, 2010 – the date Judge Porteous filed his Motion for Assistance – he had not sought to copy those MCC documents which have been made available to him.

Even putting aside that the House believes it to be unlikely that the MCC actually possesses other documents related to Judge Porteous, the House urges the Committee to reject Judge Porteous's request. As with his request for Wrinkled Robe materials, Judge Porteous does not seek to invoke the Committee's assistance to request that the MCC

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provide any particular documents to support a particular evidentiary or factual theory. Rather, Judge Porteous seeks that the Committee help him determine whether the MCC has any additional documents – regardless of relevance – and if so, to make them available. This is precisely the sort of "fishing" expedition that is disapproved in the discovery process, and Judge Porteous has made no showing that would justify the Committee's intervention, particularly where he has not yet obtained or looked at the MCC documents which have been made available.

WHEREFORE, the House requests Judge Porteous's Motion to Compel and Motions for Assistance be denied.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

July 1, 2010

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Attachment One

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United States Senate
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
DISPOSITION OF PRETRIAL ISSUES
FOURTH ORDER

Upon consideration of the submissions of the parties and after hearing from them at the pretrial conference of May 18, 1989, the chair, in consultation with the vice chair, issues the following rulings on behalf of the committee:

Stipulations

Senate Resolution 480 of the 100th Congress, which was agreed to on September 30, 1988, requested the parties to work together to stipulate to evidentiary matters that are not in dispute and to report to the Senate on the stipulations to which they had agreed. On December 15, 1988, the House served proposed documentary and factual stipulations. On February 20, 1989, the parties reported to the Senate that they had reached no agreement on any stipulations.

On January 17, 1989, by which time it may have become apparent that a voluntary stipulation process would not be productive, the House proposed that the Senate "adopt a rule that would hold that any proposed stipulation of fact filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true." The House also requested that the Senate "adopt a parallel rule addressing

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the authenticity of documents, which would establish that any proposed stipulation regarding the admissibility of a document filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true." Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration, at 2-3.

On March 31, 1989, the House renewed its proposals on admissions concerning facts and documents, and resubmitted its stipulation of facts in revised form. In a filing with the committee on April 2, 1989, Judge Hastings stated his opposition to the House's proposals for stipulations prior to trial. A Further Memorandum on Pre-Trial and Trial Procedures Necessary for a Trial that is Fair to Respondent, at 31-32.

The committee heard oral argument by the parties on April 12, 1989, and issued its first order on pretrial issues on April 14, 1989. In that order, the committee adopted the House proposal that any proposed stipulation of fact be accepted as true unless the opposing party files an objection, including a proffer as to why the proposed stipulation should not be taken as true. A like rule was adopted for the stipulations as to documents. By its second order, dated April 21, 1989, the committee extended to May 17, 1989 the date for the filing of Judge Hastings' response to the House

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stipulations. The second order also extended until May 17, 1989, the date for Judge Hastings to file his own stipulations, which, like those of the House, would be accepted as true unless a specific objection was filed. Judge Hastings chose not to file his own stipulations.

Judge Hastings' Response to Stipulations Proposed by the House, which was received by telecopy on May 18, 1989, does not comport with the committee's order. Judge Hastings has in large part failed to respond to the stipulations proposed by the House. Although his response makes certain generalized objections, a few specific objections, and several generalized concessions, the committee in most cases is unable to determine Judge Hastings' position with respect to particular House stipulations. Instead, Judge Hastings, without having asked the committee to reconsider the April 14, 1989 order at any time between its issuance and the May 17, 1989 date for compliance, argues that he should not be required to take part in this process of identifying those matters that are not truly in contest. While the committee appreciates the inevitable burdens which these proceedings impose on all concerned, it believes that these burdens can best and most efficiently be discharged by complying with its orders, rather than by reiterating at length the difficulties of compliance.

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The committee continues to believe that both parties as well as the Senate will benefit from a narrowing of the issues to those matters which are truly in dispute. The committee accordingly will review the stipulations proposed by the House and give careful consideration to any specific objections that it is able to identify in Judge Hastings' May 18, 1989 response and in any supplement that he may file to that response by June 1, 1989. Upon completion of its review, the committee will issue a ruling that sets forth the matters which shall be deemed to be found as true as a matter of record for purposes of the committee's evidentiary proceedings and its report to the Senate of matters that are not in dispute.

If Judge Hastings wishes to participate further in this process of distinguishing contested from uncontested issues, he may submit an additional response to the House's proposed stipulations on or before June 1, 1989. That response shall set forth for each proposed fact and each document his specific objection, or lack of objection, to each particular stipulation. In so doing, Judge Hastings should respond to each factual and documentary stipulation proposed by the House: for example, that a particular document is authentic or is a business or public record, or that a particular fact is true. He need not address whether a particular document or fact is relevant and admissible in evidence.

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Although the House has referred to its "proposed stipulation[s] regarding the admissibility of a document," see page 2 supra, we agree with both parties that documentary admissions need go no further than the genuineness of the documents and, for those categories specifically identified by the House, their status as records of regularly conducted activities or public records, see Proposed Stipulations of Documents, filed December 15, 1988, at 1. Admissions concerning facts also need go only to their truth and not to their relevance.

Depositions

By its April 14, 1989 order, the committee advised Judge Hastings that it would consider his request to take pretrial depositions if he provided a list of, and certain information concerning, his proposed deponents. Judge Hastings responded with a Request for Specific Depositions, filed on May 10, 1989, in which he asked that subpoenas be issued for sixteen individuals. The House, on May 16, 1989, filed a request for the issuance of deposition subpoenas, naming three individuals.

In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition

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could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.

For persons whom Judge Hastings designates as "Participants in Borders's Scheme," the committee declines to issue the requested subpoenas for Rebecca Sutton Nesline and Peter Chaconas. No showing has been made that either Rebecca Sutton Nesline or Peter Chaconas has knowledge of any matter relevant to the Articles of Impeachment. With respect to Joseph Nesline, before deciding whether a threshold showing has been made which might justify the issuance of a subpoena, the committee requests that the House make available to the committee the information in the House's possession concerning Mr. Nesline's competency as a witness.

The committee will grant Judge Hastings' request for the issuance of a subpoena to William Dredge for pretrial testimony. Although Mr. Dredge's testimony before the Eleventh Circuit Investigating Committee is available to Judge Hastings' counsel, the committee has decided to permit a pretrial examination of Mr. Dredge because Judge Hastings has argued that Mr. Dredge's testimony may be especially central to his defense. The committee requests that the parties confer with each other on arrangements for a pretrial examination of Mr. Dredge and that they advise the committee about available dates for that examination so that a subpoena

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may be issued for a suitable time.

Concerning the FBI and Justice Department officials for whom Judge Hastings requests the issuance of deposition subpoenas, Judge Hastings is ordered, on or before June 1, 1989, to provide the committee with a list of the three individuals, in order of priority, whom he deems most important to depose. In compiling that list, he should be mindful of whether or not he has access to the individual's prior testimony. He should also furnish to the committee at that time any supporting information, including documentation, which supports his claim that these persons possess knowledge relevant to the Articles of Impeachment, and shows that he is in fact unable to obtain information voluntarily from those persons. The committee will then determine whether it will issue subpoenas for their pretrial examination.

With respect to the House requests, the committee declines to issue subpoenas for Marilyn Carter and Alan G. Ehrlich, both of whom have given previous testimony which is available to the House for its trial preparation. In contrast to Mr. Dredge, whose pretrial examination we will allow, there is no indication that either of these witnesses is sufficiently central to these proceedings to warrant the issuance of subpoenas for their pretrial examination. The committee has decided that a subpoena shall issue for Joanne Tyson Colt, who was a law clerk in Judge Hastings' chambers

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in October of 1981, who has never previously testified, and who has refused to be interviewed by the House. The requested subpoena shall issue for her pretrial testimony after counsel for the parties have advised the committee about available dates for Ms. Colt's pretrial examination.

Conduct of Evidentiary Hearings

Pursuant to the committee's second pretrial order, issued on April 21, 1989, the committee heard from the parties at the May 18, 1989 pretrial conference on various proposals concerning the conduct of the evidentiary hearings which shall begin on July 10, 1989. To the extent that Judge Hastings' submissions to the committee should be understood to be a request to postpone those hearings, that request is denied.

One of the issues that the parties addressed, at the committee's request, was whether the evidentiary proceedings should be bifurcated to permit the taking of each party's evidence first on the bribery and perjury articles and second, after receiving all the evidence on those matters, on the wiretap disclosure article. Judge Hastings objects to bifurcation because it would require him, if he testifies, to divide his testimony into two parts. We will respect Judge Hastings' objection and will not bifurcate the evidentiary hearings. The committee will accommodate the interest of the House in deferring, if it so wishes, the portion of its

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opening statement on the wiretap disclosure issue to the point in the presentation of its evidence when it is prepared to present its case on that issue.

At the May 18, 1989 conference, the parties also briefly discussed whether it would be appropriate to permit introduction of prior testimony, taken in United States v. Borders, United States v. Hastings, and before the Eleventh Circuit Investigating Committee, in place of taking live testimony before this committee. The committee believes that the use of such prior recorded testimony is desirable in certain circumstances, particularly, for example, where the testimony is not that of a key witness whose credibility is at issue, and encourages its use consonant with fairness to the parties and the development of a coherent record for use by the Senate.

Accordingly, both parties are directed to file and serve, no later than June 14, 1989, an identification of the prior testimony which, to the best of their knowledge, they in fact intend to offer into evidence. That identification shall: (1) specify the proceedings from which the proffered testimony is drawn, (2) append a copy of the proffered testimony, and (3) briefly state why the party believes that it would be appropriate to submit that particular testimony by way of prior recorded testimony rather than through a live witness. Each party shall in its pretrial statement on

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June 21, 1989, state, for each such proffer of prior testimony by the opposing party, whether or not it objects to introduction of that prior testimony and, if so, the specific nature of its objections.

The parties were also invited to suggest ways in which the evidentiary proceedings could be structured to permit the taking of evidence within a three-week period of time. In response, the House suggested that the committee adopt the procedure, used by United States District Judge Pierre Laval in the Westmoreland v. CBS defamation case, of dividing a predetermined number of hours between the parties, leaving each side free to determine how its case can best be presented within the available time. Judge Hastings has not responded to the particulars of the House proposal or offered any specific proposals of his own.

The committee believes that guidelines, fairly and flexibly applied, must be adopted to facilitate realistic trial preparation and to enable the Senate and the parties to focus on matters that will be important to the Senate's disposition of the Articles of Impeachment. In framing their final pretrial statements, due on June 21, 1989, and in preparing for the evidentiary proceedings which will commence on July 10, 1989, the parties should operate within guidelines premised on the availability of eighty trial hours during the course of three weeks of hearings. Reserving several hours for miscellaneous matters, the parties should

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anticipate that they will each have thirty-eight hours in which to present their evidence on all matters, dividing their time as each sees fit between direct and cross-examination. In addition, each party may present an opening statement of no longer than one hour, which, if either party wishes, may be divided into two portions.

The parties should address in their final pretrial statements of June 21, 1989, and be prepared to discuss at the pretrial conference on June 22, 1989, the amount of time which they intend to allocate to direct testimony, whether by prior or live testimony, and whether their preparation has shown that some modification of these guidelines is necessary. The committee is mindful that the foregoing guidelines may need adjustment, both before commencement of the evidentiary proceedings and in the course of those proceedings, and that there must, and will, be flexibility in their application.

An additional order providing further details about the required content of the final pretrial statements will be issued shortly.

Jeff Bingaman
Chairman

Arlen Specter
Vice Chairman

May 24, 1989

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

July 1, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous

Dear Senator McCaskill and Senator Hatch:

On June 27, 2010, the defense filed a Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives (the "House") in its investigation and impeachment of Judge G. Thomas Porteous, Jr. In that Motion, the defense noted that a recent review of previously withheld documents revealed obviously relevant and material evidence. House Impeachment Counsel have opposed the requested inspection and have refused to provide a general listing of still withheld files, despite past precedent in other impeachment trials. House Impeachment Counsel claim they have produced, or made available, all relevant discovery to the defense. That is simply incorrect. This letter is to raise a disturbing example of material identified among the withheld evidence which should have been produced to Judge Porteous.

Yesterday, the House filed a "Supplemental Filing in Support of its Preliminary Requests for Subpoenas and Immunity." Included in that filing was a list of individuals for whom the House seeks a subpoena from the United States Senate. That list includes Michael J. Reynolds. Mr. Reynolds is referenced by name in the House of Representatives Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana (Report 111-427, dated March 4, 2010, hereinafter "House Report."). Specifically, on page 76, footnote 369, the House quotes a statement purportedly made by Mr. Reynolds during a "Task Force Staff Interview" taken on January 5, 2010. The defense has not received a copy of the transcription, notes, or summary of this Task Force Staff Interview. Further, based on the defense's review to date, we do not believe that the House has made such materials available for inspection and copying. Given the House's use of and reliance upon such

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quoted statements, such material is clearly relevant and material.[1]

According to House report, the Task Force Staff "interviewed over 70 individuals," many of who "were not deposed." *See* House Report at 7 and footnote 1. In addition to Reynolds, the House references other interviews with key witnesses as part of the investigation of Judge Porteous, including (1) Justice of the Peace Kevin Centanni (*id.* at fn. 380), (2) Amwest official Norman Stotts (*id.* at fn. 395), (3) U.S. Bankruptcy Judge William Greendyke (*id.* at fn. 531), and (4) Sharon Konnerup (*id.* at 123.) These were all interviews conducted as part of the investigation of Judge Porteous and part of the record leading to his impeachment. This material is obviously relevant and discoverable.

Yesterday, after receiving the House filing with the listing of Reynolds, the defense, through a letter to the House Impeachment Counsel, demanded the production of the Reynolds interview material. The defense also requested, among other things, that the House produce all documents created in connection with any other Task Force Staff Interviews. The House declined to respond to this request, prompting this letter to the Senate Impeachment Trial Committee.

The House Counsel has yet to state a compelling public purpose served by withholding evidence, particularly in a constitutional process designed to ensure the greatest possible scrutiny before the removal of a federal judge. Not only is the House withholding obviously material evidence but it is even opposing the standard request that the Senate request relevant material from the Justice Department and Metropolitan Crime Commission – material that the House likely already possesses in full or in part. Similar materials have been provided in prior impeachment proceedings, but House Impeachment Counsel seeks to exploit their advantage as "prosecutor" by blocking even this modest request in an apparent effort to disadvantage the accused in every possible way. House Impeachment Counsel contend that Judge Porteous' requests are just an excuse to delay further the hearing in this case. In fact, what is delaying proper preparation for the hearing, so that it can occur as scheduled, is House Impeachment Counsel's peculiar intransigence in refusing to comply with normal discovery processes. While the House Impeachment Counsel advises the Senate that it applied a "commonsense" approach to determining what the defense needs for trial, it is now clear that "commonsense" has dictated the withholding of material that would be produced in any civil or criminal case. Indeed, the withholding of such evidence would likely result in sanctions in federal court.

We request that the Senate order House Impeachment Counsel to immediately make the above-referenced material available to the defense. Quite apart from these specific documents, the withholding of such obviously relevant material confirms our earlier-stated concerns that the House is adopting an exceptionally narrow interpretation

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[1] Notably, given the House's use of the interview (as well as the attendant notes or summaries created in connection with that interview) to support its allegations, any claim of privilege has clearly been waived.

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of materiality in order to deny the defense the full record in the case, thus depriving Judge Porteous of an opportunity to adequately prove his defense. Given the short period for new counsel to prepare this case for trial, the continued withholding of such evidence constitutes a direct denial of a fair trial and due process.

Given the still pending motion for inspection of withheld information, the defense opted to supply this information in a letter as opposed to a motion to avoid unnecessary litigation. However, we would be happy to submit such a motion if the Senate would prefer formal argument on the matter. We ask that the Senate order this production in addition to an immediate inspection of the withheld evidence referenced in the pending motion.

Respectfully,

Jonathan Turley /pjm

Jonathan Turley
Counsel to Judge G. Thomas Porteous

cc: Alan I. Baron, Esq., House Impeachment Counsel
Mark Dubester, Esq., House Impeachment Counsel
Harry Damelin, Esq., House Impeachment Counsel
Kirsten Konar, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Impeachment Counsel

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Congress of the United States
Washington, DC 20515

July 2, 2010

Via Electronic Mail and Hand Delivery

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr.

Dear Senator McCaskill and Senator Hatch:

Late yesterday, July 1, 2010, Mr. Turley submitted a letter to the Senate Impeachment Trial Committee relating to various discovery issues. On the second page of his letter, Mr. Turley makes reference to sending House Impeachment Counsel a letter on June 30, 2010, which made certain demands for interview notes related to Mr. Michael Reynolds. He also noted that the House declined to respond to this letter.

For your information, enclosed please find the letter that House Impeachment Counsel received from Judge Porteous's counsel at 6:50 p.m. on June 30, 2010, requesting a response by noon the next day. Also enclosed is House Impeachment Counsel's response to the June 30, 2010 letter, which was sent to Judge Porteous's counsel this morning.

There should be no mistake, the House did not decline to respond to the defense's letter. The House declined to be compelled to answer within the unilaterally imposed "deadline" announced by counsel for Judge Porteous.

Very Truly Yours,

Alan I. Baron

Alan I. Baron
Special Impeachment Counsel

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cc: Jonathan Turley, Esq. (via e-mail)
Daniel C. Schwartz, Esq. (via e-mail)
P.J. Meitl, Esq. (via e-mail)
Dan O'Connor, Esq. (via e-mail)
Morgan Frankel, Esq. (via e-mail)

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Attachment 1

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Daniel C. Schwartz
Direct: 202-508-6025
dschwartz@bryancave.com

June 30, 2010

VIA EMAIL AND FIRST-CLASS MAIL

Alan I. Baron, Esq.
Special Impeachment Counsel
United States House of
Representatives
The Ford House Office Building
Room H2-365
Washington, D.C. 20515

Bryan Cave LLP
1155 F Street N.W.
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Bryan Cave Strategies
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www.bryancavestrategies.com
Washington, DC
St. Louis

Dear Mr. Baron:

This morning, the House of Representatives (the "House") filed a "Supplemental Filing in Support of its Preliminary Requests for Subpoenas and Immunity." Included in that filing was a list of individuals for whom the House seeks a subpoena from the United States Senate. That list includes Michael J. Reynolds.

Mr. Reynolds is referenced by name in the House of Representatives Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana (Report 111-427, dated March 4, 2010). Specifically, on page 76, footnote 369, the House quotes a statement purportedly made by Mr. Reynolds during a "Task Force Staff Interview" taken on January 5, 2010. We have not received a copy of the transcription, notes, or summary of this Task Force Staff Interview. Further, based on our review to date, we do not believe that the House has made such materials available for our inspection and copying. As such, we believe these materials have been improperly withheld from the defense. Accordingly, we request that the House immediately produce these materials to the defense.[1] There can be no serious debate that this material is highly relevant to the instant proceeding. Moreover, given the House's use of the interview (as well as the attendant notes or summaries created in connection with that interview) to support its allegations, any claim of privilege has clearly been waived. Indeed, since the defense cannot obtain this material from any other source, any potentially applicable privilege must yield to the needs of the defense.

Additionally, we request that the House also produce all documents created in

[1] This request is separate and apart from our request for full inspection of the materials in the possession of the House. This request is a specific demand for material clearly relevant to this matter and which should have been disclosed in the first instance.

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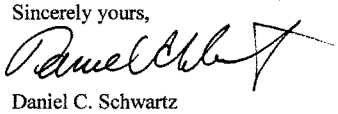
connection with any other Task Force Staff Interviews. If you claim privilege as to some portion of these materials, we ask that you produce an appropriate privilege log so that we can review your claims.

Finally, House Exhibit 69(e) contains a Federal Bureau of Investigation 302 Report (labeled PORT000000753-60). In that 302 Report, the name of the interviewee is redacted. Please advise whether the House is aware of the identity of the individual whose interview formed the basis for that Report. If the House is aware of that information, we request that the House immediately disclose the individual's identity to the defense.

We request that you explain the basis for withholding this highly relevant information and inform us of your response to this request by noon tomorrow, July 1, 2010, so that we may expeditiously seek relief as required and appropriate.

Sincerely yours,



Daniel C. Schwartz

cc: Mark Dubester, Esq., House Impeachment Counsel
Harry Damelin, Esq., House Impeachment Counsel
Kirsten Konar, Esq., House Impeachment Counsel

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Attachment 2

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Congress of the United States
Washington, DC 20515

July 2, 2010

Via Electronic Mail and First Class Mail

Daniel C. Schwartz
Bryan Cave LLP
1155 F Street N.W.
Washington, D.C. 20004

Re: Impeachment of Judge G. Thomas Porteous, Jr.

Dear Mr. Schwartz:

This letter is in response to your correspondence of June 30, 2010, in which you request any transcriptions, notes, or summaries of the January 5, 2010 Task Force interview of Michael J. Reynolds. No transcription of Mr. Reynolds's interview exists. The only notes taken during this interview were taken by Task Force counsel on behalf of the House. To the extent your letter seeks copies of these interview notes, those notes clearly constitute attorney work product, to which you are not entitled and which the House declines to provide.

As you are undoubtedly aware, Judge Porteous previously requested the production of all witness interview notes taken by Task Force counsel in his May 28, 2010 Motion for Discovery. The Senate Impeachment Trial Committee specifically denied that request in its June 9, 2010 Disposition of Discovery Issues.

We would note that, contrary to the representation in your letter, there is no reason to believe that Mr. Reynolds is unavailable for interview by counsel for Judge Porteous, should you wish to interview him. Moreover, as your letter acknowledges, the House of Representatives Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana was issued on March 4, 2010. Judge Porteous has thus had almost four months to interview witnesses identified in that Report, including Mr. Reynolds.

Finally, with regard to the redactions in House Exhibit 69(e), pertaining to the identity of the interview subject in an FBI 302, as we previously explained to Richard Westling, the redactions in Exhibit 69(e) were made by the Department of Justice. The House therefore has no authority to un-redact this information. Accordingly, we are not in a position to provide you with the identity of the interview subject.

Very Truly Yours,

Alan I. Baron
Special Impeachment Counsel

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cc: Johnathan Turley, Esq. (via e-mail)
P.J. Meitl, Esq. (via e-mail)
Dan O'Connor, Esq. (via e-mail)

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

July 2, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous Jr.

Dear Senator McCaskill and Senator Hatch:

I write to briefly respond to the House of Representatives' (the "House") letter dated July 2, 2010. Given the importance of this issue, I hope that the parties can address this matter more fully in the meeting of counsel next week. To facilitate that discussion, I am writing to make clear the position of Judge G. Thomas Porteous, Jr. with regard to the requested documents and the nature of the ongoing discovery disputes.

The House, in its Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana (Report 111-427, dated March 4, 2010, hereinafter "House Report"), explicitly relied upon (and, in fact, quoted) from the notes of the Task Force Staff related to the interview of Michael Reynolds. In response to the defense's request for those and other similar materials relied upon by the House, House Impeachment Counsel concedes that the material is relevant but argues that it is protected by the work-product privilege.

House Impeachment Counsel fails to address substantively the defense's assertion that such claimed privileges have been waived. For there to be true due process in these proceedings, we assume the Senate Impeachment Trial Committee (the "Committee") intends to recognize and respect asserted common-law privileges,[1] such as the attorney-client privilege and the attorney work-product privilege. If so, it also must recognize the long-standing and established limits to those privileges. The "work-product privilege is a

[1] Congress has increasingly exercised its discretion to deny privilege, regardless of whether a judge would uphold the claim. *See* Jonathan P. Rich, *Note, The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 159 (1988).

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qualified one." *FTC v. Grolier, Inc.*, 462 U.S. 19 (U.S. 1983). "Like other qualified privileges, it may be waived." *United States v. Nobles*, 422 U.S. 225, 239 (U.S. 1975). Courts, in cases where the asserting party relies upon or quotes a document, routinely find that the work-product privilege has been waived as to that document. *See Avago Techs. Gen. IP PTE LTD. v. Elan Microelectronics Corp.*, 2006 U.S. Dist. LEXIS 86292 (N.D. Cal. Nov. 13, 2006) (finding "that work product protection has been waived as to [a certain] report, because plaintiffs revealed part of the contents of the report."). Other courts, when specifically considering quoted material that one party claims to be protected by the attorney work-product privilege, have determined that that waiver extends to the information disclosed as well as "the details underlying the data which was . . . published." *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988). In fact, the Fourth Circuit, in *In re Martin Marietta* found that "the work product protection ha[d] been waived as to most of the internal notes and memoranda [of] these interviews which, by way of summarizing in substance and format the interview results, [the privilege asserting party] used as the basis of its disclosure." *Id.* at fn. 2. As such, the fact that the House, in its published Report quoted part of its interview of Reynolds, thereby relying upon notes or summaries that it had created, have waived any work-product privileges that may have otherwise applied.

Moreover, the material cited in our last letter falls squarely under conventional federal discovery rules, including but not limited to *Brady v. Maryland*, 373 U.S. 83 (1963), the Jencks Act, 18 U.S.C. § 3500, Rule 16 of the Federal Rules of Criminal Procedure and Rule 26.2 of the Federal Rules of Criminal Procedure. In fact, the arguments of House were specifically rejected by the Supreme Court in *Goldberg v. United States*, 425 U.S. 94, 102 (U.S. 1976), where the Court stated that "there is no broad attorney's work-product exception to the Jencks Act that shelters statements relating to the subject matter of the testimony of a witness merely because the statements were obtained by a government attorney rather than a government investigator."[2] Thus, under either a civil or criminal standard, the material must be disclosed, given the nature of the House's use of the material and its relevance to these proceedings.

House Impeachment Counsel further argues that the reason for the withholding of the documentation is that the Committee has already considered the instant request and rejected it. This is simply incorrect. In the May 28, 2010 Discovery Request submitted by Judge Porteous (through his previous counsel), the defense requested categories of documents and did not make specific arguments regarding the waiver of privilege or the fact that certain documents had been relied upon by the House and not turned over to the defense. In response, the Committee determined that these general requests made by the defense "would intrude into the work product of the House and conclude[d] that disclosure is not justified at this time." *See* Committee Disposition of Discovery Issues, dated June 9, 2010. As such, the Committee qualified its rejection of the request, leaving open a later review and specifically did not rule upon requests as to certain documents for

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[2] In this case, the Task Force Staff may very well have been acting in an investigatory capacity during these interviews, as opposed to that of attorneys representing the United States.

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which the defense claimed that asserted privileged had been waived.[3]

The intransigence and stubbornness of House Impeachment Counsel regarding the production of the material related to Mr. Reynolds is indicative of the larger campaign by the House to force the defense to fight and claw for every piece of evidence, wasting valuable time that could be spent on the defense of the matter. This is a particularly troubling in a case where, unlike the Hastings and Nixon cases, the Committee and the defense do not have a developed trial record. This matter is not the typical civil litigation, where parties routinely employ litigation tactics to frustrate discovery for a litigation advantage. This is a trial in the United States Senate of a sitting United States District Court Judge, a proceeding which has taken place less than twenty times in the history of our nation. The House appears intent on substituting a "fast" for a "fair" trial and withholding documents for no other reason that they believe they can. If federal law is any measure, they cannot. The House relied on these references to secure impeachment and now are preparing to call this very witness. We ask the Senate to order the immediate disclosure of this information.

Respectfully,

Jonathan Turley /psm

Jonathan Turley
Counsel to Judge G. Thomas Porteous

cc: Alan I. Baron, Esq., House Impeachment Counsel
Mark Dubester, Esq., House Impeachment Counsel
Harry Damelin, Esq., House Impeachment Counsel
Kirsten Konar, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Impeachment Counsel

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[3] The House also makes the argument that the House Report has been made public for four months and the defense is only now requesting the material. It is unclear why the timing of the request is of significance, particularly when new counsel for Judge Porteous has only been fully responsible for all four articles of impeachment for only the last two weeks, and the House only recently finished producing what it claims to be all discoverable material.

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DANIEL K. INOUYE, HAWAII, CO-CHAIRMAN
ARLEN SPECTER, PENNSYLVANIA, CO-CHAIRMAN
PATRICK J. LEAHY, VERMONT
EDWARD M. KENNEDY, MASSACHUSETTS
JEFF SESSIONS, ALABAMA
JON KYL, ARIZONA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE
WASHINGTON, DC 20510–6326

DISPOSITION OF JUDGE G. THOMAS PORTEOUS, JR.'S MOTIONS TO COMPEL AND FOR DEPOSITIONS

Judge G. Thomas Porteous, Jr. filed (1) a Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives and (2) a Motion for Authority to Issue or, Alternatively, Assistance in Issuing, Deposition Subpoenas, which requests pretrial depositions of ten potential witnesses. The House has submitted Oppositions to both motions. The Committee hereby denies the Motion to compel and grants in part and denies in part the Motion for depositions.

MOTION TO COMPEL

Judge Porteous alleges that the House is withholding non-privileged documents that are relevant to his defense. He seeks an order compelling production of the documents or a "generalized list" of the categories of withheld documents. In addition, Judge Porteous specifically seeks access to the House Impeachment Task Force's staff notes, arguing that what appears to be a two-word quotation from a witness interview included in a footnote to the House Judiciary Committee Report waived work product protection with regard to the underlying witness interview notes. The House maintains that it has either provided copies of or access to inspect all non-privileged documents relevant to the four Articles of Impeachment.

Judge Porteous seeks broad access to the files of the House Impeachment Task Force beyond the parameters set out in the Committee's Disposition of Discovery Issues of June 9, 2010 ("June 9 Discovery Order"). In his Motion for Discovery filed on May 28, 2010, Judge Porteous included requests for witness interview notes taken by Task Force staff and an index of withheld documents. The Committee ruled that the House should produce information "relevant to, or likely to lead to new evidence on, the adopted Articles of Impeachment" but that the House was not required to produce its work product or the requested index.[1]

Judge Porteous has neither demonstrated noncompliance by the House with the June 9 Discovery Order nor moved for its reconsideration. The House has provided voluminous material to Judge Porteous and afforded multiple opportunities for his counsel to inspect numerous other documents and request copies. The House represents that it is withholding a few folders of documents that are irrelevant to the Articles of Impeachment. Judge Porteous argues, in effect, that the House should not be determining what must be produced and may be withheld under the Committee's June 9 Discovery Order. However, in any litigation, the parties bear the affirmative burden of complying with court orders; without concrete evidence of noncompliance or bad faith, the Committee has no cause to intervene. A brief reference to a witness interview

[1] Senate Impeachment Trial Committee, Disposition of Discovery Issues (June 9, 2010).

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does not justify removing work product protection for the House's staff notes. For these reasons, the Motion to Compel is denied.

DEPOSITION REQUESTS

Judge Porteous requests pretrial depositions of the following ten witnesses "to elicit from these witnesses exculpatory and/or contradictory testimony concerning the House's Articles of Impeachment": Jacob Amato, Jr.; Robert Creely; Louis Marcotte, III; Lori Marcotte; Rafael Goyeneche; DeWayne Horner; Joseph Mole; Claude Lightfoot; Bobby Hamil; and Cheyenne Tackett. The House argues that under the Committee precedent depositions should only be permitted for central witnesses who have not previously testified or have refused to cooperate and that Judge Porteous's requests do not meet this standard.

The taking of pretrial deposition testimony is neither a guaranteed right of an impeached federal officer nor an established norm of Senate impeachment trial proceedings. Use of pretrial depositions in impeachment proceedings is a recent development first authorized in the 1989 Committee proceedings for the impeachment trial of Judge Alcee Hastings.[2] The Hastings Committee highlighted the unprecedented nature of the deposition requests and authorized only four of the sixteen requests:

> In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.[3]

The Hastings Committee recognized that deposition testimony should be rare and subject to a demanding standard.

The Committee finds that Judge Porteous has demonstrated "a strong showing of need" for taking pretrial depositions of the following four witnesses: (1) Jacob Amato, Jr.; (2) Robert Creely; (3) Louis Marcotte, III; and (4) Lori Marcotte. First, these four witnesses were key participants in Judge Porteous's alleged pattern of corrupt conduct. These four witnesses will likely offer relevant testimony and probative evidence for the House's case and Judge Porteous's defense.

Second, although these witnesses have given some prior testimony before a federal grand jury, the Special Investigatory Committee of the Fifth Circuit Court of Appeals, and the House Impeachment Task Force that Judge Porteous may use to prepare for the Senate trial, pretrial depositions will supplement the limited opportunities for examination that he had in those proceedings. Notwithstanding the House's argument, the existence of prior witness testimony from other proceedings alone does not prohibit a witness deposition. The Hastings Committee authorized the deposition of a witness who had given testimony before the Eleventh Circuit

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[2] There is no record of the use of pretrial depositions in the Committee impeachment trial proceedings against Judge Harry Claiborne and Judge Walter Nixon.

[3] Report of the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings, S. Hrg. 101-194, pt. 1, at 605-06 (1989).

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investigatory committee because he was considered to be "especially central to [Judge Hastings's] defense."[4] The Committee concludes that Mr. Amato, Mr. Creely, Mr. Marcotte, and Ms. Marcotte will likely be "especially central" witnesses in this proceeding and that their depositions will give Judge Porteous "a sufficient basis for trial preparation."[5]

Judge Porteous has not demonstrated "a strong showing of need" for the depositions of Mr. Goyeneche, Mr. Horner, Mr. Mole, Mr. Lightfoot, Mr. Hamil, and Ms. Tackett. None of these witnesses can be deemed "especially central" to Judge Porteous's defense. To the extent that these witnesses have relevant testimony, the existing transcripts of testimony from prior proceedings, documentary evidence already provided to Judge Porteous, and the opportunity to interview these witnesses should provide him "a sufficient basis for trial preparation." For these reasons, the Committee denies the Motion as to Mr. Goyeneche, Mr. Horner, Mr. Mole, Mr. Lightfoot, Mr. Hamil, and Ms. Tackett.

The depositions of Mr. Amato, Mr. Creely, Mr. Marcotte, and Ms. Marcotte shall be set for August 2, 2010 in the Senate Office Buildings. The Committee hereby authorizes subpoenas to issue for these witnesses. As all four of these witnesses have given some prior testimony, each deposition shall be limited to no more than three hours. The Committee staff will issue appropriate deposition notices after subpoenas are served.

Dated: July 19, 2010

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

[4] *Id.* at 606.
[5] *Id.*

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II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

a. Discovery Matters

iv. Motions for Assistance in Securing Discovery from Third Parties

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE METROPOLITAN CRIME COMMISSION

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and respectfully requests the assistance of the Senate in securing discovery materials from the Metropolitan Crime Commission. In support, Judge Porteous states the following:

1. The Metropolitan Crime Commission, Inc. is a "non-profit, privately funded, citizen's organization dedicated to exposing and eliminating public corruption and to reducing the incidence of crime and improving the administration of justice in order to improve the quality of life for citizens in the Baton Rouge and New Orleans metropolitan areas and throughout Louisiana." *See* http://www.metropolitancrimecommission.org/ (website for the Metropolitan Crime Commission).

2. In 1994, the Metropolitan Crime Commission opened an investigation into Judge Porteous prior to his confirmation by the United States Senate. As part of this investigation, the Metropolitan Crime Commission interviewed Judge Porteous. The Metropolitan Crime Commission forwarded certain information that it received to the

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Department of Justice. According to the Metropolitan Crime Commission, they have an "extensive file" on Judge Porteous with "intelligence reports" dating back to June 1993. (*See* Letter from Metropolitan Crime Commission, dated March 24, 2004, attached as Exhibit 1.)

3. The articles of impeachment against Judge Porteous allege a concealment of conflicts of interest in connection with his prior service as a state judge in Louisiana. Moreover, the witnesses called by the House of Representatives during its impeachment proceedings specifically raised the distinction between issues known before the confirmation and issues concealed from the Senate and its investigators. Thus, the question of what was known before Judge Porteous's confirmation is highly material to any defense at his Senate impeachment trial.

4. Only a small number of documents relating to the Metropolitan Crime Commission have been produced to the defense.

5. In the Hastings and Nixon Impeachment trials, defense counsel for the accused requested the assistance of the United States Senate in acquiring discovery from third-party sources. A procedure was developed to permit such discovery, including from the Department of Justice. In those cases, the Chairman of the Senate Impeachment Trial Committee submitted a letter requesting that the third-party produce the requested discovery. (*See* Letter from Senator Wyche Fowler, dated July 18, 1989, attached as Exhibit 2.) Senate personnel then reviewed the materials and designated for production to counsel from the accused those materials that were deemed relevant to any article of impeachment or asserted defense.

6. Judge Porteous seeks the production of the following materials:

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a. All material in the possession of the Metropolitan Crime Commission that references or relates to Judge Porteous or the underlying allegations in this impeachment.

b. All material maintained by the Metropolitan Crime Commission that references or relates to Louis or Lori Marcotte and/or Bail Bonds Unlimited.

c. All material maintained by the Metropolitan Crime Commission that references or relates to the setting, modifying, and/or splitting of bonds.

d. All material maintained by the Metropolitan Crime Commission that references or relates to allegations of improper expungements of convictions by Judge Porteous or judges in Louisiana.

e. All material maintained by the Metropolitan Crime Commission that references or relates to Jacob Amato or Robert Creely.

f. All material maintained by the Metropolitan Crime Commission that references or relates to gifts, money, or other items of value received by judges, magistrates, or other judicial officers in the Jefferson Parish Courthouse.

g. All material forwarded by the Metropolitan Crime Commission to the Department of Justice or the Fifth Circuit Court of Appeals relating to the investigation of Judge Porteous.

7. Because new counsel has only recently been added to this case and because the evidentiary hearing in this matter is fast approaching, Judge Porteous seeks the immediate assistance of the Senate in procuring these materials. In prior cases, defense counsel initially corresponded with third-parties, received correspondence in return rebuffing their requests for materials, filed motions with the Senate for assistance, and then waited for the third-parties to comply. For example, in the case of Judge Nixon, this process took over two months – an amount of time that current defense counsel simply do not have given the impending trial schedule in this matter. In an effort to avoid

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unnecessary delay, Judge Porteous seeks the immediate assistance of the Senate in resolving this issue.

Alternatively, Judge Porteous suggests that, due to the truncated timeframe, that all of the requested material be produced directly to Judge Porteous and that Judge Porteous enter into an appropriate protective order regarding the material. The relevance of these categories of discovery are obvious. Judge Porteous will agree not to discuss or disclose such material absent use at the evidentiary hearing itself. Such a process would allow for an expedited review and avoid any delay of the trial.

WHEREFORE, Judge Porteous respectfully requests that the Senate impellent a procedure to ensure that relevant materials from the Metropolitan Crime Commission be made available to Judge Porteous.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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

Dated: June 27, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl

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Exhibit 1

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METROPOLITAN CRIME COMMISSION OF NEW ORLEANS, INC.

1615 POYDRAS STREET, SUITE 1060
NEW ORLEANS, LA 70112

TELEPHONE 504/524-3148 • FAX 504/566-0658 • www.metrocrimeno.org

March 24, 2004

Mrs. Jan Mann
U.S. Attorney's Office
501 Magazine Street
New Orleans, LA. 70130

Re: Judge Thomas G. Porteous, Jr.

Dear Mrs. Mann:

The Metropolitan Crime Commission (MCC) has an extensive file on Judge Thomas G. Porteous, Jr. The intelligence reports date back to June 23, 1993 and continue to the present.

The MCC investigation of Judge Porteous and Aubry Wallace is disturbing. In short, Judge Porteous did a favor for Louis Marcotte and altered the conviction of Aubry N. Wallace.

The MCC's file on Judge Porteour is available if you need additional information. I can be reached at 524-3148.

Sincerely,

Anthony Radosti
Vice President

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Exhibit 2

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United States Senate
WASHINGTON, DC 20510

July 18, 1989

John C. Keeney, Esq.
Deputy Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Keeney:

As Chairman of the Senate Impeachment Trial Committee on theArticles of Impeachment against Judge Nixon, I write to request the Department's assistance in the Committee's efforts to assure that Judge Nixon receives a fair trial in the Senate. The Committee has determined that it would make a useful contribution to the trial process if the Department were willing to permit the Committee, through its staff, to review the documents (excluding grand jury materials governed by Rule 6(e)) in the possession of the Department, including those possessed by the Federal Bureau of Investigation, that were requested by Judge Nixon in his June 1, 1989 letter to the Attorney General, which was the subject of your response on June 21, 1989.

The review would be consistent with that conducted in the case of the Hastings impeachment matter. That is, the focus of the review would be to determine if there is evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Nixon's guilt or innocence. In the event that it is determined that particular documents should properly be made part of the pending impeachment proceedings, and accordingly made available to the parties for use at trial, the committee would hear from the Department prior to disclosing any documents that you believe contain particularly sensitive matters, so that we may address any continuing concerns that you have. No documents or portions of documents would be made available to the parties without the consent of the Department.

Your expeditious response to this request would be most helpful to the committee in attempting to complete discovery by July 31st.

Sincerely,

Wyche Fowler, Jr.

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE AMERICAN BAR ASSOCIATION

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and respectfully requests the assistance of the Senate in securing discovery materials from the American Bar Association. In support, Judge Porteous states as follows:

1. The American Bar Association ("ABA") is a "voluntary professional association" made up of "more than 400,000 members" that "provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public." *See* http://www.abanet.org/about/ (website for the ABA).

2. "Since the Eisenhower administration," the ABA, through its Standing Committee on the Federal Judiciary [(the "ABA Standing Committee")], "has conducted peer reviews of potential federal judicial nominees."
See http://www.abajournal.com/magazine/article/a_proud_tradition/ (article dated April 1, 2010). "Starting with responses of prospective nominees to a Senate Judiciary Committee questionnaire, the [ABA Standing C]ommittee conducts in-depth research and

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confidential interviews with lawyers and judges who have personal knowledge of a potential nominee's background." *Id.*

3. On June 28, 1994, prior to Judge Porteous's nomination to the federal bench, the U.S. Department of Justice sent a letter to the ABA Standing Committee requesting that it conduct a background investigation and prepare a "formal report" concerning Judge Porteous. *See* Exhibit 1 (labeled Port000000066).

4. Between June and August of 1994, the ABA Standing Committee, led by Circuit Representative Sylvia H. Walbolt, Esq., investigated Judge Porteous's background and fitness to serve as a federal judge.

5. On or before August 24, 1994, the ABA Standing Committee "preliminarily found Judge Porteous qualified for appointment" to the federal bench, which finding the Attorney General relayed to the President. *See* Exhibit 2. Shortly thereafter, on August 30, 1994, the ABA Standing Committee finalized its opinion concerning Judge Porteous and reported to both the Justice Department and the Senate Judiciary Committee that it was "unanimously of the opinion that Honorable G. Thomas Porteous, Jr. is Qualified for appointment as Judge of the United States District Court, Eastern District of Louisiana." *See* Exhibit 3 (labeled Port000000062-64).

6. The articles of impeachment against Judge Porteous allege a concealment of conflicts of interest in connection with his prior service as a state judge in Louisiana. Moreover, the witnesses called by the House of Representatives during its impeachment proceedings specifically raised the distinction between issues known before Judge Porteous's confirmation and issues concealed from the Senate and its investigators.

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Thus, the question of what was known prior to Judge Porteous's confirmation is highly material to any defense at his Senate impeachment trial.

7. Only a very small number of documents relating to the ABA Standing Committee's investigation of Judge Porteous have been produced to the defense.

8. In order to obtain additional such material, Judge Porteous's counsel's support staff contacted the ABA and inquired whether it would provide copies of the reports prepared, and materials collected, in connection with the ABA Standing Committee's investigation concerning Judge Porteous. An ABA representative declined to provide the requested materials voluntarily, noting that such materials are typically not released to the public.[1]

9. Pursuant to the request of the Senate Impeachment Trial Committee Staff (made during a June 29, 2010 conference call with counsel for all parties), counsel for Judge Porteous further sent a formal letter request to the ABA. *See* Exhibit 4. Should the ABA reverse its initial indication and provide the documents requested voluntarily, Judge Porteous will so notify the Committee.

10. Having been unable to otherwise obtain materials from the ABA, Judge Porteous now seeks the Senate's assistance in obtaining the production of the following materials:

> a. All materials in the possession of the American Bar Association, including the American Bar Association's Standing Committee on the Federal Judiciary, that refer or relate to Judge G. Thomas Porteous, Jr., including without limitation any information or evidence gathered, reports prepared (in either draft or final form),

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[1] *See also* http://www.abajournal.com/magazine/article/a_proud_tradition/ (article dated April 1, 2010, noting that the ABA Standing Committee "publicly provides an explanation for a rating only if requested by the Senate Judiciary Committee."

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or opinions rendered concerning Judge Porteous's fitness to serve on the federal bench.

11. Assisting Judge Porteous to obtain these materials is supported by past precedent. Specifically, in both the *Hastings* and *Nixon* Impeachment trials, defense counsel requested the assistance of the Senate in acquiring discovery from third-party sources. The Senate developed a procedure to permit such discovery, whereby the Chairman of the Senate Impeachment Trial Committee submitted a letter requesting that the third-party produce the requested discovery. *See* Letter from Senator Wyche Fowler, Jr., dated July 18, 1989, attached as Exhibit 5. Senate personnel then reviewed the materials and designated for production to defense counsel those materials that were deemed relevant to any article of impeachment or asserted defense.

12. Because new counsel has only recently been added to this case and because the evidentiary hearing in this matter is fast approaching, Judge Porteous seeks the immediate assistance of the Senate in procuring the materials delineated above from the ABA. Having attempted to obtain these materials voluntarily, and having been rebuffed, such immediate assistance is necessary in order to help avoid any undue delay in these proceedings.

13. Alternatively, Judge Porteous suggests the following two additional options. First, if the ABA has already provided all requested material to the Senate Judiciary Committee (in connection with its consideration of Judge Porteous's 1994 nomination and confirmation), then the Senate may wish to provide that material to Judge Porteous directly. Second, should the Senate decline to provide the materials itself, Judge Porteous proposes that, due to the truncated timeframe, all of the requested material be produced by the ABA directly to Judge Porteous and that he enter into an appropriate

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protective order regarding the material, pursuant to which he would agree not to discuss or disclose such material absent use at the evidentiary hearing itself. Such a process would allow for an expedited review and avoid any delay of the trial.

WHEREFORE, Judge Porteous respectfully requests that the Senate implement a procedure to ensure that all relevant materials from the American Bar Association are made available to Judge Porteous.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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

Dated: June 30, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ Daniel T. O'Connor

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Exhibit 1

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U. S. Department of Justice
Office of Policy Development

Washington, D.C. 20530

June 28, 1994

Robert P. Watkins, Esq.
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005

Dear Mr. Watkins:

We would appreciate having the formal report of the ABA Standing Committee on Federal Judiciary on G. Thomas Porteous, Jr., who is under consideration for appointment as United States District Judge for the Eastern District of Louisiana.

To facilitate the Committee's evaluation, we have asked Judge Porteous to forward his response to the Personal Data Questionnaire to you and to the Circuit representative of the Committee.

Sincerely yours,

Eleanor D. Acheson
Assistant Attorney General

cc: Sylvia H. Walbolt, Esq.

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Exhibit 2

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Office of the Attorney General
Washington, D. C. 20530

August 24, 1994

Dear Mr. President:

I have the honor to enclose the nomination of G. Thomas Porteous, Jr., of Louisiana, to be United States District Judge for the Eastern District of Louisiana vice Robert F. Collins, resigned.

Judge Porteous was born December 15, 1946 in New Orleans, Louisiana. He received a B.A. degree in 1968 from Louisiana State University and a J.D. degree in 1971 from Louisiana State University Law School. He was admitted to the Louisiana State Bar in 1971.

Since 1984, Judge Porteous has served as a District Judge for the 24th Judicial District Court of Louisiana. Prior to his appointment to the court, he was City Attorney for the City of Harahan, 1982-1984; a partner in the law firm of Porteous & Mustakas, 1980-1984; a partner in the law firm of Porteous, Lee & Mustakas, 1976-1980; a partner in the law firm of Edwards, Porteous & Lee, 1974-1976; Chief of the Felony Complaint Division of the District Attorney's Office for the Parish of Jefferson, 1973-1975; a partner in the law firm of Edwards, Porteous & Amato, 1973-1974; and Special Counsel for the Louisiana Attorney General's Office, 1971-1973.

The appropriate Circuit Representative of the Standing Committee on Federal Judiciary of the American Bar Association has preliminarily found Judge Porteous qualified for appointment to this position, and that finding is before this Committee for a final vote. We have no reason to believe that the Committee's vote and a formal report will differ from the preliminary rating. He bears an excellent reputation as to character and integrity, has judicial temperament and is, I believe, worthy of appointment as a United States District Judge.

I recommend the nomination.

Respectfully,

Janet Reno

The President
The White House

Copy to
V. Radd 8/25

EF

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Exhibit 3

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CHAIR
William E. Willis
125 Broad Street
28th Floor
New York, NY 10004-2498
FIRST CIRCUIT
Michael S. Greco
19th Floor
One International Place
100 Oliver Street
Boston, MA 02110
SECOND CIRCUIT
Arnold I. Burns
23rd Floor
1585 Broadway
New York, NY 10036
THIRD CIRCUIT
Victor F. Battaglia, Sr.
1800 Mellon Bank Center
Tenth and Market Streets
Wilmington, DE 19801
FOURTH CIRCUIT
J. Hardin Marion
26th Floor
100 East Pratt Street
Baltimore, MD 21202
FIFTH CIRCUIT
Pike Powers, Jr.
2400 One American Center
600 Congress Avenue
Austin, TX 78701
SIXTH CIRCUIT
Charles E. English
1101 College Street
Bowling Green, KY 42102-0770
SEVENTH CIRCUIT
Thomas Z. Hayward, Jr.
Suite3200
70 West Madison Street
Chicago, IL 60602-4207
EIGHTH CIRCUIT
James E. McDaniel
714 Locust Street
St. Louis, MO 63101
NINTH CIRCUIT
Lambhard C. Howell
Arctic Building Penthouse
700 Third Avenue
Seattle, WA 98104
Richard M. Macias
624 South Grand Avenue
Los Angeles, CA 90017
TENTH CIRCUIT
Mona S. Lambird
500 West Main
Oklahoma City, OK 73102-2275
ELEVENTH CIRCUIT
Sylvia H. Walbolt
Barnett Tower, Suite 2300
One Progress Plaza
St. Petersburg, FL 33701
DISTRICT OF COLUMBIA CIRCUIT
Carolyn B. Lamm
Suite 500
1747 Pennsylvania Avenue, N.W.
Washington, DC 20006-4604
FEDERAL CIRCUIT
Mortimer M. Caplin
Suite 1100
One Thomas Circle, N.W.
Washington, DC 20005
BOARD OF GOVERNORS LIAISON
R. William Ide III
One Peachtree Center
303 Peachtree Street
Atlanta, GA 30308
STAFF LIAISON
Irene R. Emsellem
American Bar Association
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary**
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CONFIDENTIAL August 30, 1994

Hon. Eleanor Dean Acheson
Assistant Attorney General
United States Department of Justice
Office of the Attorney General
Room 5131
Washington, D.C. 20530

RE: HONORABLE G. THOMAS PORTEOUS, JR.
United States District Court
Eastern District of Louisiana

Dear Eldie:

As a result of our investigation our Committee is unanimously of the opinion that Honorable G. Thomas Porteous, Jr. is Qualified for appointment as Judge of the United States District Court, Eastern Districtof Louisiana,

Sincerely,

Bill

William E. Willis
Chair

cc: All Committee Members

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AMERICAN BAR ASSOCIATION Standing Committee on Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CHAIR
William E. Willis
125 Broad Street
28th Floor
New York, NY 10004-2498
FIRST CIRCUIT
Michael S. Greco
19th Floor
One International Place
100 Oliver Street
Boston, MA 02110
SECOND CIRCUIT
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23rd Floor
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New York, NY 10036
THIRD CIRCUIT
Victor F. Battaglia, Sr.
1800 Mellon Bank Center
Tenth and Market Streets
Wilmington, DE 19801
FOURTH CIRCUIT
J. Hardin Marion
26th Floor
100 East Pratt Street
Baltimore, MD 21202
FIFTH CIRCUIT
Pike Powers, Jr.
200 One American Center
600 Congress Avenue
Austin, TX 78701
SIXTH CIRCUIT
Charles E. English
1101 College Street
Bowling Green, KY 42102-0770
SEVENTH CIRCUIT
Thomas Z. Hayward, Jr.
Suite3200
70 West Madison Street
Chicago, IL 60602-4207
EIGHTH CIRCUIT
James E. McDaniel
714 Locust Street
St. Louis, MO 63101
NINTH CIRCUIT
Lambhard G. Howell
Arctic Building Penthouse
700 Third Avenue
Seattle, WA 98104
Richard M. Macias
624 South Grand Avenue
Los Angeles, CA 90017
TENTH CIRCUIT
Mona S. Lambird
500 West Main
Oklahoma City, OK 73102-2275
ELEVENTH CIRCUIT
Sylvia H. Walbolt
Barnett Tower, Suite 2300
One Progress Plaza
St. Petersburg, FL 33701
DISTRICT OF COLUMBIA CIRCUIT
Carolyn B. Lamm
Suite 500
Pennsylvania Avenue, N.W.
Washington, DC 20006-4604
FEDERAL CIRCUIT
Mortimer M. Caplin
Suite 1100
One Thomas Circle, N.W.
Washington, DC 20005
BOARD OF GOVERNORS LIAISON
R. William Ide III
One Peachtree Center
303 Peachtree Street
Atlanta, GA 30308
STAFF LIAISON
Irene R. Emsellem
American Bar Association
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CONFIDENTIAL August 30, 1994

Committee on the Judiciary
ATT: Hon. Joseph R. Biden, Jr., Chairman
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6275

RE: HONORABLE G. THOMAS PORTEOUS, JR.
United States District Court
Eastern District of Louisiana

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Honorable G. Thomas Porteous, Jr. for appointment as Judge of the United States District Court, Eastern District of Louisiana.

Our Committee is unanimously of the opinion that Judge Porteous is Qualified for this appointment.

A copy of this letter has been sent to Judge Porteous for his information.

Sincerely,

Bill Willis

William E. Willis
Chair

cc: Honorable G. Thomas Porteous, Jr.
All ABA Judiciary Committee Members
Hon. Eleanor Dean Acheson

PORT000000063

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CHAIR
William E. Willis
125 Broad Street
28th Floor
New York, NY 10004-2498
FIRST CIRCUIT
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100 Oliver Street
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23rd Floor
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New York, NY 10036
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26th Floor
100 East Pratt Street
Baltimore, MD 21202
FIFTH CIRCUIT
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Bowling Green, KY 42102-0770
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Suite3200
0 West Madison Street
Chicago, IL 60602-4207
EIGHTH CIRCUIT
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714 Locust Street
St. Louis, MO 63101
NINTH CIRCUIT
Lembhard G. Howell
Arctic Building Penthouse
700 Third Avenue
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TENTH CIRCUIT
Mona S. Lambird
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ELEVENTH CIRCUIT
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One Progress Plaza
St. Petersburg, FL 33701
DISTRICT OF COLUMBIA CIRCUIT
Carolyn B. Lamm
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Washington, DC 20006-4604
FEDERAL CIRCUIT
Mortimer M. Caplin
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Washington, DC 20005
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Atlanta, GA 30308
STAFF LIAISON
Irene R. Emsellem
American Bar Association
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

AMERICAN BAR ASSOCIATION Standing Committee on Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CONFIDENTIAL August 30, 1994

Honorable G. Thomas Porteous, Jr.
24th Judicial District Court
Division "A"
Gretna Courthouse Annex Bldg.
Second Floor, Room 200
Gretna, LA 70053

Dear Judge Porteous:

Congratulations on your nomination for appointment as Judge of the United States District Court, Eastern District of Louisiana.

At the invitation of the United States Senate Committee on the Judiciary, we have today sent a letter to them reporting on our evaluation of your qualifications. A copy of this letter is enclosed for your information.

Sincerely,

Bill Willis

William E. Willis
Chair

(Enclosure)

cc: All ABA Judiciary Committee Members
Hon. Eleanor Dean Acheson

PORT000000064

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Exhibit 4

VerDate Nov 24 2008 21:01 Nov 08, 2010 Jkt 057952 PO 00000 Frm 00342 Fmt 6602 Sfmt 6602 C:\DOCS\57952.TXT SHAUN PsN: DPROCT

Insert offset folio 346 here 57952.346

Daniel C. Schwartz
Direct: 202-508-6025
dschwartz@bryancave.com

June 30, 2010

VIA EMAIL AND FIRST-CLASS MAIL

Kim J. Askew
Chair and Member-At-Large
American Bar Association,
Standing Committee on the Federal Judiciary
1717 Main Street, Suite 2800
Dallas, TX, 75201
Email: kim.askew@klgates.com

Denise A. Cardman
American Bar Association, Staff Liaison
740 15th Street, N.W.
Washington, DC 20005-1019
Email: cardmand@staff.abanet.org

Dear Ms. Askew and Ms. Cardman:

I write as counsel to Judge G. Thomas Porteous, Jr., of the United States District Court for the Eastern District of Louisiana, who is the subject of an impeachment issued by the House of Representatives and now before the United States Senate. The purpose of this letter is to request the opportunity to review and make copies of certain materials in the possession of the American Bar Association, Standing Committee on the Federal Judiciary in order to prepare for the Senate trial.

The Senate Impeachment Counsel have asked the defense to formally request this material before seeking the intervention of the Senate to guarantee this discovery. The information that we are seeking is highly material to the Articles of the Impeachment.

The materials that we request include the following:

a. All materials in the possession of the American Bar Association, including the American Bar Association's Standing Committee on the Federal Judiciary, that refer or relate to Judge G. Thomas Porteous, Jr., including without limitation any information or evidence gathered, reports prepared (in either draft or final form), or opinions rendered concerning Judge Porteous's fitness to serve on the federal bench.

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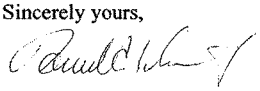
The evidentiary hearings in the Senate are scheduled to begin in mid-September 2010 and all motions must be filed by July 21, 2010. As such, we would appreciate your prompt response to this request, whether through by mail, fax, or email.

Sincerely yours,



Daniel C. Schwartz

cc: Alan I. Baron, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Legal Counsel
Derron Parks, Esq., Senate Impeachment Trial Committee

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Exhibit 5

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459

United States Senate

WASHINGTON, DC 20510

July 18, 1989

John C. Keeney, Esq.
Deputy Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Keeney:

As Chairman of the Senate Impeachment Trial Committee on theArticles of Impeachment against Judge Nixon, I write to request the Department's assistance in the Committee's efforts to assure that Judge Nixon receives a fair trial in the Senate. The Committee has determined that it would make a useful contribution to the trial process if the Department were willing to permit the Committee, through its staff, to review the documents (excluding grand jury materials governed by Rule 6(e)) in the possession of the Department, including those possessed by the Federal Bureau of Investigation, that were requested by Judge Nixon in his June 1, 1989 letter to the Attorney General, which was the subject of your response on June 21, 1989.

The review would be consistent with that conducted in the case of the Hastings impeachment matter. That is, the focus of the review would be to determine if there is evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Nixon's guilt or innocence. In the event that it is determined that particular documents should properly be made part of the pending impeachment proceedings, and accordingly made available to the parties for use at trial, the committee would hear from the Department prior to disclosing any documents that you believe contain particularly sensitive matters, so that we may address any continuing concerns that you have. No documents or portions of documents would be made available to the parties without the consent of the Department.

Your expeditious response to this request would be most helpful to the committee in attempting to complete discovery by July 31st.

Sincerely,

Wyche Fowler, Jr.

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S NOTICE OF THE REFUSAL OF THE AMERICAN BAR ASSOCIATION TO PROVIDE DOCUMENTS VOLUNTARILY

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and notifies the Senate that the American Bar Association ("ABA") has refused to voluntarily provide Judge Porteous with certain requested discovery materials. In support, Judge Porteous states as follows:

1. On June 30, 2010, Judge Porteous, through counsel, sent a letter (the "Letter Request") to the ABA requesting the production of certain materials relating to Judge Porteous that are in the possession of the ABA's Standing Committee on the Federal Judiciary (the "ABA Standing Committee").[1] A copy of the Letter Request is attached as Exhibit 1.

2. As detailed in the Letter Request, Judge Porteous sought production of:

[1] Between June and August of 1994, the ABA Standing Committee, at the request of the U.S. Department of Justice, investigated Judge Porteous and prepared a formal report concerning his fitness for appointment to the federal bench.

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> All materials in the possession of the American Bar Association, including the American Bar Association's Standing Committee on the Federal Judiciary, that refer or relate to Judge G. Thomas Porteous, Jr., including without limitation any information or evidence gathered, reports prepared (in either draft or final form), or opinions rendered concerning Judge Porteous's fitness to serve on the federal bench.

(Ex. 1.)

3. Also on June 30, 2010, anticipating that the ABA would refuse this request and seeking to move expeditiously so as to avoid any undue delay in these proceedings, Judge Porteous filed a Motion For Assistance Securing Discovery From the American Bar Association (the "Motion"). In his Motion, Judge Porteous sought the assistance of the Senate in obtaining the requested information from the ABA.

4. On July 7, 2010, the Senate Impeachment Trial Committee (the "Committee") Staff held a Status Conference with counsel for all parties. At that Status Conference, Committee Staff advised that the Senate would act on Judge Porteous's Motion after the ABA responded to the Letter Request.

5. On July 13, 2010, counsel for Judge Porteous received the ABA's response to the Letter Request, a copy of which is attached as Exhibit 2. In its response, the ABA refused to voluntarily produce to Judge Porteous those documents sought in his Letter Request, with one, small exception.[2] While noting its history of maintaining material gathered in connection with judicial nominees in confidence, the ABA did not, however, state that it would refuse to provide such material if requested by the Senate.

---

[2] The ABA did provide, as an attachment to its response, a one-page letter dated August 30, 1994, from the ABA Standing Committee to the then-Chair of the Senate Judiciary Committee, Senator Joseph Biden, disclosing its finding that Judge Porteous was qualified for appointment to the federal bench. This single page letter had previously been provided to Judge Porteous, and was attached to the Motion as exhibit 3.

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6. Given the ABA's clear statement that it will not provide Judge Porteous with the material that he has requested voluntarily, the Senate's assistance is required.[3]

7. The Senate should provide such assistance because, as explained in the Motion (*see* ¶¶ 6, 11), it is necessary in order to obtain highly relevant and material information, and is supported by past precedent.

WHEREFORE, Judge Porteous respectfully requests that the Senate grant his Motion and implement one of the following three procedures to ensure that all relevant material in the possession of the ABA is immediately made available to Judge Porteous:

1) Instruct the ABA to produce the materials sought by Judge Porteous to the Senate, have Committee Staff review such materials, and then produce to Judge Porteous any material that the Senate deems relevant to any article of impeachment or asserted defense;

2) Determine if the ABA previously provided all materials sought by Judge Porteous to the Senate Judiciary Committee (in connection with its consideration of Judge Porteous's 1994 nomination and confirmation) and, if so, produce that material to Judge Porteous directly; or

3) Instruct the ABA to produce all materials sought by Judge Porteous directly to Judge Porteous.[4]

---

[3] Such assistance is further required since, based on conversations that Judge Porteous's counsel had with two former Chairs of the ABA Standing Committee (who served from 1993 to 1995), it is our understanding that whatever records exist concerning the ABA's 1994 investigation into Judge Porteous, those materials are in the exclusive possession of the current Chair of the ABA Standing Committee.

[4] If necessary, Judge Porteous is willing to enter into an appropriate protective order regarding such produced material, pursuant to which he would agree not to discuss or disclose the material absent use at the evidentiary hearing itself.

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Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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

Dated: July 13, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ Daniel T. O'Connor

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Exhibit 1

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Daniel C. Schwartz
Direct: 202-508-6025
dschwartz@bryancave.com

June 30, 2010

VIA EMAIL AND FIRST-CLASS MAIL

Kim J. Askew
Chair and Member-At-Large
American Bar Association,
Standing Committee on the Federal Judiciary
1717 Main Street, Suite 2800
Dallas, TX, 75201
Email: kim.askew@klgates.com

Denise A. Cardman
American Bar Association, Staff Liaison
740 15th Street, N.W.
Washington, DC 20005-1019
Email: cardmand@staff.abanet.org

Dear Ms. Askew and Ms. Cardman:

I write as counsel to Judge G. Thomas Porteous, Jr., of the United States District Court for the Eastern District of Louisiana, who is the subject of an impeachment issued by the House of Representatives and now before the United States Senate. The purpose of this letter is to request the opportunity to review and make copies of certain materials in the possession of the American Bar Association, Standing Committee on the Federal Judiciary in order to prepare for the Senate trial.

The Senate Impeachment Counsel have asked the defense to formally request this material before seeking the intervention of the Senate to guarantee this discovery. The information that we are seeking is highly material to the Articles of the Impeachment.

The materials that we request include the following:

a. All materials in the possession of the American Bar Association, including the American Bar Association's Standing Committee on the Federal Judiciary, that refer or relate to Judge G. Thomas Porteous, Jr., including without limitation any information or evidence gathered, reports prepared (in either draft or final form), or opinions rendered concerning Judge Porteous's fitness to serve on the federal bench.

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The evidentiary hearings in the Senate are scheduled to begin in mid-September 2010 and all motions must be filed by July 21, 2010. As such, we would appreciate your prompt response to this request, whether through by mail, fax, or email.

Sincerely yours,

Daniel C. Schwartz

cc: Alan I. Baron, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Legal Counsel
Derron Parks, Esq., Senate Impeachment Trial Committee

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Exhibit 2

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Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

R. Thomas Howell, Jr.
General Counsel

Office of the General Counsel
321 North Clark Street, 21st Floor
Chicago, Illinois 60610
(312) 988-5215
(312) 988-5217 - Fax
e-mail: thowell@staff.abanet.org

July 12, 2010

VIA UNITED POSTAL SERVICE AND E-MAIL TO dschwartz@bryancave.com

Daniel C. Schwartz
Bryan Cave LLP
1155 F. Street N.W.
Washington, D.C. 20004

Re: Judge G. Thomas Porteous, Jr.

Dear Mr. Schwartz:

Please consider this letter as the response of the American Bar Association to your letter dated June 30, 2010 to Kim J. Askew and Denise A. Cardman, requesting certain materials concerning your client, Judge G. Thomas Porteous, Jr., that are in the possession of the American Bar Association, Standing Committee on the Federal Judiciary (the "Standing Committee").

The only document that the Standing Committee can provide is the letter dated August 30, 1994, which was prepared by then-Chair, William E. Willis. This letter, a copy of which is attached, contained the Standing Committee's rating of "Qualified" and was transmitted to the White House, the Department of Justice, each member of the Senate Judiciary Committee, and the nominee. No other written materials were publicly released. Further, as the Senate Judiciary Committee did not request that the Standing Committee testify with respect to this nomination, no written testimony was provided or oral statements given on behalf of the Standing Committee.

Throughout its existence, the Standing Committee has steadfastly maintained the strict confidentiality of all information collected and materials prepared in connection with its review of a nominee's professional qualifications for service on the federal bench. The assurance of confidentiality, which is given to each judge, lawyer and other individual who participates in this peer-review process, is essential to the Standing Committee's ability to obtain candid assessments and is the foundation for the impartiality and integrity of the rating that results.

Yours truly,

R. Thomas Howell, Jr.

Attachment

cc: Alan I. Baron, Esquire, House Impeachment Counsel (via hand delivery)
Morgan Frankel, Esquire, Senate Legal Counsel (via hand delivery)
Derron Parks, Esquire, Senate Impeachment Trial Committee (via hand delivery)

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CHAIR
William E. Willis
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FIRST CIRCUIT
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10th Floor
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Boston, MA 02110
SECOND CIRCUIT
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1800 Mellon Bank Center
Tenth and Market Streets
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FOURTH CIRCUIT
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26th Floor
100 East Pratt Street
Baltimore, MD 21202
FIFTH CIRCUIT
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2406 One American Center
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Austin, TX 78701
SIXTH CIRCUIT
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Bowling Green, KY 42102-0778
SEVENTH CIRCUIT
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EIGHTH CIRCUIT
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714 Locust Street
St. Louis, MO 63101
NINTH CIRCUIT
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Arctic Building Penthouse
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Seattle, WA 98104
Richard A. Marcus
624 South Grand Avenue
Los Angeles, CA 90017
TENTH CIRCUIT
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100 West Main
Oklahoma City, OK 73102-2275
ELEVENTH CIRCUIT
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Barnett Tower, Suite 1300
One Progress Plaza
St. Petersburg, FL 33701
DISTRICT OF COLUMBIA CIRCUIT
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STAFF LIAISON
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Washington, DC 20036
(202) 331-2210

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary**
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CONFIDENTIAL August 30, 1994

Committee on the Judiciary
ATT: Hon. Joseph R. Biden, Jr., Chairman
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6275

RE: HONORABLE G. THOMAS PORTEOUS, JR.
United States District Court
Eastern District of Louisiana

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Honorable G. Thomas Porteous, Jr. for appointment as Judge of the United States District Court, Eastern District of Louisiana.

Our Committee is unanimously of the opinion that Judge Porteous is Qualified for this appointment.

A copy of this letter has been sent to Judge Porteous for his information.

Sincerely,

William E. Willis
Chair

cc: Honorable G. Thomas Porteous, Jr.
All ABA Judiciary Committee Members
Hon. Eleanor Dean Acheson

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CLAIRE McCASKILL, MISSOURI, CHAIRMAN
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ROGER F. WICKER, MISSISSIPPI
MIKE JOHANNS, NEBRASKA
JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE
WASHINGTON, DC 20510–6326

July 9, 2010

The Honorable Patrick J. Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
U.S. Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

As you know, the Senate is in the process of fulfilling our role under the Constitution to conduct a trial on the articles of impeachment against Judge G. Thomas Porteous, Jr. of the Eastern District of Louisiana. We, as the Chairman and Vice Chairman of the Senate Impeachment Trial Committee, request your assistance in obtaining files from the National Archives related to the nomination and confirmation of Judge Porteous. Specifically, the Committee is seeking any and all information or files that the Judiciary Committee may have received or compiled during the confirmation process for Judge Porteous in 1994.

It is alleged that Judge Porteous made false statements in connection with his nomination and confirmation to the Federal bench. Judge Porteous believes that what was known to the Senate Judiciary Committee prior to his confirmation is material to his defense. As such, Judge Porteous has requested this Committee's assistance in obtaining documents related to the FBI background investigation, the judicial rating process of the American Bar Association's Standing Committee on the Federal Judiciary, questionnaires, transcripts of confidential interviews and any other relevant material. We believe that some of this information may be contained in the archived files of the Senate Judiciary Committee.

The Senate Impeachment Trial Committee will provide whatever information it is provided to counsel for Judge Porteous. We ask that the Senate Judiciary Committee authorize Susan Smelcer of the Congressional Research Service, acting on behalf of this Committee, to obtain all Senate Judiciary Committee archived material related to the nomination and confirmation of Judge Porteous.

Thank you for your attention to this request.

Sincerely,

Claire McCaskill
Chairman

Orrin G.Hatch
Vice Chairman

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PATRICK J. LEAHY, VERMONT, CHAIRMAN

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BRUCE A. COHEN, *Chief Counsel and Staff Director*
BRIAN A. BENCZKOWSKI, *Republican Staff Director*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 27, 2010

The Honorable Claire McCaskill, Chairman
The Honorable Orrin G. Hatch, Vice Chairman
Senate Impeachment Trial Committee
United States Senate
Washington, D.C. 20510

Dear Chairman McCaskill and Vice Chairman Hatch:

We write in response to your July 9 letter requesting documents from the Senate Judiciary Committee's archived files on the 1994 nomination of Judge G. Thomas Porteous to the U.S. District Court for the Eastern District of Louisiana. Your letter explains that the request is made based on Judge Porteous' belief that the Committee has documents "material to his defense."

When the House Impeachment Task Force requested our files on the same matter, we provided them with the following items, which are also attached here on a DVD: a chart with dates of materials received on the nomination; the nomination; blue slips; the ABA rating letter; resume; Senate Questionnaire (public and Committee confidential section) including the financial disclosure and signed affidavit; opinions; news articles; and the Senate hearing transcript.

Your letter references "the FBI background information, the judicial rating process of the American Bar Association's Standing Committee on the Federal Judiciary, questionnaires, transcripts of confidential interviews and other relevant material." As a matter of practice, the Committee does not retain the FBI background information. Instead, the FBI background information compiled and provided to the Committee by the U.S. Department of Justice at the time of the nomination was returned to the Executive branch. We have provided the ABA rating letter. The Committee does not have materials on "the judicial rating process" of the ABA Standing Committee. We have provided the Senate Questionnaire, including the Committee confidential section. The Committee does not possess "any transcripts of confidential interviews."

Although not requested by your letter, we also note the following additional documents: (1) a staff memorandum summarizing Judge Porteous' responses on his Senate public questionnaire, which also includes a summary of the endorsements of Judge Porteous collected during staff due diligence calls; (2) handwritten staff notes from phone calls to 6 of 10 individuals listed by Judge Porteous on pages 22-23 of his Senate public questionnaire as individuals who "recently dealt with [him] on legal matters within the last five years;" and (3) three pages of typed staff notes summarizing the FBI background information.

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First, the staff memorandum would ordinarily be considered "Committee Confidential" and it has that label at the top of the document. It does not indicate the name of the staffer who drafted it. It does not indicate whether the memo was circulated to any Committee staffers or Senators. It appears to summarize information derived from that provided by the then-nominee in his questionnaire and staff due diligence calls. It also contains a summary of articles reviewed as the result of a Lexis-Nexis search, many of which have been provided. We are enclosing a copy of this memorandum.

Second, the handwritten staff notes from phone calls do not reveal the name of the staffer who made the calls. Whoever it was, that person is no longer an employee of the Committee and his or her identity is not readily apparent given the changeover among Committee staff during the last 16 years. These pages do not contain anything negative about the then-nominee from the references he provided. As you will see, the notes do not reflect any comments about out-of-court behavior. Given their lack of relevance to your proceedings and the fact that we do not know whether the Committee promised confidentiality when making these calls, we are reluctant to release these notes. If you would like to review them for relevance, please let us know and we will arrange that.

Finally, the staff notes summarizing the FBI background information are governed by a Memorandum of Understanding between the Committee and the Executive branch, which requires that "[n]otes and memoranda derived from the contents of the FBI background investigation reports … shall, in whatever form … be … secured in the same manner as FBI background investigation reports." The author of the notes is not indicated and they contain no analysis. There is no indication that these notes were shared with Senators, which would have been highly unlikely. We understand that the House Impeachment Task Force obtained the FBI background information and have made them available to you. These staff notes appear to derive from someone's review of the FBI background information and are entirely derivative of what was in that material. We have been in contact with the Executive branch and have been advised that there is no objection to our disclosing these notes to your committee. We are enclosing a copy of the notes.

In the process of reviewing our archives at your request, we also discovered two letters from Judge Porteous to then-Chairman Biden supplementing his Senate questionnaire. Copies of these letters and their attachments are also enclosed.

Sincerely,

PATRICK LEAHY
Chairman

JEFF SESSIONS
Ranking Member

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CLAIRE McCASKILL, MISSOURI, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN

AMY KLOBUCHAR, MINNESOTA
SHELDON WHITEHOUSE, RHODE ISLAND
TOM UDALL, NEW MEXICO
JEANNE SHAHEEN, NEW HAMPSHIRE
EDWARD E. KAUFMAN, DELAWARE

JIM DeMINT, SOUTH CAROLINA
JOHN BARRASSO, WYOMING
ROGER F. WICKER, MISSISSIPPI
MIKE JOHANNS, NEBRASKA
JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510–6326

July 30, 2010

VIA E-MAIL AND HAND DELIVERY

Jonathan Turley, Esq.
George Washington University Law School
2000 H Street, N.W.
Washington, D.C. 20052

Alan I. Baron, Esq.
Chief Special Impeachment Counsel
U.S. House of Representatives
Washington D.C. 20515

Dear Counsel:

I am writing to provide you with the entire Senate Judiciary Committee file with the exceptions noted in the July 27, 2010 letter from Chairman Patrick Leahy and Ranking Member Jeff Sessions. The production includes all of the materials provided by the Senate Judiciary Committee to the House Impeachment Task Force. In addition, the Senate Judiciary Committee provided the following additional documents to the Senate Impeachment Trial Committee:

1. Judge Porteous letter supplementing his questionnaire dated 9-15-94, including attachments;
2. Judge Porteous letter supplementing his questionnaire dated 9-29-94, including attachments;
3. Judiciary Committee staff confidential memorandum; and
4. Judiciary Committee staff confidential notes on the FBI background investigation file.

Due to the size of the files, I am only attaching, via electronic mail, the four documents which were not previously produced to the House. A full electronic copy of all of the documents will be hand-delivered on Monday. If you have any questions, please feel free to contact me.

Sincerely,

Derron R. Parks
Staff Director
Senate Impeachment Trial Committee

Enclosures as stated

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United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510-6326

DISPOSITION OF JUDGE G. THOMAS PORTEOUS, JR.'S MOTIONS FOR ASSISTANCE IN SECURING DISCOVERY FROM THE METROPOLITAN CRIME COMMISSION AND THE AMERICAN BAR ASSOCIATION

Judge G. Thomas Porteous, Jr. filed motions seeking the Committee's assistance in securing discovery from the American Bar Association ("ABA") and the Metropolitan Crime Commission ("MCC"). The Committee understands from Judge Porteous's counsel that the MCC has cooperated with Judge Porteous in resolving the document requests; therefore, that motion is denied as moot. Judge Porteous continues to request the Committee's assistance in securing discovery from the ABA, which the Committee denies.

REQUEST TO THE AMERICAN BAR ASSOCIATION

Judge Porteous submitted a request to the ABA on June 30, 2010, seeking all materials in its possession "that refer or relate to Judge G. Thomas Porteous, Jr., including without limitation any information or evidence gathered, reports prepared (in either draft or final form), or opinions rendered concerning Judge Porteous's fitness to serve on the federal bench." On the same day, Judge Porteous moved for the Committee's assistance in securing discovery of these materials from the ABA. On July 12, 2010, the ABA, through its counsel, responded to Judge Porteous's request, disclosing one letter dated August 30, 1994, from the ABA Standing Committee on the Federal Judiciary to the Senate Committee on the Judiciary, rating Judge Porteous as Qualified for appointment to the federal bench. This letter was the only document publicly released by the ABA in connection with Judge Porteous's nomination. In declining to provide other responsive documents from its files, the ABA response explained its policy of "strict confidentiality of all information collected and materials prepared in connection with its review of a nominee's professional qualifications for service on the federal bench."

In his Motion, Judge Porteous insists that the ABA's background investigation file on his nomination and "the question of what was known prior to [his] confirmation" is "highly material" to his defense because the Articles of Impeachment "allege a concealment of conflicts of interest in connection with his prior service as a state judge in Louisiana." He also states that "the witnesses called by the House of Representatives during its impeachment proceedings specifically raised the distinction between issues known before Judge Porteous's confirmation and issues concealed from the Senate and its investigators."

The Committee finds that the ABA's background investigation file is not relevant to, or likely to lead to new evidence on, the Articles of Impeachment. First, Article IV alleges that

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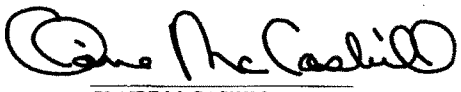
Judge Porteous "knowingly made false statements about his past to both the United States Senate and to the Federal Bureau of Investigation." The ABA's file on Judge Porteous is not relevant to whether he knowingly made false statements during his nomination and confirmation process during his FBI background check and on his Senate Judiciary Committee's Questionnaire for Judicial Nominees." Second, the ABA response indicates that written materials regarding Judge Porteous's nomination and confirmation were neither publicly released nor provided to the Senate Judiciary Committee, except for the August 30 letter. Further, "no written testimony was provided or oral statements given on behalf of the [ABA] Standing Committee."

In the alternative, Judge Porteous seeks ABA material related to his nomination and confirmation from the Senate Judiciary Committee's files. While not required, and on its own initiative, this Committee obtained the full Senate Judiciary Committee file on the nomination and confirmation of Judge Porteous and provided that material to both parties on July 30, 2010.

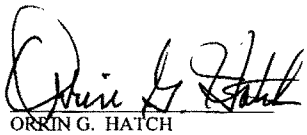
CONCLUSION

For these foregoing reasons, the Motion for Assistance in Securing Discovery from the MCC is denied as moot. The Motion for Assistance in Securing Discovery from the ABA is denied.

Dated: August 4, 2010



CLAIRE McCASKILL
Chairman



ORRIN G. HATCH
Vice Chairman

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE DEPARTMENT OF JUSTICE

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and respectfully requests the assistance of the Senate in securing discovery materials from the United States Department of Justice. In support, Judge Porteous states the following:

1. The Federal Bureau of Investigation ("FBI"), under the supervision of the Department of Justice, was responsible for investigating Judge Porteous after President Clinton nominated him to the federal bench in 1994.

2. The FBI also investigated possible corruption at the Jefferson Parish Courthouse in Gretna, Louisiana through Operation Wrinkled Robe between approximately 1999 and 2002. As part of this investigation, the FBI investigated former state court judges, including Judge Porteous.

3. In investigating whether impeachment of Judge Porteous was appropriate, the House of Representatives (the "House") acquired certain files from the Department of Justice relating to both the investigation concerning Judge Porteous's nomination and the Wrinkled Robe investigation.

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4. The articles of impeachment against Judge Porteous allege a concealment of conflicts of interest in connection with his prior service as a state judge in Louisiana. Moreover, the witnesses called by the House during its impeachment proceedings specifically raised the distinction between issues known before the confirmation and issues concealed from the Senate and its investigators. Thus, the question of what was known before Judge Porteous's confirmation is highly material to any defense at his Senate impeachment trial.

5. Many of the allegations raised in the articles of impeachment involve practices of judges in the Jefferson Parish Courthouse in the 1980s and early 1990s. As such, the practices of judges other than Judge Porteous are relevant to possible defenses, including but not limited to the view of what constituted *de minimis* gifts or services for judges.

6. The House has apparently refused to produce to Judge Porteous all documents made available to it from all sources, including the Department of Justice. The House's Special Impeachment Counsel have also refused to produce a simple listing of withheld files – as they did previously in the Hastings impeachment. This is the subject of a separate motion, which is being filed concurrently with this motion.

7. In the Hastings and Nixon impeachment trials, defense counsel for the accused requested the assistance of the United States Senate in acquiring discovery from third-party sources, such as the Department of Justice. A procedure was developed to permit discovery of Justice Department materials. In those cases, the Chairman of the Senate Impeachment Trial Committee submitted a letter to the Department of Justice requesting that it produce the requested discovery. (*See* Letter from Senator Wyche

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Fowler, dated July 18, 1989, attached as Exhibit 1.) The Justice Department complied with these requests and produced the documentation directly to the Senate. (*See* Letters from James Cole, dated August 1, 1989 and August 11, 1989, attached as Exhibit 2.) Senate personnel then reviewed the materials and designated for production to counsel for the accused those materials that were deemed relevant to any article of impeachment or asserted defense.

8. Judge Porteous seeks the production of the following materials:

a. All FBI 302 forms – both draft and completed versions – relating to the FBI's investigation of Judge Porteous in connection with his nomination and confirmation to the federal bench in 1994.

b. All material collected by the FBI and/or the Department of Justice during its investigation of Judge Porteous in connection to his nomination and confirmation to the federal bench in 1994.

c. All material from the Wrinkled Robe investigation that references or relates to Judge Porteous.

d. All material from the Wrinkled Robe investigation that references or relates to the setting, modifying, and/or splitting of bail bonds.

e. All material from the Wrinkled Robe investigation that references or relates to Jacob Amato, Robert Creely, Louis Marcotte, and Lois Marcotte

f. All material from the Wrinkled Robe investigation that references or relates to gifts, money, or other items of value received by judges, magistrates, or other judicial officers in the Jefferson Parish Courthouse.

g. All Department of Justice "Prosecution Memorandums" that reference or relate to Judge Porteous.

h. All Department of Justice "Requests for Authorizations to Indict" individuals in connection to the Wrinkled Robe investigation.

9. Because new counsel has only recently been added to this case and because the evidentiary hearing in this matter is fast approaching, Judge Porteous seeks

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the immediate assistance of the Senate in procuring these materials. In prior cases, defense counsel initially corresponded with the Justice Department, received correspondence in return rebuffing their requests for materials, filed motions with the Senate for assistance, and then waited for the Justice Department to comply. For example, in the case of Judge Nixon, this process took over two months – an amount of time that current defense counsel simply do not have given the impending trial schedule in this matter. Thus, in an effort to avoid unnecessary delay, Judge Porteous seeks the immediate assistance of the Senate in resolving this issue.

Alternatively, Judge Porteous suggests that, due to the truncated timeframe, that all of the requested material be produced directly to Judge Porteous and that Judge Porteous enter into an appropriate protective order regarding that material. The relevance of these categories of discovery is obvious. Judge Porteous will agree not to discuss or disclose such material absent use at the evidentiary hearing itself. Such a process would allow for an expedited review and avoid any delay of the trial.

WHEREFORE, Judge Porteous respectfully requests that the Senate implement a procedure to ensure that relevant materials from the Justice Department be made available to Judge Porteous.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

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/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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

Dated: June 27, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl

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Exhibit 1

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United States Senate

WASHINGTON, DC 20510

July 18, 1989

John C. Keeney, Esq.
Deputy Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Keeney:

As Chairman of the Senate Impeachment Trial Committee on theArticles of Impeachment against Judge Nixon, I write to request the Department's assistance in the Committee's efforts to assure that Judge Nixon receives a fair trial in the Senate. The Committee has determined that it would make a useful contribution to the trial process if the Department were willing to permit the Committee, through its staff, to review the documents (excluding grand jury materials governed by Rule 6(e)) in the possession of the Department, including those possessed by the Federal Bureau of Investigation, that were requested by Judge Nixon in his June 1, 1989 letter to the Attorney General, which was the subject of your response on June 21, 1989.

The review would be consistent with that conducted in the case of the Hastings impeachment matter. That is, the focus of the review would be to determine if there is evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Nixon's guilt or innocence. In the event that it is determined that particular documents should properly be made part of the pending impeachment proceedings, and accordingly made available to the parties for use at trial, the committee would hear from the Department prior to disclosing any documents that you believe contain particularly sensitive matters, so that we may address any continuing concerns that you have. No documents or portions of documents would be made available to the parties without the consent of the Department.

Your expeditious response to this request would be most helpful to the committee in attempting to complete discovery by July 31st.

Sincerely,

Wyche Fowler, Jr.

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Exhibit 2

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U.S. Department of Justice

Washington, D.C. 20530

AUG 1 1989

Donald A. Purdy, Jr., Esq.
Counsel to the Committee
United States Senate Impeachment
Trial Committee
Room Sh-902D
Hart Senate Office Building.
Washington, D.C. 20510

Dear Mr. Purdy:

Re: United States District Judge Walter L. Nixon, Jr.

Pursuant to the request of Senator Wyche Fowler, Jr., Chairman of the Senate Impeachment Trial Committee, the Department of Justice is providing the documents the Committee has requested concerning the investigation and prosecution of United States District Court Judge Walter L. Nixon, Jr. In some cases, where noted, redactions have been made to the documents to delete attorney work product. The documents provided are as follows:

1. Draft FBI Form, 302 Report of Interview of Stewart Sargent (4 pages).

2. Transcript of proffer of Wylie Fairchild on November 1, 1984 (9 pages).

3. Handwritten chronology (4 pages).

4. Memo, "Prosecution Memorandum of Carroll Ingram," dated December 7, 1984 (2 pages after redaction).

5. Memo, "Recommendation to Prosecute Paul H. 'Bud' Holmes," dated March 22, 1985 (9 pages after redaction).

6. Polygraph Report on Paul Hardin Holmes, dated July 12, 1985 (4 pages).

7. Handwritten notes (5 pages).

8. Handwritten "Drew Chronology" (9 pages).

9. Memo, "Request for Authorization to Indict Reditt 'Drew' Fairchild," dated March 18, 1985 (2 pages).

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10. Memo, "Recommendation to Prosecute Drew Fairchild," dated March 22, 1985 (3 pages).

11. "Chart" (2 pages).

12. FBI Memo From SA Jerry Ripley to SAC Jackson, dated July 6, 1981 (2 pages).

13. Memo, "Recommendation to Prosecute United States District Judge Walter L. Nixon," dated July 9, 1985 (9 pages after redaction).

14. Memo, "Recommendation to Prosecute United States District Judge Walter L. Nixon," dated July 22, 1985 (9 pages after redaction).

15. Memo, "Request for Authorization to Apply for Disclosure of Tax Returns -- Walter L. Nixon," dated July 9, 1985 (2 pages).

16. Memo, "United States v. Paul H. 'Bud' Holmes: Marshals Service Staffing," dated June 6, 1985 (4 pages).

17. Handwritten notes, "Wallace Gunn TC 10/2/85" (1 page).

18. Memo, "Mississippi Investigation," dated April 30, 1984 (3 pages after redaction).

19. FBI Form 302, Report of Interview of Elma Manasco, dated November 6, 1984 (1 page).

20. Handwritten notes, first page headed "Weldon Kennedy," dated March 5, 1984 (13 pages).

21. FBI Form 302, Report of Interview of Thomas L. Dial, dated August 28, 1984 (2 pages).

22. FBI Form 302, Report of Interview of Captain James R. Kelly, dated January 24-25-26, 1984 (3 pages).

23. FBI Form 302, Report of Interview of Tom Dial, dated November 15, 1983 (2 pages).

24. FBI Form 302, Report of Interview of Robert Royals, dated January 9, 1986 (2 pages).

25. Handwritten note, headed "Ingram" (3 pages).

26. FBI Form 302, Report of Interview of Billy Riley, dated November 28, 1984 (2 pages).

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27. Handwritten note, headed "Bud and Fanning . . ." (1 page).

28. Letter from Jack Morton, Deputy Regional Counsel, IRS, to Honorable Glenn L. Archer, Jr., Assistant Attorney General, Tax Division, dated December 16, 1985 (5 pages).

29. Memo, "Status Report re: The Petit Bois Bribe Investigation," dated November 19, 1985 (20 pages after redaction).

30. Handwritten notes, headed "McMullan Proffer" (10 pages).

31. "Daily Report" for May 7, 1985 (2 pages).

32. "Walter Louis Nixon, Jr., ET AL, Narcotics Case - Background" (18 pages).

Should the Committee have any further questions concerning this matter, please feel free to contact me at 786-5059.

Sincerely,

James M. Cole
Deputy Chief
Public Integrity Section
Criminal Division

Enclosures

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U.S. Department of Justice

Washington, D.C. 20530

AUG 11 1989

Mr. Donald A. Purdy, Jr.
Counsel
Senate Impeachment Trial Committee
902 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Purdy:

Re: United States District Judge Walter L. Nixon, Jr.

Pursuant to the supplemental request of the Senate Impeachment Trial Committee, the Department of Justice is providing the additional documents concerning the investigation and prosecution of Judge Walter L. Nixon, Jr. Those documents are as follows:

1. Transcript of Grand Jury testimony of Carroll Ingram on February . , 1985 (47 pages).

2. Handwritten notes headed "Baltar File" (1 page).

3. Handwritten notes headed "Ingram Proffer Joel Blast Office 1/16/85" (4 pages).

4. Handwritten notes headed "Ingram File Proffer in D.C. 1/29/85" (15 pages).

5. Handwritten notes headed "Ingram Feb 12, 1985 Baton Rouge" (6 pages).

6. Handwritten notes headed "Ingram" (8 pages).

7. Handwritten notes headed "Ingram" (1 page).

8. Handwritten notes headed "Ingram Misc" (9 pages).

9. Handwritten notes headed "Ingram" (1 page).

10. Handwritten notes headed "Ingram" (1 page).

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11. Handwritten notes headed "Bud Holmes File" (5 pages).

12. Handwritten notes headed "Bud - Drews case" (1 page).

13. Handwritten notes headed "Holmes --> Baltar" (1 page).

14. Handwritten notes (1 page).

15. Handwritten notes headed "Facts of Drews case" (1 page).

16. Handwritten notes headed "Katie" (1 page).

17. Handwritten notes headed "Katie" (1 page).

18. Handwritten notes headed "Drew State Pros File" (15 pages).

19. Letter from R.A. Fairchild, To Whom It May Concern, dated June 20, 1983 (1 page).

20. Handwritten notes headed "Leave grantee blank" (1 page).

21. Letter from Dantin & Dantin to Frank D. Montague, Jr., dated June 5, 1985 (2 pages).

22. Typed and handwritten notes (2 pages).

23. Handwritten notes headed "Matison" (1 page).

24. Typed and handwritten notes headed "Bud Holmes re: Bob Stockett" (1 page).

25. FBI teletype from Jackson to Director, FBI, dated July 1985 (7 pages).

Of the documents listed above, the only one which has not been delivered to you is the FBI teletype, described in item 25 above. I am enclosing three copies of that document with this letter. Should the Committee have any questions concerning this matter, please feel free to contact me at my office.

Sincerely,

James M. Cole
Deputy Chief
Public Integrity Section
Criminal Division

Enclosures

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Daniel C. Schwartz
Direct: 202-508-6025
dschwartz@bryancave.com

June 30, 2010

VIA EMAIL, FACSIMILE, AND FIRST-CLASS MAIL

Ms. M. Faith Burton
Congressional Liaison Officer
U.S. Department of Justice,
Office of Legislative Affairs
Main Justice Building, Room 1145
950 Pennsylvania Avenue, NW
Washington, DC 20530
Facsimile: 202-305-2643
Email: faith.burton@usdoj.gov

Dear Ms. Burton:

I write as counsel to Judge G. Thomas Porteous, Jr., of the United States District Court for the Eastern District of Louisiana, who is the subject of an impeachment issued by the House of Representatives and now before the United States Senate. The purpose of this letter is to request the opportunity to review and make copies of certain materials in the Department of Justice's possession in order to prepare for the Senate trial.

The Senate Impeachment Counsel have asked the defense to formally request this material before seeking the intervention of the Senate to guarantee this discovery. The information that we are seeking is highly material to the Articles of the Impeachment.

The materials we request include the following:

a. All FBI 302 forms – both draft and completed versions – relating to the FBI's investigation of Judge Porteous in connection with his nomination and confirmation to the federal bench in 1994.

b. All material collected by the FBI and/or the Department of Justice during its investigation of Judge Porteous in connection to his nomination and confirmation to the federal bench in 1994.

c. All material from the Wrinkled Robe investigation that references or relates to Judge Porteous.

d. All material from the Wrinkled Robe investigation that references or relates to the setting, modifying, and/or splitting of bail bonds.

Bryan Cave LLP
1155 F Street N.W.
Washington, D.C. 20004
Tel (202) 508-6000
Fax (202) 508-6200
www.bryancave.com

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e. All material from the Wrinkled Robe investigation that references or relates to Jacob Amato, Robert Creely, Louis Marcotte, and Lois Marcotte

f. All material from the Wrinkled Robe investigation that references or relates to gifts, money, or other items of value received by judges, magistrates, or other judicial officers in the Jefferson Parish Courthouse.

g. All Department of Justice "Prosecution Memorandums" that reference or relate to Judge Porteous.

h. All Department of Justice "Requests for Authorizations to Indict" individuals in connection to the Wrinkled Robe investigation.

The evidentiary hearings in the Senate are schedule to begin in mid-September 2010 and all motions must be filed by July 21, 2010. As such, we would appreciate your prompt response to this request, whether through by mail, fax, or email.

Sincerely yours,

Daniel C. Schwartz

cc: Alan I. Baron, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Counsel
Derron Parks, Esq., Senate Impeachment Trial Committee

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 19, 2010

Daniel C. Schwartz, Esquire
Bryan Cave LLP
1155 F Street, NW
Washington, DC 20004

Dear Mr. Schwartz:

This responds to your letter, dated June 30, 2010, which requested materials from the Department of Justice in connection with your representation of Judge G. Thomas Porteous, Jr. in the impeachment proceedings pending in the United States Senate.

Historically, the Department has not provided materials to officials facing impeachment, since the Department is not a party to those congressional proceedings. It is the responsibility of the Congress to provide any relevant materials to such officials. As a courtesy, we are responding to your requests by describing the extensive production that the Department has previously made to the Committee on the Judiciary in the U.S. House of Representatives (House Committee), either directly or through our document production to the U.S. Court of Appeals for the Fifth Circuit in connection with our referral of a judicial misconduct complaint concerning Judge Porteous, which the Fifth Circuit provided to the House Committee. To the best of our knowledge, the House Committee has received all documents in our possession that are relevant to the articles of impeachment, and we understand that the Committee has made those documents available to counsel for Judge Porteous.

As we have advised your colleague, we provided records regarding Judge Porteous, totaling 804 pages, to the House Committee in 2009 in connection with the impeachment proceedings in that body. Enclosed are copies of our correspondence regarding these disclosures. Also enclosed is the referral letter we sent to the Fifth Circuit on May 18, 2007. The letter sets forth the Department's reasons for not seeking criminal charges against Judge Porteous and contains an extensive discussion of the evidence the Department gathered concerning Judge Porteous's misconduct. The Department also provided approximately 12,378 pages of documents relating to its referral to the Fifth Circuit, which we understand were subsequently made available to counsel for Judge Porteous. Additionally, we understand that the House Committee has made available copies of all the documents obtained by staff as a result of meetings with Federal Bureau of Investigation representatives in New Orleans in October and November of 2009, and January of 2010. We believe that the FBI provided all of the documents that the House Committee requested as relevant to Judge Porteous.

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As stated above, we believe that all of the relevant factual information relating to Judge Porteous has already been made available to his attorneys by the House Committee. Taken as a whole, these materials include FBI 302s and other material collected by the FBI in connection with the investigation of Judge Porteous prior to his 1994 confirmation to the federal bench and materials about Judge Porteous from the Wrinkled Robe investigation. Some of the Wrinkled Robe records pertain to his conduct relating to bail bonds, other judicial officers, and other individuals named in your letter.

The Department's production to the Fifth Circuit and the House Committee did not include our internal memoranda relating to the prosecution decisions concerning Judge Porteous and the Wrinkled Robe investigation. Based on the Department's longstanding policy of protecting the confidentiality and independence of prosecutorial deliberations, we are not prepared to make those deliberative materials available for the impeachment proceeding. We also note that our obligations under the Privacy Act, 5 U.S.C. § 552a, would complicate any effort by the Department to disclose to you records relating to third parties, although it appears that you have already received them from the House Committee, which is not covered by that Act.

We appreciate the importance of fairness in Judge Porteous's impeachment proceedings and want to assure you that we are unaware of any information in our records about Judge Porteous that is relevant or material to the articles of impeachment that is not contained in the records provided to the House Committee, and by the Committee to counsel for Judge Porteous. Under these circumstances, we are convinced that repeating our searches in response to your request would constitute only time-consuming efforts that would serve no useful purpose.

We hope that this information is helpful.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: Alan I. Baron, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Counsel
Derron Parks, Esq., Senate Impeachment Trial Committee

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 18, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to the Committee's letter, dated March 31, 2009, which requested documents and other information relating to the Department's referral to the United States Court of Appeals for the Fifth Circuit pertaining to Judge G. Thomas Porteous, Jr.

Enclosed are 223 pages of records pertaining to the Senate confirmation of Judge Porteous, including his questionnaires and other material he supplied to the FBI. Social Security numbers have been redacted from these documents in order to protect individual privacy interests. Nonetheless, these records implicate substantial individual privacy interests and, accordingly, we request that you consult with the Department prior to disclosing their contents outside of the Committee.

The FBI is working to process additional documents responsive to your request and we will supplement this response as soon as they become available. Please do not hesitate to contact us if you would like additional assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Lamar S. Smith
Ranking Minority Member

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 25, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This supplements our prior response to the Committee's letter, dated March 31, 2009, which requested documents and other information relating to the Department's referral to the United States Court of Appeals for the Fifth Circuit pertaining to Judge G. Thomas Porteous, Jr.

Enclosed are 309 pages of records pertaining to the Senate confirmation of Judge Porteous, including his background questionnaire (SF 86), FBI 302 reports of interviews in connection with the background investigation, and other related documents. These records along with the documents we produced to the Committee on June 18, 2009, complete our response to your March 31, 2009, request for documents relating to the background investigation of Judge Porteous.

The enclosed documents bear limited redactions of personal information, such as social security numbers, date of births, cell phone numbers, non-public numbers, and other limited information implicating individual privacy interests. We also have redacted the names and personal information related to law enforcement personnel, and text that would identify sources who requested confidentiality during the course of the background investigation. Nonetheless, these records implicate substantial individual privacy interests and, accordingly, we request that you consult with the Department prior to disclosing their contents outside of the Committee.

We hope that this information is helpful. Please do not hesitate to contact us if you would like additional assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Lamar S. Smith

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 9, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This supplements our prior response to the Committee's letter, dated March 31, 2009, which requested documents and other information relating to the Department's referral to the United States Court of Appeals for the Fifth Circuit pertaining to Judge G. Thomas Porteous, Jr.

Enclosed are 52 pages of documents from the Metropolitan Crime Commission of New Orleans (MCC) investigation file of Judge Porteous that were in the possession of the Department of Justice. We have consulted with the MCC on the release of the enclosed documents, and been advised that the MCC does not object to our provision of these documents to the Committee for its impeachment investigation of Judge Porteous.

We hope that this information is helpful. Please do not hesitate to contact us if you would like additional assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Lamar S. Smith
Ranking Minority Member

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 20, 2009

The Honorable Adam B. Schiff
Chairman
The Honorable Bob Goodlatte
Ranking Minority Member
Impeachment Task Force
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Congressman Goodlatte:

This responds to your letter, dated June 12, 2009, which requested documents and other information relating to the Department's referral to the United States Court of Appeals for the Fifth Circuit pertaining to Judge G. Thomas Porteous, Jr. This also supplements our prior responses of June 18 and 25, 2009, and July 9, 2009, to the Committee on this matter.

Enclosed are 163 pages of documents responsive to Items 1 and 10 of your letter. The enclosed documents bear limited redactions of personal information, such as social security numbers, date of births, cell phone numbers, non-public numbers, and other limited information implicating individual privacy interests. Similarly, we have also redacted the names and personal information related to law enforcement personnel, and the names of sources who requested during the course of the investigation of Judge Porteous that their identities not be reveled. Nonetheless, these records implicate substantial individual privacy interests and, accordingly, we request that you consult with the Department prior to disclosing their contents outside of the Committee.

In addition, below are our responses to the Committee's twelve requests for documents and information set forth in your letter:

1. Enclosed are the FBI 302s for Jeff Duhon, and Aubrey Wallace from the Department's investigation of Judge Porteous. Judge George Giacobbe was not interviewed during the investigation of Judge Porteous. Also enclosed are additional FBI 302s which Committee staff requested on July 13, 2009. However, as explained to Committee staff on July 17, 2009, we are unable to identify of the interviewees of these particular FBI 302s because they have requested that their identities not be revealed.

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2. On July 9, 2009, we provided the Committee with a copy of the Metropolitan Crime Commission (MCC) investigative file of Judge Porteous.

3. The Department has no such records concerning or verification of instances where Judge Porteous set bonds for Louis Marcotte while he was a federal judge.

4. Any responsive records in the Department's possession regarding this particular request are covered by Federal Rule of Criminal Procedure 6(e) and, therefore, cannot be released without a court order authorizing their disclosure. As you know, on July 8, 2009, the General Counsel for the U.S. House of Representatives filed a motion, pursuant to Rule 6(e), with the United State District Court for the Eastern District of Louisiana, seeking disclosure of grand jury materials in the Porteous investigation. The district court's ruling on the Committee's motion will determine which, if any, of the specific documents made in this request can be disclosed by the Department. We note that both Jacob Amato, Jr. and Robert Creely are represented by Ralph Capitelli, Esq., an attorney in New Orleans, Louisiana. Mr. Capitelli may be in a position to assist the Committee in its effort to obtain the requested information. Mr. Capitelli may be reached at (504) 582-2425.

5. Jan Rotolo was the bookkeeper for the law firm of Creely & Amato. Ms. Rotolo was not interviewed by the FBI in relation to the Department's investigation of Judge Porteous. Other relevant administrative personnel for the law firm of Creely & Amato are Diane Lamule, Robert Creely's secretary, who was interviewed twice by the FBI during its investigation of Judge Porteous, and Deborah Mull, Jacob Amato's secretary, who was not interviewed by the FBI.

6. For the identical reasons set forth in our reply to Item 4, any responsive records in the Department's possession regarding this specific request are covered by Federal Rule of Criminal Procedure 6(e) and, therefore, cannot be release by the Department without a court order authorizing their disclosure. Again, we invite the Committee to contact Mr. Capitelli, who may be able to assist the Committee in its effort to obtain the requested information.

7. The status of the source or sources to which the Complaint of Judicial Misconduct refers remains confidential. However, we can confirm no such source has any personal knowledge concerning the allegations about Judge Porteous's receipt of payments from attorneys.

8. The Department has no such records relating to an "externship" for Judge Porteous's son.

9. Special Agent Dave Williams of the Office of Inspector General for the Department of the Interior (OIG DI) conducted the investigation into the hunting trips sponsored by Rowan Drilling Company and Diamond Offshore. He may be reached at (505) 828-3500.

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10. We are providing the FBI investigative file relating to the expungement allegations of Aubrey Wallace's and Jeffrey Duhon's state criminal convictions by Judge Porteous. Other than attorney work product, these documents are the only records of the Department of Justice responsive to your request.

11. On June 23, 2009, Assistant United States Attorney Brian, during a conference call informed Committee staff that any such records are in the possession of the OIG DI, and that the Committee should contact Special Agent Dave Williams of the OIG DI to obtain a copy of the requested documents;

12. The Department has been informed that then-Judge, now Chief Judge Richard T. Haik of the Western District of Louisiana, also went on one of the sponsored hunting trips. The Department is unaware of the identity of the Rowan Drilling litigation counsel who went on any such trip.

We hope that this information is helpful. Please do not hesitate to contact us if you would like additional assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 23, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This supplements our prior responses to the Committee's letter, dated March 31, 2009, which requested documents and other information relating to the Department's referral to the United States Court of Appeals for the Fifth Circuit pertaining to Judge G. Thomas Porteous, Jr.

Enclosed are 22 pages of records pertaining to an investigation of Judge Porteous' compliance with a bankruptcy order, including FBI 302 reports of individuals interviewed in connection with that investigation. These documents bear limited redactions of personal information, such as social security numbers, date of births, cell phone numbers, non-public numbers, and other limited information implicating individual privacy interests. Similarly, we have also redacted the names and personal information related to law enforcement personnel, and the names of sources who requested that their identities not be reveled. Nonetheless, these records implicate substantial individual privacy interests and, accordingly, we request that you consult with the Department prior to disclosing their contents outside of the Committee.

Please do not hesitate to contact us if you would like additional assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Lamar S. Smith
Ranking Minority Member

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 13, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This supplements our prior responses to the Committee's letter, dated March 31, 2009, which requested documents and other information relating to the Department's referral to the United States Court of Appeals for the Fifth Circuit pertaining to Judge G. Thomas Porteous, Jr.

Enclosed are 32 pages of records from the "Wrinkled Robe" investigation conducted by the FBI and the United States Attorney's Office for the Eastern District of Louisiana pertaining to Judge Porteous. The enclosed materials are from an affidavit executed on August 27, 2001, in the Wrinkled Robe investigation supporting an application for an order authorizing Title III electronic surveillance of various telephone lines. While these documents were under seal, the Court modified the sealing order to permit this disclosure to you and the Committee's further use of the records.

The affidavit has been redacted to delete material that is not pertinent to Judge Porteous, who is referred to as "Judge #2." In addition, we have also redacted from the affidavit the names and personal information related to law enforcement personnel, and the names of sources who requested that their identities not be revealed. Nonetheless, these records implicate substantial individual privacy interests and, accordingly, we request that you treat them with appropriate sensitivity.

Please do not hesitate to contact us if you would like additional assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Lamar S. Smith
Ranking Minority Member

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U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

May 18, 2007

The Honorable Edith H. Jones
Chief Judge
United States Court of Appeals for the Fifth Circuit
515 Rusk Avenue, Room 12505
Houston, Texas 77002-2655

Re: Complaint of Judicial Misconduct Concerning the Honorable G. Thomas Porteous, Jr.

Your Honor:

The United States Department of Justice respectfully submits this complaint referring allegations of judicial misconduct concerning the Honorable G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana, pursuant to 28 U.S.C. §§ 351-64 and the Rules Governing Complaints of Judicial Misconduct or Disability (amended July 15, 2003).[1]

For the past several years, the Federal Bureau of Investigation ("FBI") and a grand jury empanelled in the Eastern District of Louisiana investigated whether Judge Porteous and other individuals bribed or conspired to bribe a public official in violation of 18 U.S.C. §§ 201 and 371, committed or conspired to commit honest services mail- or wire-fraud in violation of 18 U.S.C. §§ 371, 1341, 1343, and 1346, submitted false statements to federal agencies and banks in violation of 18 U.S.C. §§ 1001 and 1014, and filed false declarations, concealed assets, and acted in criminal contempt of court during his personal bankruptcy action in violation of 18 U.S.C. §§ 152 and 401.

The Department has determined that it will not seek criminal charges against Judge Porteous. 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 1990s and would be precluded by the relevant statutes of limitations. In reaching its decision not to bring other available charges that are not time barred, the Department weighed the government's heavy burden of proof in a criminal trial, and the obligation to carry that burden to a unanimous jury; concerns about the materiality of some of Judge Porteous's provably false statements; the special difficulties of proving mens rea and intent to deceive beyond a reasonable doubt in a case of this nature; and the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters. The Department also

[1] This complaint contains information obtained by the grand jury. The district court has authorized disclosure of matters occurring before the grand jury pursuant to Fed. R. Crim. P. 6(e)(3)(E)(I) solely for use in this complaint and any resulting judicial proceedings.

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gave careful consideration -- as it must -- to the availability of alternative remedies for Judge Porteous's history of misconduct while on the bench, including impeachment and judicial sanctions administered pursuant to 28 U.S.C. §§ 351-64.

Despite the Department's decision not to charge Judge Porteous with violations of federal criminal law, the investigation has uncovered evidence of pervasive misconduct committed by Judge Porteous. The Department also is aware that Judge Porteous and his medical examiners have concluded that he is mentally and psychologically unfit to serve as a federal judge, and that his incompetency is permanent. Collectively, the evidence indicates that Judge Porteous may have violated federal and state criminal laws, controlling canons of judicial conduct, rules of professional responsibility, and conducted himself in a manner antithetical to the constitutional standard of good behavior required of all federal judges. Further, it has come to the Department's attention that Judge Porteous is scheduled to return to the federal bench in June 2007, at which time he may seek to preside over matters involving the Department. The Department accordingly refers this evidence to Your Honor for possible disciplinary proceedings and, if warranted, certification of the allegations to Congress for impeachment.

BACKGROUND

On October 11, 1994, G. Thomas Porteous, Jr., was confirmed by the United States Senate as a United States District Court Judge for the Eastern District of Louisiana. Before his elevation to the federal bench, he served as a judge on the 24th Judicial District Court of the State of Louisiana ("24th JDC") for ten years, from 1984 to 1994.

The New Orleans Division of the FBI conducted an investigation into allegations of judicial corruption in the 24th JDC. That investigation resulted in the convictions of fourteen defendants, including several 24th JDC judges, the owners of a bail bonding business, and other state court litigants and officials. During the investigation, the FBI was informed that Judge Porteous had in the past accepted, and as a federal judge continued to accept things of value, including payments and trips, from local attorneys, allegedly in exchange for favorable rulings. The FBI also was informed that Judge Porteous maintained an improper relationship with Louis and Lori Marcotte, the owners of a bail bonding business, who allegedly provided Judge Porteous as well as other state judges and employees various things of value in exchange for access and assistance on bond-related matters.

In March 2001, Judge Porteous and his wife, Carmella Porteous, filed for bankruptcy under Chapter 13. Gabriel and Carmella Porteous signed and filed a declaration that their bankruptcy schedules and statement of financial affairs were true to the best of their knowledge, information, and belief. Subsequently, the bankruptcy court confirmed a repayment plan based on the information the Porteouses submitted to the court. The bankruptcy judge issued an order providing for repayment to the creditors over a 36-month period and prohibiting the Porteouses from accruing further debt during the bankruptcy. The repayment plan was satisfied and the bankruptcy discharged in July 2004.

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EVIDENCE OF MISCONDUCT

I. Evidence that Judge Porteous Violated the Order of the Bankruptcy Court

Judge Porteous and his wife Carmella Porteous filed for bankruptcy on March 28, 2001. The Porteouses' financial records show that they sought protection in bankruptcy in large part because of their substantial gambling activities. For example, between June 1995 and July 2000, while Judge Porteous served on the federal bench, over $66,000 in gaming charges appear on Judge Porteous's credit card statements. Along with those credit card charges, between January 1996 and May 2000 Judge Porteous wrote checks or made cash withdrawals at casinos for an additional $27,739.

Judge William Greendyke, sitting by designation on the Bankruptcy Court for the Eastern District of Louisiana, issued an Order confirming the bankruptcy repayment plan on June 28, 2001. Among other things, Judge Greendyke ordered that "[t]he debtor(s) shall not incur any 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."

Judge Porteous violated this order on multiple occasions. Among other debts, he obtained gambling markers and loans from casinos during the pendency of the bankruptcy proceeding.[2] Judge Porteous obtained the following short-term debts from casinos in the aggregate amount of $31,900 in violation of the court's order:

- on August 20 and 21, 2001, Porteous borrowed $8,000 from Treasure Chest Casino in Kenner, Louisiana;
- on September 28, 2001, Porteous borrowed $2,000 from Harrah's Casino in New Orleans, Louisiana;
- on October 13, 2001, Porteous borrowed $1,000 from Treasure Chest Casino in Kenner, Louisiana;
- on October 17 and 18, 2001, Porteous borrowed $5,900 from Treasure Chest Casino in Kenner, Louisiana;
- on October 31, 2001, Porteous borrowed $3,000 from Beau Rivage Casino in Biloxi, Mississippi;
- on November 27, 2001, Porteous borrowed $2,000 from Treasure Chest Casino in Kenner, Louisiana;

[2] A "marker" is a form of credit extended by a casino that enables a customer to borrow money while authorizing the casino to draw any unpaid balance after a fixed period of time from the customer's bank account. Typically, markers are deposited after a few days, but Judge Porteous obtained an agreement from at least one casino that he would be afforded thirty days to repay his markers before the casino would deposit them.

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- on December 11, 2001, Porteous borrowed $2,000 from Treasure Chest Casino in Kenner, Louisiana;
- on December 20, 2001, Porteous borrowed $1,000 from Harrah's Casino in New Orleans, Louisiana;
- on February 12, 2002, Porteous borrowed $1,000 from Grand Casino in Gulfport, Mississippi;
- on April 1, 2002, Porteous borrowed $2,500 from Treasure Chest Casino in Kenner, Louisiana;
- on May 26, 2002, Porteous borrowed $1,000 from Grand Casino, Gulfport, Mississippi; and
- on July 4 and 5, 2002, Porteous borrowed $2,500 from Grand Casino, Gulfport, Mississippi.

In addition, the evidence shows that Judge Porteous violated the order prohibiting new debt on several other occasions. On July 4, 2002, Judge Porteous applied successfully to increase his credit limit at Grand Casino Gulfport from $2,000 to $2,500. Judge Porteous and his wife accrued new debt on a credit card in violation of the order, including $734.31 in new charges between May 16 and June 18, 2001; $277.74 in new charges between June 15 and July 18, 2001; and $321.32 between July 16 and August 17, 2001.[3] Further, Judge Porteous and his wife obtained new, low-limited credit cards during the course of the bankruptcy without obtaining trustee approval, also in violation of the order. On several occasions, Judge Porteous signed the checks paying off the debts on credit cards that were obtained in his wife's name.

The evidence indicates that Judge Porteous intended to violate the order of the bankruptcy court. First, Judge Porteous is a federal judge who issues similar orders, and unquestionably expects that they will be obeyed. Claude C. Lightfoot, his bankruptcy attorney, testified that both he and the bankruptcy judge told Judge Porteous that he could not obtain new debt, that the requirement was well known to Judge Porteous, and that it was very clear to Judge Porteous that he would need approval to obtain new debt.[4] During a May 9, 2001 creditors meeting, Judge Porteous was further admonished by the trustee that he could not obtain new debt. The trustee also provided Judge Porteous with a written statement that reiterated the restriction on obtaining debt during bankruptcy, including credit card debt. Finally, Judge Porteous's actions in the bankruptcy show that he knew about the order's prohibition, and violated it willfully: not only

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[3] The Porteouses retained this credit card during the bankruptcy by failing to report on the bankruptcy application that they had paid off the debt on that card immediately before filing, as set forth below.

[4] The district court overseeing this grand jury investigation ruled that the attorney-client and work product privileges did not bar Lightfoot from testifying or producing records about his representation of Judge Porteous, both because the privilege did not apply to much of the requested information and also because the government satisfied its burden of showing that the crime-fraud exception defeated the claim of privilege.

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did several of the violations occur soon after the confirmation order was issued, but he complied with the no-debt provision of the order in other instances that he knew were likely to come to the attention of the trustee. Specifically, the Porteouses requested permission from the bankruptcy trustee to refinance their home, which the trustee granted on December 20, 2002, and to obtain two new car leases, which the trustee granted on January 2, 2003. That Judge Porteous knew to request permission for other debts during the pendency of the bankruptcy makes clear that his failure to request permission for gambling and credit card debts was intentional and willful.

II. Evidence that Judge Porteous Filed False Pleadings and Concealed Assets in Bankruptcy

Judge Porteous included numerous false statements in bankruptcy pleadings signed under penalty of perjury and submitted to the court -- statements that closed avenues of inquiry and undermined the administration of the bankruptcy by, among other things, concealing assets and income that potentially could have been made available to creditors, but were not.

A. False Initial Petition

The evidence indicates that Judge Porteous intentionally filed his initial bankruptcy petition using a false name to protect himself from public embarrassment. The docket and various documents from the bankruptcy of Gabriel Thomas Porteous, Jr., and Carmella Porteous, case number 01-12363 in the Eastern District of Louisiana, indicate that a petition was filed on March 28, 2001, listing the debtors as "G.T. Ortous" and "C.A. Ortous" and their "street address" as "P.O. Box 1723, Harvey, LA 70059-1723." The social security numbers listed correspond to Gabriel Thomas Porteous, Jr., and Carmella Porteous. The petition was signed by Gabriel and Carmella Porteous in two places, once each directly over the printed name "Ortous." Those signatures were made under penalty of perjury.

Bankruptcy records also indicate that an amended petition was filed in the same case number on April 9, 2001, providing the debtors' names "Gabriel T. Porteous, Jr.," and "Carmella A. Porteous" and the street address "4801 Neyrey Dr., Metairie, LA 70002." United States Postal Service records include a PS Form 1093 Post Office Box assignment for P.O. Box 1723 in Harvey, Louisiana, which indicates that Gabriel T. Porteous, Jr., rented that box on March 20, 2001, just days before filing for bankruptcy.

The Porteouses' bankruptcy attorney testified that he and Judge Porteous specifically devised this scheme to sign under penalty of perjury an initial petition using a fabricated name and newly-acquired post office box address. The attorney testified that their purpose in falsifying the initial filing was to avoid publicity and humiliation by preventing Porteous's name from being listed in the local newspaper among other bankruptcies filed that week.

B. Concealed Assets and Income

The investigation also obtained evidence that Judge Porteous concealed assets and income during his bankruptcy proceeding. The Chapter 13 Schedules and Plan were signed by Gabriel and Carmella Porteous and Claude Lightfoot and were filed on April 9, 2001. The Porteouses signed a declaration filed with the Schedules indicating that, under penalty of perjury,

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the Schedules were true to the best of their knowledge, information, and belief. Judge Porteous also stated under oath in a hearing before the bankruptcy trustee on May 9, 2001, that the materials submitted were true to the best of his knowledge. However, the bankruptcy schedules and other Porteous financial records indicate that the Porteouses concealed from the bankruptcy court several assets and sources of income, including those described below.

1. Concealed Tax Refund – In response to question 17 of Schedule B, filed April 9, 2001, which asks for "other liquidated debts owing debtor including tax refunds," Judge Porteous stated that there were "None." For question 20 of Schedule B, which asks for "other contingent and unliquidated claims of every nature, including tax refunds," Judge Porteous likewise responded, "None." However, records provided by Bank One for accounts of Gabriel and Carmella Porteous indicated that a $4,143.72 tax refund was deposited approximately one week later, on April 13, 2001. In an interview, the bankruptcy trustee indicated that the Porteouses did not notify him about their calendar year 2000 tax refund and did not turn the refund over to him even though they were required to do so. Their attorney, Claude Lightfoot, testified that the Porteouses never told him they were expecting a refund for calendar year 2000 when he went over each line of their schedules with them before signing and filing them.

2. Understated Bank Account Balance – In response to question 2 of Schedule B, which asks for "checking, savings, or other financial accounts, . . . or shares in banks, savings and loan, thrift, building and loan, and homestead associations," the Porteouses listed "Bank One Checking Account No. 002379554" with a current value of $100. However, the Porteouses' Bank One statement for that account, covering the period March 23 to April 23, 2001, indicates that the balance in that account on March 28, 2001, the date the bankruptcy petition was filed, was more than $1,800. The balance on April 9, 2001, the date the schedules were filed, was more than $3,000. Another bank account, which had a balance of more than $280 at the time, was not included in the bankruptcy filings at all. Judge Porteous's bankruptcy attorney testified that the only account Judge Porteous told him about was the account listed in the schedules, and that the $100 figure for that account came from Judge Porteous. By providing counsel with false and incomplete information, Porteous prevented his lawyer from rendering considered advice on what amounts to include, and by failing to disclose the full amount of assets in his bank account, Judge Porteous obstructed the trustee's task of accurately providing a full accounting of the Porteouses' financial condition to the bankruptcy court and interested creditors.

3. Carmella Porteous's Employment – Schedule I requires debtors to list, among other items, current income, occupation, and name of employer for the individual debtors. On Schedule I, the Porteouses listed the employer and take-home pay for Judge Porteous, but provided no employer name or income for Carmella Porteous. However, the Porteouses' bank records indicate that Carmella Porteous worked sporadically for several established employers both before and after the bankruptcy petition was filed. For instance, in the year 2000, she earned at least $864 from Adecco Employment Services and $327 from New Orleans Metropolitan Convention and Visitors, and in 2001, she earned $3,109.50 from R&M Glynn, Inc., and $915 from New Orleans Metropolitan Convention and Visitors. None of this income was indicated on the bankruptcy petition or schedules, nor was it subsequently brought to the attention of the trustee or the court.

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C. Concealed Preferred Creditors

The bankruptcy schedules and other Porteous financial records also indicate that the Porteouses apparently concealed from the bankruptcy trustee and creditors the existence of several additional creditors who were paid in full immediately before the bankruptcy was filed.

Gabriel and Carmella Porteous signed under penalty of perjury their Statement of Financial Affairs on April 9, 2001. Question 3 of the Statement stated, "List 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 Porteouses answered, "Normal installments." That statement was false, as they failed to list full repayments made to Fleet Credit Card Services and Grand Casino Gulfport shortly before they declared bankruptcy. These creditors therefore appear to be secretly preferred creditors, preferences that allowed the Porteouses to retain a credit card and protect their line of credit with a casino during the pendency of their bankruptcy repayment plan.

1. Fleet Credit Card – Credit card records of Carmella Porteous from Fleet Credit Card Services obtained pursuant to a grand jury subpoena indicate that Carmella Porteous held Fleet credit card account # 5447195123210658 prior to the filing of the Porteouses' bankruptcy on March 28, 2001. The records further indicate that the balance on that account, $1,088.41, was paid in full with a March 23, 2001 check from Judge Porteous's secretary, Rhonda Danos. His secretary testified that she made that payment at Judge Porteous's direction. Accordingly, Fleet Credit Card Services was fully paid off, in contrast to the creditors included in the bankruptcy, and the Porteouses retained the Fleet credit card for their own use, all without any disclosure to the bankruptcy trustee, judge, or creditors. Indeed, the Porteouses subsequently used this credit card in violation of the bankruptcy court's order prohibiting them from accruing new debt.

2. Grand Casino Markers – Records obtained from Grand Casino Gulfport pursuant to a grand jury subpoena indicated that Gabriel Porteous obtained two $1,000 markers from the casino on February 27, 2001. According to casino and bank records and interviews, Grand Casino Gulfport attempted to deposit the markers, which Judge Porteous had not repaid, in March 2001, but was unsuccessful due to a change in the ownership of Judge Porteous's bank. Casino records further show that Porteous contacted the casino and provided the new bank information before filing his Statement of Financial Affairs. On April 4, 2001, the markers were successfully deposited. Grand Casino Gulfport was therefore fully paid off, in contrast to the creditors included in the bankruptcy, all without any notification to the bankruptcy trustee, judge, or creditors. In addition, as noted above, Judge Porteous subsequently raised his credit limit with Grand Casino Gulfport during the pendency of his bankruptcy.

D. Undisclosed Gambling Losses

On the Statement of Financial Affairs, Question 8 states, "List all losses from fire, theft other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case." The Porteouses checked the box for "None." However, analyses of casino records indicated that Judge Porteous's gambling losses exceeded $12,700 during the preceding year, or at least $5,700 in net losses. According to the trustee, had

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he known about the Porteouses' gambling losses he may have scrutinized more carefully the income and expense figures reported by the Porteouses in their filings.

E. Impact of False Statements and Concealed Assets in Bankruptcy

Judge Porteous, in the series of false statements set out above, subverted the bankruptcy court's ability to properly administer his bankruptcy. His use of a false name and his concealment of his gambling losses in the year preceding his bankruptcy prevented the public from learning about the nature of his public bankruptcy and prevented the trustee, court, and creditors from learning a relevant aspect of his financial condition. His false statements about expected tax refunds, bank accounts, his wife's income, and the existence of preferred creditors all concealed from the court income or assets that could have been distributed to creditors in the bankruptcy or been used to calculate the Porteouses' obligations in the event their assets were to be liquidated. The Porteouses filed a Chapter 13 bankruptcy, in which payments to creditors are based on prospective income. Carmella Porteous's income would have been directly relevant to the calculation of income available to repay creditors. Moreover, in order to determine a fair recovery for creditors under Chapter 13, courts compare the amount that a debtor would pay under Chapter 13 with the amount they would pay were the debtor's assets liquidated. The creditors must fare at least as well in Chapter 13 as they would if the assets were liquidated under Chapter 7. Accordingly, depending on how they were treated by the trustee and bankruptcy judge, concealed assets such as the Porteouses' expected tax refund, money in bank accounts, and money paid to preferred creditors (which the court could order repaid and distributed among all creditors) could have affected the comparative liquidation value of his estate, the amount of the monthly payments the Porteouses were required to make, or the percentage of debt the Porteouses were ultimately obligated to repay.

Even if the value of the hidden assets would not ultimately have affected the amount recovered by any individual creditors, Judge Porteous's false statements nonetheless undermined the bankruptcy process generally. "Debtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate." In re Yonikus, 974 F.2d 901, 904 (7th Cir. 1992). This is because allowing debtors "the discretion to not report exempt or worthless property usurps the role of the trustee, creditors, and the court by denying them the opportunity to review the factual and legal basis of debtors' claims." In re Bailey, 147 B.R. 157, 163 (Bankr. N.D. Ill. 1992). Judge Porteous's concealment of assets and his filing of a false petition, schedules, and his statement of financial affairs precluded other interested parties from asserting their rights and enjoying a full and fair hearing on any claims they may have made against the estate.[5]

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[5] Despite the evidence recited above, the Department ultimately concluded that it would not seek to charge Judge Porteous with violations of federal criminal law under 18 U.S.C. § 152(1) and (3) (concealed assets and false statements in bankruptcy) and 18 U.S.C. § 401(3) (criminal contempt of court). Several factors informed that decision, including the burdens of proving beyond a reasonable doubt to a unanimous jury the materiality of Judge Porteous's misconduct in the bankruptcy proceeding. The burdens on the government in a criminal prosecution, however, do not apply in judicial misconduct or impeachment proceedings. An

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III. Evidence that Judge Porteous Submitted Additional False and Misleading Statements

The investigation obtained evidence that numerous signed documents filed prior to or contemporaneously with the initiation of bankruptcy on which Judge Porteous had a duty to be truthful -- including government financial disclosure reports, a casino credit application, and a bank loan renewal application -- also contained false or misleading information.

Porteous's financial disclosure report for calendar year 2000, filed with the Administrative Office in May 2001 just over a month after he filed for bankruptcy, failed to list numerous credit accounts he was obligated to disclose, including most of those listed on his bankruptcy documents. Further, on that disclosure report Judge Porteous indicated liabilities of $15,000 or less on each of two credit cards, while Schedule F to his bankruptcy filings from the same time period reflects that Judge Porteous in fact owed approximately $196,000 in unsecured debt, most of it credit card debt. Judge Porteous also failed to disclose on his annual financial disclosure forms the travel, cash, and gifts he received while a federal judge from attorneys and others with matters before him, as discussed further below. In addition, Judge Porteous reported "0" indebtedness on an April 30, 2001, credit application filed with Harrah's casino just weeks after he noted in his petition to the bankruptcy court that he had incurred $196,000 in unsecured debt.

The investigation also uncovered evidence that Judge Porteous intended to mislead Region's Bank about his financial condition in order to ensure that a $5,000 single-payment loan scheduled to become due shortly before the bankruptcy would be extended and, thus, discharged among other unsecured debts in the bankruptcy. In response to a grand jury subpoena, Claude Lightfoot, the Porteouses' bankruptcy attorney, produced a letter from him to the Porteouses dated December 21, 2000, which discussed additional letters he had sent to all but one of the unsecured creditors that later were included in the bankruptcy. Lightfoot stated, "I enclose a copy of the letters and one copy of the attachments I included with each that I have sent to all of the unsecured creditors, with the exception of Regions Bank which we wanted to exclude, proposing the workout of the debts to each . . . ." (emphasis added). These "workout" letters proposed a 21% payment of the debts the Porteouses owed to each of 13 unsecured creditors "[i]n an effort to provide all of my clients' unsecured creditors with immediate payment now and to avoid the necessity of a Chapter 7 bankruptcy filing." (emphasis added). Region's Bank, to whom the Porteouses owed $5,000 on an unsecured "single payment" loan scheduled to come due January 13, 2001, was not sent a workout letter, nor was the $5,000 Regions loan amount included in the schedule of debts provided in the workout letters to other creditors. Another document Lightfoot produced was a list of the Porteouses' creditors and debts that had been prepared by Judge Porteous and his wife, and which Lightfoot used, along with other worksheets, during his efforts to reduce the Porteouses' debts short of bankruptcy as well as in preparing the bankruptcy petition and schedules. That list includes an entry in what has been identified as Judge Porteous's handwriting that states, "Regions Bank $5000 unsecured loan due 1/13/01."

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impeachable offense is any misconduct that damages the State and the operations of governmental institutions; it is not limited to criminal misconduct.

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On January 16, 2001 -- shortly after the workout letters were sent to the unsecured creditors -- Judge Porteous signed an application with Region's Bank to renew his loan and extend the date of repayment on the loan six months. On the application Judge Porteous certified that he was not "in the process of filing bankruptcy" and signed under the acknowledgment that there had been "no material adverse change" in his financial condition "as disclosed in my most recent financial statement to lender." (The relevant loan applications with Region's Bank submitted in January and July 2000 included financial statements, but neither of those statements appears to have been completed.) The loan renewal was approved, and the repayment date was extended to July 17, 2001. The Porteouses then filed their initial voluntary petition for bankruptcy approximately two months later, on March 28, 2001, and the loan from Region's Bank was discharged in the bankruptcy.

The December 21, 2000, letter from their attorney to the Porteouses establishes that Judge Porteous's decision not to disclose his actual financial condition and impending bankruptcy to Region's Bank in the loan renewal application was intentional. Indeed, the letter states that the Porteouses and their attorney decided not to send the workout letter to Region's Bank in particular. As a result, Judge Porteous was able to obtain an extension under the false pretense that his financial condition had not materially worsened and that he was not on the brink of bankruptcy, and was able to include the Region's Bank loan in the bankruptcy even though it was originally set to mature before he filed.

IV. Evidence that Judge Porteous Solicited and Accepted Things of Value from Attorneys and Litigants with Matters Before Him

Among the attorneys identified by FBI sources as the group most closely linked to the corruption allegations surrounding Judge Porteous were Donald Gardner, Robert Creely, Leonard Levenson, and Warren Forstall. Each of those attorneys was interviewed or compelled to testify before the grand jury about their financial dealings with the Judge. The evidence obtained from those witnesses shows that Judge Porteous accepted cash, expensive meals, travel, and other benefits from them, gifts that the Judge failed to disclose to the Administrative Office on his annual financial disclosure reports or to litigants and opposing counsel in cases in which those attorneys were engaged. The Department also has obtained evidence that Judge Porteous received unreimbursed travel and sport hunting trips from litigants with matters before him in federal court, also without disclosing his apparent conflicts to interested parties and counsel.

A. Cash Payments from Attorneys

Robert Creely and Jacob Amato, who represented clients with matters before Judge Porteous in state and federal court, testified that Judge Porteous solicited and accepted cash payments from them while he was a state and federal judge. According to their testimony, none of the payments occurred after 1999.

Robert Creely is a lawyer in New Orleans, Louisiana. He met Judge Porteous in high school, and practiced at the same firm as Judge Porteous for a year after law school. Creely then left the firm with another local attorney, Jacob Amato. Creely and Amato practiced together in

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the law firm of Creely & Amato for 29 years. Creely describes himself as a very close personal friend of Judge Porteous, as does Amato.

Creely testified that, beginning in the late 1980s and early 1990s, while Judge Porteous was a state court judge, he began to solicit cash payments from Creely. Creely and Amato had matters before Judge Porteous in state court at that time. Creely testified that he and Amato would each take draws for half the amount from their joint law firm account. Creely would give that money to Judge Porteous in cash. Creely indicated that Judge Porteous would always ask for the money to pay urgent, unforeseen expenses related to his family. However, Creely stated that Judge Porteous drank and gambled excessively, and Creely was concerned he was paying for the Judge's extravagant lifestyle. Creely testified that, as a result, he eventually told Judge Porteous he could not continue to give him money.

After Creely decided to cut off further payments to Judge Porteous, the Judge began to designate Creely as the curator on executory interests in mortgaged property in actions over which he presided as a state court judge. Creely testified that he received approximately $175 from the state court system for each curatorship, and that those cases required very little time or effort on his part. In return, Judge Porteous asked Creely for the money he was paid by the court. Creely testified that he paid Judge Porteous in cash the amount he received, minus his minimal costs, which usually involved simply sending a letter and posting public notice of the pending executory actions. Although PACER records indicate Judge Porteous appointed Creely as the representative for an absent party in at least one forfeiture action in federal court -- that is, United States v. Ratcliff, Civ. No. 95-00224 (filed Jan. 19, 1995) -- Creely testified that the kick-back scheme he described came to an end when Judge Porteous moved from state to federal court in 1994. Jacob Amato also testified about the curatorships and stated that he was aware that Judge Porteous asked Creely for money and explicitly tied those payments to the many cases in which the Judge appointed Creely as a curator.

Creely testified that, in May 1999, Judge Porteous once more asked his law partner, Jacob Amato, for a payment of $2,000, this time to help defray the cost of a wedding for one of his children. This request was made while Amato was counsel on the Liljeberg matter, a multi-million dollar civil action pending before Judge Porteous in federal court, described further below. Jacob Amato also testified about that request for money from Judge Porteous. Amato gave Porteous the money he asked for in cash, again splitting the payment with Creely through personal draw-downs from their law firm account. Creely testified that Judge Porteous has not solicited, and he has not given him, any additional cash since the May 1999 payment of $2,000. Creely testified that Judge Porteous instructed him to give the cash to his secretary, Rhonda Danos, who would pick it up from his office. Creely says he put the money in a sealed envelope and gave it to Danos. Danos testified that she does not recall receiving an envelop with cash in it, although she stated that she did pick up items from time to time for the Judge from Creely's office.

Jacob Amato corroborated Creely's claims that they made cash payments to Judge Porteous both while he was a state and a federal judge. Between them, Creely and Amato represented parties in four actions over which Judge Porteous presided on the federal bench

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according to the PACER electronic court records system.[6] Creely testified that in total they may have given Judge Porteous as much as $10,000 over time.

Donald Gardner is also an attorney in New Orleans, Louisiana and a close personal friend of Judge Porteous. Although Gardner testified he does not gamble often, he stated that on occasions when he was at casinos with Judge Porteous, the Judge would ask for money to gamble, and he would give it to him. Gardner testified Judge Porteous would request amounts in the range of $100 to $200. He also testified that he provided Judge Porteous approximately $200 to purchase a gift for his wife. Gardner also paid $300 to a contractor on behalf of Judge Porteous. Gardner testified that his payments to or on behalf of Judge Porteous occurred prior to him taking the federal bench. According to Gardner, he estimated that over the course of their friendship he did not give Judge Porteous more than $3,000 in total. Although the FBI developed sources who believed that Gardner regularly paid Judge Porteous, the investigation was ultimately unable to disprove his testimony about the extent of his cash payments to Judge Porteous.

In addition to cash payments to Judge Porteous, several attorneys testified that they gave money to his secretary, Rhonda Danos, to help support Judge Porteous's son during his externship in Washington, D.C., while Judge Porteous was a federal judge. Leonard Levenson is another local attorney who has been friends with Judge Porteous since the early 1980s. Levenson testified that, although he never gave cash directly to Judge Porteous, he may have contributed a few hundred dollars to Rhonda Danos to be used for Judge Porteous's son's externship. Don Gardner also testified that he gave a couple hundred dollars for the externship.[7]

B. Travel, Meals, and Hunting and Fishing Trips from Lawyers and Litigants

The investigation of the FBI into alleged judicial corruption also led to the discovery of evidence that, on a regular basis, Judge Porteous accepted gifts of travel, expensive meals, drinks, and hunting and fishing trips from attorneys and businesses with matters before him both in state and federal court, and that Judge Porteous failed to disclose his receipt of those benefits to interested counsel and litigants and, for all but two hunting trips, in his financial disclosure reports to the Administrative Office.

Several attorneys who were compelled to testify admitted that they paid for travel for Judge Porteous. In May 1999, Judge Porteous and several others traveled to Las Vegas, Nevada for his son's bachelor party. Credit card records and Caesar's Hotel records indicate that Robert

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[6] See In re. Liljeberg Enters. Inc., Civ. No. 93-01794 (filed June 01, 1993); United States v. Ratcliff, Civ. No. 95-00224 (filed Jan. 19, 1995); Buck v. Candy Fleet Corp., Civ. No. 97-01593 (filed May 16, 1997); and Union Planters Bank, N.A. v. Gavel, Civ. No. 02-01224 (filed Apr. 24, 2002).

[7] Gardner also testified that he, like Creely, was designated by Judge Porteous as a curator in numerous state cases then pending before the Judge. He claimed, however, that the Judge never asked for money in connection with those appointments.

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Creely paid $421.90 with his credit card for Porteous's room from May 20 to May 23, 1999. Judge Porteous's credit card records indicate that he took out more than $5,000 on his credit cards at Caesar's Hotel during the trip. Caesar's Hotel records estimate that Judge Porteous lost $1,200 gambling over the course of his stay. Judge Porteous's bank records indicate that he deposited $5,000 into his money market account days after he returned from the trip. The source of that money is unknown. Don Gardner, the New Orleans attorney representing the opposing party in the Liljeberg cases that were then pending before Judge Porteous, also attended the May 1999 Las Vegas bachelor party trip.

In grand jury testimony and an interview with the FBI, Robert Creely admitted that he attended the bachelor party trip, but did not recall paying for Judge Porteous's room. He said that he and two other non lawyers present on the trip also split the bill for an expensive steak dinner for many of the people in attendance, including Judge Porteous. He claimed that he did not give Judge Porteous any money during or immediately following that trip.

Robert Creely also testified that he has taken Judge Porteous on many fishing trips over the years, including while Judge Porteous was a federal judge, and on two or perhaps three hunting trips while Porteous was on the state bench. Creely valued the hunting trips at the time at around $1,500 per person plus airfare, all of which he covered on Judge Porteous's behalf. Judge Porteous never covered any of the costs related to the hunting or fishing trips.

Warren Forstall, Jr. is a lawyer who practices in New Orleans, Louisiana. He and Judge Porteous have been friends for about 20 years. Forstall testified that in September 1999, at Judge Porteous's invitation, Forstall purchased tickets for both of them to San Francisco to attend an attorney conference together. They later cancelled the trip, and Forstall did not know what became of the ticket he purchased for Judge Porteous. Credit card and travel agency records for Forstall show that he paid $238 with his credit card for the airline tickets for Judge Porteous to San Francisco on September 18, 1999, with a return flight from Reno-Tahoe to New Orleans on September 22, 1999, along with an accompanying ticket for himself. Travel records indicate that Judge Porteous traded his California plane ticket for a ticket to Las Vegas in October 1999. Judge Porteous failed to disclose his acceptance of an airline ticket from Forstall on his financial disclosure forms or in any litigation in which Forstall had an interest.[8]

In an interview with the FBI, Leonard Levenson stated that he has paid for hunting trips with Judge Porteous both while the Judge was on the state and federal bench. In October 1999, Levenson and his wife accompanied Judge Porteous to Las Vegas, Nevada. Porteous obtained his airfare for that trip by trading in the unused ticket to San Francisco that he previously had obtained from Warren Forstall. Judge Porteous's secretary, Rhonda Danos, paid for the

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[8] The Court's PACER records indicate that Forstall's firm represented parties in at least six federal actions before Judge Porteous. See Everage v. Fisher, Civ. No. 98-00451 (filed Feb. 11, 1998); McAfee v. Ayers, Civ. No. 98-01415 (filed May 12, 1998); Ford v. United States Postal Serv., Civ. No. 98-02170 (filed July 24, 1998); Wingate v. Brock, Civ. No. 98-03290 (filed Nov. 6, 1998); Coleman v. United States Postal Serv., Civ. No. 99-02017 (filed June 30, 1999); and Minnifield v. Drug Trans. Inc, Civ. No. 02-02516 (filed Aug. 13, 2002).

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Levensons' airfare, and was reimbursed by them in November 1999. Levenson has been counsel in at least eleven matters over which Porteous presided in federal court.[9] It does not appear that Judge Porteous provided notice to any party of his acceptance of gifts and benefits from Levenson.

According to evidence obtained from attorneys who were interviewed or testified before the grand jury, Judge Porteous also made it his regular practice to receive gifts of meals and drinks at expensive restaurants from lawyers with matters before him while he was a judge in both state and federal court. Robert Creely, Jacob Amato, Leonard Levenson, Donald Gardner, and Warren Forstall all admitted that they frequently bought meals for Judge Porteous that he did not reimburse. Creely testified that Judge Porteous always expected that the lawyers would pick up the tab, and that the Judge would never offer to pay. Ronald Bodenheimer, a former 24th JDC judge who agreed to be interviewed and testify after pleading guilty to honest services fraud in connection with the investigation of judicial corruption in the 24th JDC, stated that when he was elected to the state bench, Judge Porteous told him that since he was a judge he would never again need to pay for his own lunch. Each of the attorneys who routinely bought meals for Judge Porteous had matters before him both in state and federal court. Judge Porteous apparently never disclosed to any litigant or counsel his receipt of benefits from these lawyers, nor did he disclose any meals valued over $100 in any financial disclosure report filed with the Administrative Office.[10]

The FBI and other investigative agencies also have obtained evidence that, on at least three occasions, Judge Porteous accepted free travel and hunting trips from the Rowan Company and Diamond Offshore. Rowan and Diamond are each frequently named as defendants in maritime actions brought in the Eastern District of Louisiana and, on many occasions, in actions assigned to Judge Porteous. The hunting trips included free air transportation by private plane from New Orleans, Louisiana to Falfurrias, Texas, and sport hunting on property owned or

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[9] See In re. Liljeberg Enters. Inc., Civ. No. 93-01794 (filed June 01, 1993); In re. Owen McManus, Civ. No. 95-01615 (filed May 23, 1995); Alliance General Ins. Co. v. Louisiana Sherriff's Auto. Risk Prog., Civ. No. 96-00961 (filed Mar. 15, 1996); First Natl Bank v. Evans, Civ. No. 96-01006 (filed Mar. 20, 1996); Joseph v. Sears Roebuck & Co., Civ. No. 97-00192 (filed Jan. 21, 1997); Siddiqui Group Enters., Inc. v. Shell Oil Co., Civ. No. 98-00606 (filed Feb. 26, 1998); Liberty Mutual Fire Ins. v. Ravannack, Civ. No. 00-01209 (filed Apr. 19, 2000); Holmes v. Consolidated Cos., Inc., Civ. No. 00-01447 (filed May 17, 2000); Loehn v. Hardin, Civ. No. 02-00257 (filed Jan. 30, 2002); Salatich v. America Online Inc., Civ. No. 03-02943 (filed Oct. 21, 2003); and Morales v. Trippe, Civ. No. 04-02483 (filed Aug. 31, 2004).

[10] For example, although it is difficult to reconstruct the record with certainty, Amato's financial records and testimony indicate that he may have spent at least $1,500 in 1999 and $2,250 in 2000 for dining and beverage expenses at restaurants at which he entertained Judge Porteous. Judge Porteous was required to report to the Administrative Office gifts of food and drink valued at more than $100 on his annual financial disclosure reports. However, Judge Porteous has never reported the receipt of any gift from Amato or any other attorney with matters before him.

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controlled by Rowan near the Mariposa Ranch in Falfurrias. The government has also obtained evidence that Judge Porteous traveled from the Falfurrias camp by private plane to a similar hunting camp near San Antonio, Texas owned or controlled by Diamond. Further evidence indicates that, on at least one of the trips paid for by Rowan, Judge Porteous was accompanied on the trip by litigation counsel for Rowan.[11]

Judge Porteous disclosed two of these hunting trips in financial disclosure reports filed with the Administrative Office. On his report for calendar year 2004, filed May 12, 2005, in response to Part V, "Gifts," Judge Porteous reported that he received a hunting trip from Rowan Company, for which he reported a fair market value of $1,000. On his report for calendar year 2005, filed July 24, 2006, in response to Part V, "Gifts," Judge Porteous reported that he received a hunting trip from Diamond Offshore, which he also valued at $1,000. Judge Porteous has yet to file his financial disclosure report for calendar year 2006. Judge Porteous's reports appear to understate the fair market value of the hunting trips. Evidence indicates that the cost to operate the private plane used to transport Judge Porteous to Falfurrias, Texas itself was approximately $1,000 an hour. According to commercial sports hunting locations in the same area, the fee for merely observing a hunt is approximately $200 a day in addition to the cost of the full hunting package for the other hunt participants, while the fee to participate in a Whitetail Buck hunt, which evidence shows was the subject of at least one of the hunting trips, would cost approximately $3,000 to $3,500 per participant. Together, the evidence suggests the total fair market value for each hunting trip would have been in excess of the $1,000 reported by Judge Porteous.

In addition to apparently understating the fair market value of his trips on financial disclosure reports submitted to the Administrative Office, Judge Porteous apparently failed to disclose his receipt of the trips to counsel and parties adverse to Rowan and Diamond in the actions over which he presided. The Court's PACER electronic records system indicates that, since the late 1980s, the Rowan Companies, Inc. and its related companies have been parties in more than a hundred cases filed in the Eastern District of Louisiana. Judge Porteous has presided over at least six such actions.[12] Of those cases, Hanna was an open matter during all of 2004, and therefore was pending when Judge Porteous received a hunting trip from Rowan. About one week after returning from his January 2006 trip with Rowan, he was assigned to preside over the Thomas matter. Despite his obligation to do so, Judge Porteous apparently failed to disclose the benefits he received from Rowan to counsel and the opposing parties in each of those cases.

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[11] There is evidence that one other federal district judge attended at least one of the hunting trips Rowan sponsored.

[12] See Lucas v. Tetra Technologies, Civ. No. 96-03501 (filed Oct. 28, 1996); Grubb v. Rowan Companies, Inc., Civ. No. 00-01075 (filed Apr. 10, 2000); Hoffman v. Rowan Companies, Inc., Civ. No. 01-01285 (filed Apr. 27, 2001); Hanna v. Rowan Company, Inc., Civ. No. 03-03285 (filed Nov. 21, 2003); Thomas v. Rowan Companies, Inc., Civ. No. 06-00166 (filed Jan. 13, 2006); and Cooley v. Crescent Drilling & Production, Inc., Civ. No. 06-01427 (filed Mar. 20, 2006).

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Likewise, Diamond and its related companies were frequent litigants in the Eastern District of Louisiana, also parties in more than a hundred actions filed since the early 1990s. According to the PACER system, Judge Porteous presided over seven matters in which Diamond was a party.[13] Of those seven, Johnson was pending for part of, and Jones during all of 2005, the year in which Diamond provided Judge Porteous one of the trips according to Judge Porteous's financial disclosure report. The docket in each case does not reflect that Judge Porteous provided notice to the parties or counsel of the trip he received from Diamond.

C. Effect of Judge Porteous's Misconduct on the Administration of Justice

Judge Porteous's apparent misconduct has had a derogatory effect on the administration of justice in the Eastern District of Louisiana. That impact can be illustrated by the effect his conflicts had specifically on the litigation surrounding the Chapter 11 bankruptcy filing of Liljeberg Enterprises, Inc., and the cloud of suspicion those undisclosed conflicts raised about the validity of Judge Porteous's rulings in that matter. See In re Liljeberg Enterprises, Inc., Civ. Nos. 93-1794, 93-4249, 95-2922, and 94-3993. The bankruptcy action was commenced in 1993, and the matter was transferred and consolidated with related cases before Judge Porteous on January 16, 1996. On September 19, 1996, after Judge Porteous's assignment to the litigation and just weeks before the complex matter was scheduled to be tried to the bench, Liljeberg Enterprises moved to substitute Jacob Amato and Leonard Levenson as counsel of record. Judge Porteous signed the order granting the substitution on September 23, 1996. Amato handled the representation of Liljeberg on behalf of the Creely & Amato law firm. Levenson testified that he was told when he was hired by Liljeberg that he was being retained for strategy and assistance during the trial of the matter. However, based on recent public statements made by his client, Levenson now believes that his apparent close relationship with Judge Porteous influenced his client to hire him. Jacob Amato testified that he also believed his connection to Judge Porteous played a role in his client's decision to engage him.

One of several parties adverse to Liljeberg in these actions was LifeMark Hospitals, Inc. After Amato and Levenson were retained by Liljeberg, Lifemark in turn sought to associate a long-time friend of Porteous, Donald Gardner.

Gardner testified that he did not have experience handling federal litigation matters, and that Lifemark had competent local counsel. Gardner stated that the reason he was asked to associate himself on the case was his known relationship with Judge Porteous. LifeMark's counsel, Joseph Mole, testified that he hired Gardner because his client believed it was necessary to "level the playing field" following the retention by Liljeberg of Amato and Levenson – whose close connections to Judge Porteous were also well known among local attorneys. Indeed, prior

[13] See Pierce v. Diamond Offshore, Civ. No. 98-01661 (filed June 4, 1998); Gonzalez v. Diamond Offshore, Civ. No. 99-00815 (filed Mar. 11, 1999); Sylve v. Oceaneering Int'l, Inc., Civ. No. 99-00841 (filed Mar. 15, 1999); Dillon v. Diamond Offshore, Civ. No. 99-02026 (filed June 30, 1999); Farrar v. Diamond Offshore Co., Civ. No. 03-00782 (filed Mar. 19, 2003); Johnson v. Diamond Offshore, Civ. No. 03-02505 (filed Sept. 4, 2003); and Jones v. Diamond Offshore, Civ. No. 04-00922 (filed Mar. 31, 2004).

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to hiring Gardner, counsel for LifeMark filed a motion seeking Judge Porteous's recusal because of the appearance of partiality created by the close personal relationship among Porteous, Amato, Creely, and Levenson. LifeMark's counsel testified that he was not aware that Porteous had received cash payments from Amato or his partner Creely, and trips and other benefits from Amato, Creely, and Levenson. He testified that, had he known about those dealings, he would certainly have included that information in his motion to recuse. Judge Porteous denied the motion. In his opinion, Judge Porteous failed to disclose his solicitation and acceptance of cash, travel, and other things of value from Amato, Creely, and Levenson. Counsel for LifeMark filed a mandamus action with the Fifth Circuit, but the Circuit denied LifeMark's requested relief as well -- also without being informed of Judge Porteous's financial dealings with Liljeberg's counsel. Amato testified that his and his partner's gifts of cash and other benefits to Judge Porteous were never disclosed in the litigation, and admitted that they "probably" would have been a basis for recusal. As noted, three years later, while Liljeberg was still pending before him, Judge Porteous again solicited and received $2,000 in cash from Creely and Amato, which Porteous also failed to disclose to the counsel or litigants in the Liljeberg action, as well as the Administrative Office.

The written fee agreement between Gardner and LifeMark provided that Gardner would be paid a $100,000 flat fee for associating himself on the case. The agreement included a provision that, if the case was transferred to another judge, Gardner's engagement would end, but he would be paid an additional $100,000 severance. The fee agreement also contained a sliding-scale of additional fees contingent on various measures of LifeMark's success at trial. According to LifeMark's lead counsel, Joseph Mole, he included that contingent fee component to create an incentive for Gardner to deal honestly with LifeMark and not collude with Amato and Levenson. Mole saw Gardner as part of a circle of friends surrounding Judge Porteous, a circle that included opposing counsel Amato and Levenson. When asked whether Gardner was expected to give any part of his fee to Judge Porteous, both Gardner and Mole testified that he was not. Both also testified that Gardner informed LifeMark up front that he would not be able to influence Judge Porteous to do anything unethical or improper.

Mole testified that Gardner was retained solely because of his close relationship with Judge Porteous, and that his only active role in the case was to attend the bench trial. Gardner testified that he offered advice on how he thought Judge Porteous might react to LifeMark's evidence and strategies, but that counsel for LifeMark disregarded most of that advice. When questioned about the perceived need to pay $100,000 -- and potentially many hundreds of thousands more -- to an attorney who had no relevant federal experience but who was a friend of the Judge so that he would file an appearance and observe the bench trial, Mole testified that he thought his client was a victim of a broken system.

The non-jury trial before Judge Porteous commenced June 16, 1997 and continued with breaks over several weeks until July 23, 1997. Following the bench trial, Judge Porteous failed to rule for nearly three years. During the time that Judge Porteous's judgment was pending, the evidence reflects, as recounted above, that Judge Porteous asked for and received cash payments

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from Creely and Amato, and was the beneficiary of numerous meals, trips, and other gifts from Creely, Amato, Levenson, and Gardner.[14]

On April 26, 2000, Judge Porteous ruled in favor of Amato and Levenson's client, Liljeberg Enterprises, Inc., on most of the important contested issues.[15] Porteous's ruling in favor of Liljeberg was partially reversed by the Fifth Circuit in an unusually critical opinion. Regarding Porteous's finding that LifeMark had breached a fiduciary duty it owed to Liljeberg by, among other things, failing to reinscribe a collateral mortgage and mitigate harms caused by not doing so, the Circuit excoriated Judge Porteous:

> . . . The extraordinary duty the district court imposed upon LifeMark . . . is inexplicable. . . .
>
> . . . The right of LifeMark to unilaterally release any part of the property from the mortgage is wholly at odds with the district court's discovery of a "duty" to reinscribe the collateral mortgage. . . .
>
> . . . [Judge Porteous's theory that LifeMark consequently owed a duty to mitigate] is a mere chimera, existing nowhere in Louisiana law. It was apparently constructed out of whole cloth.

In re Liljeberg Enters., Inc., 304 F.3d 410, 428-29 (5th Cir. 2002). Similarly, in finding that Judge Porteous clearly erred in his ruling that the judicial sale of the hospital must be overturned in favor of Amato and Levenson's client, Liljeberg, the Court censured the unsupported conclusions drawn by the Judge:

> . . . the district court's findings of a "conspiracy" to wrest control of the hospital and medical office building from St. Jude 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 St. Jude's losses were caused by Lifemark. . . .

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[14] On May 28, 1999, Judge Porteous granted summary judgment in favor of Levenson's client in Alliance Gen. Ins. Co. v. Louisiana Sherriff's Auto. Risk Prog., Civ. No. 96-00961.

[15] According to American Express credit card records, Amato paid$130 at Commander's Palace -- a fine dining restaurant in New Orleans -- on April 25, 2000, the day on which Judge Porteous signed his long-pending judgment in favor of Amato's client. The judgement was filed on the docket on April 26, 2000. Amato has informed the government that Rhonda Danos, Porteous's secretary, was present with him at Commander's Palace on April 25, 2000, and that he paid that bill. Danos testified that the pending judgment was not discussed during the April 25, 2000 rendevous at Commander's Palace, that she never received any cash or bribe from Amato, and that the timing of her meeting with Amato at Commander's Palace on the day the judgment was signed was a coincidence.

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> These findings turn on the remarkable but largely implicit conclusion . . . that, under Louisiana law, a second mortgagee . . . cannot initiate foreclosure proceedings. 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.

Id. at 431.

V. Evidence that Judge Porteous Accepted Things of Value from Bail Bonds Unlimited and Louis and Lori Marcotte in Exchange for Access and Assistance

Louis and Lori Marcotte operated Bail Bonds Unlimited, a bail bonds company with business before the 24th JDC. As a result of the FBI investigation into corruption in the 24th JDC, both Louis and Lori Marcotte pleaded guilty to bribing Louisiana state judges in addition to other offenses. In interviews following their guilty pleas, the Marcottes said they paid for expensive meals, trips, and other benefits for Judge Porteous in exchange for favorable treatment when he was a state judge in the early 1990's, and that they continued to pay for meals while he was a federal judge. The Marcottes estimated the cost of weekly Friday lunches they provided for Judge Porteous and his staff and other invitees at about $500 each. They also stated that they paid for innumerable additional meals and drinks at expensive restaurants that cost hundreds of dollars each. In addition, the Marcottes said they paid for numerous car repairs for Judge Porteous and his family, paid for a fence to be built for him, gave parking privileges to Porteous's son at their office near the courthouse, and provided business to his son's legal courier service.

Other witnesses confirm that Louis Marcotte did numerous favors for and gave many gifts to Judge Porteous while he was a state court judge. Former Marcotte employees say that Marcotte paid for car repairs for Judge Porteous and a fence for Judge Porteous' house. Other witnesses report that Marcotte paid for many meals for Judge Porteous and at least one trip to Las Vegas, Nevada for Judge Porteous. Additional sources report, and the FBI in one instance observed, that Louis Marcotte continued to take Judge Porteous out for meals when he was a federal judge.

In 1992, the Marcottes invited Judge Porteous to Las Vegas with them, but he was unable to attend. Several months later, around August 1992, Rhonda Danos called the Marcottes to inform them that Judge Porteous "was ready to go" to Las Vegas with them. The Marcottes and two local attorneys paid to take Judge Porteous and another state judge to Las Vegas. Danos booked the trip on her credit card and then sought reimbursement from Louis Marcotte. The Marcottes stated that the arrangement was designed to disguise the fact that they and other lawyers were paying for the trip. They also stated that they invited the other attorneys and judge to provide cover for Judge Porteous.

In July 1999, the Professional Bail Agents of America paid $206.80 for lodging for Judge Porteous at their conference at the Beau Rivage in Biloxi, Mississippi. Judge Porteous spoke at the conference. Judge Porteous did not report this payment on his financial disclosure form (there is no minimum value for required reporting of travel reimbursements). The charge for Porteous's lodging was paid by the PBAA out of its "master account." In turn, the Marcottes

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made a $7,000 contribution to cover expenses on that master account. The Marcottes also provided the PBAA with a list of people whose charges should be credited against the Marcotte's credit card. That list included Porteous's secretary, Rhonda Danos.

The Marcottes asserted that they also paid for Porteous's secretary to go to Las Vegas, Nevada for many years with them when they were attending annual bail bonding conventions there. This began in 1992 and continued through the first few years Judge Porteous was a federal judge. The Marcottes have provided the FBI with pictures that show the Judge's secretary in their company in Las Vegas. They claimed that they covered all of Danos's costs during the trips. For several years, the Marcottes also provided Danos and Judge Porteous with five to ten tickets each year to an annual police fund-raising party, valued at $100 per ticket. The expenses borne by the Marcottes on behalf of the Judge's secretary tend to corroborate their claim that they provided gifts to Judge Porteous in exchange for access. The Marcottes explained that Danos was the gatekeeper for access to Judge Porteous, and that it was therefore essential to their purpose that they kept Danos happy by plying her with gifts as well.

According to the Marcottes, in exchange for their generosity with Judge Porteous and Danos, while Judge Porteous was a state court judge,he gave the Marcottes immediate access to him on bonding whenever they needed him. The Marcottes say he granted most of their requests. Louis Marcotte told the FBI that Judge Porteous was more likely to grant a problematic request after a lunch or a car repair. Judge Porteous also made introductions for the Marcottes to other state judges and lent his support by vouching to other judges that Louis Marcotte was a good person to deal with on bond issues. He also spoke to other state judges about the benefits to the court system of split bonds, a practice that was extremely beneficial to the business of Bail Bonds Unlimited. Following his own agreement to plead guilty to honest services fraud and to cooperate with the government, former 24th JDC judge Ronald Bodenheimer corroborated much of what the Marcottes told the FBI concerning the assistance Judge Porteous provided around the courthouse for their business interests in the 24th JDC.

In addition to making himself accessible and assisting the Marcottes on bonding matters, at Louis Marcotte's request Judge Porteous expunged the felony convictions of two Marcotte employees shortly before Judge Porteous left the state bench in 1994. This permitted the employees to work for the Marcottes in the bail bonding business, which otherwise was prohibited under Louisiana law. It appears that Judge Porteous decision to expunge the convictions was contrary to law. Nonetheless, Porteous claimed in an interview with the New Orleans Metropolitan Crime Commission that an Assistant District Attorney was present during the hearing and failed to object on the record. Even if true, there is no indication that the Assistant District Attorney was aware that Porteous was the recipient of a stream of things of value from the Marcottes, all of which the Marcottes claim they provided with the specific intent to influence Judge Porteous.

Although the Marcottes have made many allegations of improprieties involving Judge Porteous, they have pleaded guilty to charges of extensive fraudulent conduct. They also admit that they never obtained an explicit agreement with Judge Porteous that he would grant bond requests in exchange for favors. They claim instead that the agreement was implicit in the

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relationship, and that the Judge knew very well why they lavished him and his long-time secretary with food, drinks, trips, favors, and other things of value.

VI. Further Circumstantial Evidence that Judge Porteous Engaged in Corrupt Activities

The investigation has uncovered large amounts of unexplained cash being deposited in Judge Porteous's accounts. Financial records reveal that Judge Porteous deposited more than $57,000 in cash into his checking account between 1998 and 2000. Additional records received from Fidelity Homestead Association show that five separate deposits of currency totaling approximately $20,000 were also made into the Judge's money market account from 1998 to early 2000. This account was not reported on Judge Porteous's bankruptcy petition. In addition, one of the deposits, made two days after Judge Porteous returned from his Las Vegas trip, was in the amount of $5,000, roughly the amount he withdrew over the "bachelor party" weekend, despite casino records that estimated a $1,200 loss during that trip.

In addition, the investigation has revealed that Judge Porteous's secretary, Rhonda Danos, paid for many of his expenses from her own bank account. While Judge Porteous did write checks to her, the FBI was not able to establish that he fully reimbursed her. In 1999 and 2000, for example, Danos paid $41,621.15 for credit card bills and other expenses for Judge Porteous; during the same period, she received $32,554.51 in checks from him. Over the same two year period, Danos also made $60,027.80 in cash deposits, a greater sum than her payroll and other sources of income for the same period. Focusing on year 1999 in particular, her financial records indicate that she may have received as much as thirty to forty thousand dollars in unexplained deposits. In addition, in her testimony about her 1999 financial activities, Danos could not account for nearly ten thousand dollars in excess of her admitted sources of income that year, even giving her the benefit of dubious, post-hoc explanations for some sources of funds. Together, these facts evidence that Danos -- on whom Judge Porteous relied for payment of many of his own expenses -- received additional, unexplained cash during the period that the judgement in Liljeberg was pending. Indeed, the Marcottes stated in interviews with the FBI that Danos was used specifically to disguise their payments in connection with the 1992 trip to Las Vegas for Judge Porteous.

VII. Evidence that Judge Porteous Is Incompetent to Serve

During the course of this investigation the Department has learned that Judge Porteous has obtained the reports of medical examiners concluding that he is incompetent to render decisions as a federal judge because of permanent mental and psychological impairments. In correspondence with Your Honor, Judge Porteous stated that he believes he no longer can meet the responsibilities that fall to him as a judge, and that the reports of a psychologist and psychiatrist confirm that every day he sits on the bench is a disservice to his fellow judges, to the parties who appear before him, and to the people of this country who put their trust in the judiciary. This mental impairment follows a history of alcoholism and reckless gambling, demonstrated in financial records and attested to by witnesses with whom he has had personal relationships. Therefore, in addition to the many allegations of judicial misconduct recited above, Judge Porteous's self-professed inability to render competent and fair decisions as a federal judge and the chronicle of his reckless and dishonorable personal behavior while on the

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federal bench also serve as a basis for possible disciplinary action by the Court or referral to Congress for impeachment.

CONCLUSION

As noted earlier, issues of statute of limitations, the materiality of the alleged false statements, the government's twin burdens of proof and unanimity at trial, and the availability of alternative remedies persuaded the Department that criminal prosecution was not warranted. The results of the FBI's investigation into allegations of misconduct concerning Judge Porteous, however, raise serious doubts about his suitability for office under the constitutional standard of good behavior on which that service is contingent. The instances of Judge Porteous's dishonesty in his own sworn statements and court filings, his decade-long course of conduct in soliciting and accepting a stream of payments and gifts from litigants and lawyers with matters before him, and his repeated failures to disclose those dealings to interested parties and the Court all render him unfit as an Article III judge. Based on the evidence of pervasive misconduct described herein, the Department respectfully submits this complaint for any further action Your Honor may deem warranted.

Sincerely,

John C. Keeney

John C. Keeney
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice

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II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

b. Pre-Trial Filings regarding Witnesses and Subpoenas

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IN THE SENATE OF THE UNITED STATES
SITTING AS A COURT OF IMPEACHMENT

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

JUDGE G. THOMAS PORTEOUS, JR. PRELIMINARY DESIGNATION OF WITNESSES, REQUEST FOR SUBPOENAS, RELATED FUNDING AND IMMUNITY ORDERS, AND RESPONSE ADDRESSING STIPULATIONS RELATED TO ARTICLES I, III, and IV

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and files his Preliminary Designation of Witnesses, Request for Subpoenas and Relating Funding, Requests for Immunity, and Stipulations Related to Articles I, III, and IV.[1] Judge Porteous respectfully submits as follows:

1. **Preliminary Designation of Witnesses and Requests for Subpoenas, Related Funding, and Immunity Orders**

Judge Porteous anticipates that he may call the following witnesses[2] during the impeachment trial and requests that subpoenas be issued to each of these witnesses and

[1] The limitation of this pleading to Articles I, III, and IV of the Articles of Impeachment is based upon the issue raised in the June 9, 2010 letter sent by Professor Jonathan Turley to the Chair and Vice-Chair of the Senate Impeachment Trial Committee addressing the conflict issue relating to the Marcottes and Article II.

[2] Judge Porteous notes that this is only a preliminary designation of witnesses and that additional witnesses may be added in advance of trial. The list is limited, in part, because discovery is still on-going and because, to date, a substantial amount of the material that Judge Porteous believes is necessary to prepare his defense, and which he has requested from the House Managers, has not been produced. Indeed, the House Managers have refused to produce most of this information or even to identify what portion of

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that funding be provided for the travel and related expenses of these witnesses in order to secure their appearance at trial.

1. Daniel Petalas
2. Peter Ainsworth
3. Richard E. Windhorst, III
4. Don M. Richard
5. Sidney Powell
6. S.J. Beaulieu
7. Christopher Cox
8. Kristie Escuider
9. Andree Braud
10. Nancy Langston
11. Current Judges of the U.S. District Court for the Eastern District of Louisiana (to be designated)
12. Any witness listed by the House Managers

At this time Judge Porteous does not anticipate that any of these witnesses will require an immunity order.

As noted above, Judge Porteous also requests that, given the strain on his financial resources caused by this litigation, the Senate Impeachment Trial Committee

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that information is in their possession. As a result, Judge Porteous is in the process of preparing third-party discovery requests to the U.S. Department of Justice and the U.S. Court of Appeals for the Fifth Circuit, among others, in an effort to secure this essential information despite the House Managers refusal to provide it. Additional witness designations may be added to his list as more of the necessary discovery is made available.

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provide a mechanism for funding the travel expenses of any witnesses subpoenaed at Judge Porteous' request. As the facts of this case demonstrate, Judge Porteous is without the substantial financial resources necessary to defend this case, particularly when compared to the vast resources of the House Managers. In order to ensure that the Senate Impeachment Trial Committee is able to build a complete record in this matter, Judge Porteous is asking for travel funding for his witnesses. Further, to the extent the Committee believes further briefing is necessary prior to addressing this funding request, Judge Porteous is willing to address the issue more fully in a separate pleading.

2. Response to House Managers Request for Stipulations

Judge Porteous is continuing to review the stipulations proposed by the House Managers. Those stipulations include a general request that Judge Porteous stipulate to the authenticity of the documents listed in the House Managers' Exhibit List and more than 300 proposed factual stipulations.

As to the House Managers request for a stipulation as to the authenticity of the exhibits included on their Exhibit List, Judge Porteous is prepared to execute a stipulation to the authenticity of any and all of the documents relating to Articles I, III, and IV that have not been redacted, although specifically reserving any objections to the admissibility of the documents.

With regard to the proposed factual stipulations relating to Articles I, III, and IV, Judge Porteous anticipates being in a position to provide a response to the proposed stipulations including a stipulation-by-stipulation statement of his position shortly and not later than June, 18, 2010. Additionally, to the extent there is an objection to a proposed

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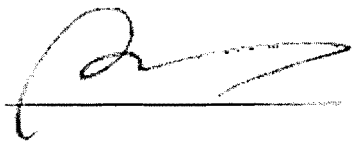
stipulation, the grounds will be outlined in the response. Judge Porteous opposes the procedure proposed by the House Managers with regard to the stipulations and does not believe that it is appropriate to impose any stipulations in the absence of the agreement of the parties.

3. Request for Stipulations

Judge Porteous is in the process of preparing proposed stipulations for the consideration of the House Managers. These stipulations likely will not be presented to the House Managers until sometime after the pretrial motions deadline currently set on June 15, 2010.

Respectfully submitted,



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Submitted: June 9, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June 2010, a copy of the foregoing pleading was served by electronic mail on the House Managers, through counsel, at the following e-mail addresses:

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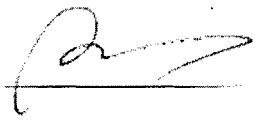
Kirsten Konar - kkonar@seyfarth.com

Jessica Klein, Clerk - Jessica.Klein@mail.house.gov



Richard W. Westling

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

June 9, 2010

By Electronic and Regular Mail

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous

Dear Senator McCaskill and Senator Hatch:

Last night, I was informed by the staff director, Mr. Derron Parks, that the Senate Impeachment Trial Committee expects the submission of Judge Porteous's Preliminary Designation of Witnesses as to Article II, Request for Subpoenas as to Article II, Related Funding and Immunity Orders as to Article II, and Response Addressing Stipulations as to Article II by noon on Thursday, June 10, 2010.

As the staff is aware, I only joined the case in a couple weeks ago. As I explained in a letter I sent yesterday, new counsel in the case from the law firm of Bryan Cave LLP were only retained as counsel on June 9, 2010. At the time, Mr. Westling agreed to remove himself from matters related to Article II and I will work exclusively with Bryan Cave on that article. I will also serve as co-lead counsel with Mr. Westling on Articles I, III, and IV.

This change was prompted by the appearance of a conflict of interest raised by the House and Senate counsel related to that Article. As a result, we will no longer have the benefit with regard to Article II of the experience and preparation of Mr. Westling and the other lawyers who have been working on this matter for the past year. In my letter to the Committee, I asked that we discuss the need for a continuation of the case in light of the change in the defense team.

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JONATHAN TURLEY

J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

Although we understand the Committee's desire to proceed expeditiously on this matter to a trial, it would produce a gross unfairness and would violate fundamental due process to require new counsel to designate witnesses, identify exhibits or take any of the other preliminary steps without having an opportunity to learn the full facts underlying this Article. Bryan Cave and I would require 45-60 days to review fully the documents and records in the case and be in a position to engage in pre-trial exchanges of information, motions in limine, stipulations and the like. The desire to keep to an expedited schedule for trial should not be allowed to trump basic due process concerns.

In order not to delay matters unnecessarily, we agreed to file on these matters vis-à-vis Articles I, III, and IV. We do so despite the fact that new counsel was not in a position to be fully informed as to the underlying facts. However, on Article II, the demand for filings tomorrow and the following week would raise serious ethical and procedural problems in forcing counsel to effectively file critical motions with little or no knowledge of the salient facts.

In a brief conversation with Mr. Parks, it was made clear that the Committee would not even entertain an extension in due to the change in representation in the last twenty-four hours – despite the fact that federal counsel routinely allow for such changes in these circumstances. We were also told that tomorrow's filing is preliminary and made be amended. In order to avoid unnecessary litigation, we will indeed make a preliminary filing by the noon deadline. However, this is done with the express understanding that counsel does not (and cannot) supply a full accounting on these issues and may have to substantially amend these filings. We will also seek a continuation of the schedule by 60 days to allow the defense to properly prepare and fully represent Judge Porteous. Once again, it is not clear why an arbitrary trial date should control over the serious due process issues raised by the schedule. Following the same schedule as the last impeachment proceeding involving former Judge Alcee Hastings, the trial would not have been scheduled until February 2011. We are not asking for such a schedule, but the insistence on trying this case before the August recess creates an abbreviated and unfair process. We will seek to address these issues in tomorrow's meeting and will file a formal motion for a continuance in the case by Friday. We would be happy to discuss these issues directly with you and opposing counsel at any time of your convenience.

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2000 H STREET, NW • WASHINGTON, DC 20052 • 202-994-7001 • 202-994-9811

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JONATHAN TURLEY

J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

Respectfully,

Jonathan Turley

Jonathan Turley
Co-Lead Counsel to Judge G. Thomas Porteous

Daniel C. Schwartz
P.J. Meitl

BRYAN CAVE LLP

cc: Senate Counsel
House Counsel

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

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

JUDGE G. THOMAS PORTEOUS JR. PRELIMINARY DESIGNATION OF WITNESSES, REQUEST FOR SUBPOENAS, RELATED FUNDING AND IMMUNITY ORDERS, AND RESPONSE ADDRESSING STIPULATIONS RELATED TO ARTICLE II

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and files his Preliminary Designation of Witnesses, Request for Subpoenas and Relating Funding, Requests for Immunity, and Stipulations related to Article II.

As detailed in a letter sent to the Senate Impeachment Trial Committee yesterday, June 9, 2010, Judge Porteous has retained, just this week, new counsel to represent him in relation to Article II (hereinafter referred to as "Article II counsel").[1] This change was prompted by the suggestion of a conflict of interest raised by the House and Senate counsel in regards to lead counsel Richard Westling and his law firm as to issues related to Article II. As a result of this bifurcation of representation as to the Articles of Impeachment, Judge Porteous's Article II counsel will no longer have the benefit of the experience and preparation of Mr. Westling and the other lawyers who have been

[1] Article II counsel consists of co-lead counsel Professor Jonathan Turley and Daniel Schwartz and P.J. Meitl of Bryan Cave LLP.

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working on this matter for the past year with regard to Article II. Therefore, Article II Counsel must review the facts and issues related to Article II from the beginning – a process that is just beginning and will likely take several weeks, if not months. Therefore, Article II counsel had requested, through letter and conversation with Committee Staff, for an extension of time, beyond June 10, 2010, to file this pleading.[2] This request was based on counsel's ethical concerns regarding their representation of Judge Porteous, issues of due process, and basic fairness. Moreover, although aware of the need to expeditiously move this matter to trial, this request was premised on the notion that due process concerns should outweigh procedural deadlines. Committee staff declined this request and demanded that Article II counsel file the instant pleading by noon on June 10, 2010, in advance of the meeting of all counsel regarding "witnesses, immunity, etc." as outlined in the May 26, 2010 scheduling order.[3]

Judge Porteous, through Article II counsel, are in no position and have no ability to respond fully and adequately to the issues raised in this pleading and intend to substantially supplement and/or amend this filing as they review the evidence and issues related to Article II. Judge Porteous, through Article II counsel, reserves the right to add,

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[2] Judge Porteous' Article II counsel is cognizant of the Committee's May 26, 2010 Scheduling Order which required that "Applications for modification [of scheduling deadlines] shall be made no later than two (2) business days prior to the due date." Article II counsel, however, was not retained as of June 4, 2010, the relevant date for seeking an extension of the instant pleading. As a result, Judge Porteous is not filing an out-of-time motion for an extension at this time. If the Committee believes additional briefing regarding the necessity for the change in counsel, the requested delay, or other matters, Judge Porteous' counsel is prepared to provide such briefing.

[3] Alternatively, Article II counsel proposed that the deadline for filing this pleading be extended, at the very least, until after Article II counsel met with the Committee and the House Managers on June 10, 2010 at 2:00 p.m., as previously scheduled by the Committee's May 26, 2010 Scheduling Order. This request was also denied.

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remove, or amend all and any portion of this filing.[4] Nevertheless, out of respect for the Committee and its orders, and given no other option for redress of the request by for an extension by the Committee, Judge Porteous, through Article II counsel, submits the instant preliminary filing.

1. Preliminary Designation of Witnesses

As this preliminary stage, without the benefit of his counsel's review of all facts and circumstances underlying Article II, Judge Porteous may reasonably call individuals falling into the following categories:

- Any witness listed by the House Managers.
- Any witness listed by counsel for Judge Porteous as to Article I, III, and IV.
- Judges of the 24th Judicial District Court for the Parish of Jefferson and/or State of Louisiana between 1984 and 2004.
- Staff or employees of Judges of the 24th Judicial District Court for the Parish of Jefferson and/or State of Louisiana between 1984 and 2004.
- Judges of the U.S. District Court for the Eastern District of Louisiana between 1984 and 2004.
- Staff or employees of Judges of the U.S. District Court for the Eastern District of Louisiana between 1984 and 2004.
- Judges of the Fifth Circuit of the United States Court of Appeals.
- Any individuals related to or associated with Louis or Lois Marcotte.
- Individuals, other than the Marcottes, employed as bail bondsmen in the Parish of Jefferson or the State of Louisiana between 1984 and 2004.
- Any member of Judge Porteous staff, including but not limited to law clerks, interns, or administrative staff between 1984 and 2004.

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[4] Moreover, the responses provided herein, are also limited because discovery is still on-going and because, to date, a substantial amount of the material that Judge Porteous believes is necessary to prepare his defense, and which he has requested from House Managers, has not been produced.

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- Representatives of, or individuals employed by, restaurants or dining establishments frequented by the Marcottes and/or Judge Porteous between 1984 and 2004.
- Other judicial officers, including but not limited to, Justices of the Peace for the Parish of Jefferson and/or State of Louisiana between 1984 and 2004.
- Any individual involved with or with knowledge of the Wallace criminal conviction and the subsequent Motion to Set Aside the Conviction, including attorneys representing Mr. Wallace.
- Any individual connected to the issuance of or underwriting of bonds that were set or adjudicated by Judge Porteous between 1984 and 2004.
- Members of Judge Porteous's immediate family.
- Any other individual with knowledge of the alleged conduct within Article II.

2. Requests for Subpoenas

At this preliminary date, and without sufficient time to fully identify specific individuals to testify, Judge Porteous cannot request that specific subpoenas be issued. Judge Porteous does intend to request that subpoenas be issued for specific individuals related to his defense of Article II and will supplement this pleading on a timely basis.

3. Related Funding

Despite not being able, at this time, to identify specific individuals who will serve as likely witnesses in relation to Article II, Judge Porteous does request, given the strain in his financial resources caused by this litigation, that the Senate Impeachment Trial Committee provide a mechanism for funding the travel expenses (including applicable per diem fees) of any witnesses subpoenaed at Judge Porteous' request.

As the facts of this case demonstrate, Judge Porteous is without the substantial financial resources necessary to defend this case, particularly when compared to the vast resources of the House Managers. In order to ensure that the Senate Impeachment Trial Committee is able to build a complete record in this matter, Judge Porteous is asking for

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travel funding for any witnesses, located outside the Washington metropolitan area. Otherwise, Judge Porteous will be deprived of the ability to provide witnesses in his defense.

Judge Porteous also requests that the Committee provide for travel funding related to Judge Porteous's own required travel to Washington, D.C., so that he may fully participate in his own defense and attend all necessary proceedings. Similarly, Judge Porteous requests that the Committee reimburse him for any out-of-pocket legal expenses (outside of attorneys fees) incurred as a result of his defense of this action.[5]

4. Immunity Orders

At this preliminary date, and without sufficient time to fully identify specific individuals to testify, Judge Porteous cannot identify and request specific immunity orders. Judge Porteous anticipates that certain immunity orders may be required, including, but not necessarily limited to, those for judges (both state and federal), other judicial officers, staff and employees of judges and judicial officers, and other individuals, beyond the Marcottes, employed as bail bondsmen in the Parish of Jefferson and/or the State of Louisiana. Judge Porteous will supplement this pleading on a timely basis.

5. Response to House Managers Request for Stipulations

Having just entered the case, Judge Porteous' Article II counsel has only begun to review the stipulations proposed by the House Managers. The House Manager's List contains over 300 proposed factual stipulations. Although only ten of the stipulations proposed are specifically identified as relating to Article II, a number of other stipulations

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[5] Judge Porteous is willing to separately and more fully brief the related funding issue if the Committee believes that to be useful.

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are potentially relevant and material to Judge Porteous' Article II defense. Judge Porteous anticipates being able to respond to the proposed stipulations after review of the relevant facts and circumstances related to Article II. Judge Porteous opposes the procedure proposed by the House Managers with regard to the stipulations and objects to any procedure that would impose any stipulations in the absence of the agreement of the parties. In light of the lack of knowledge on the basis for these stipulations, Judge Porteous must currently oppose the stipulations pending further review when such opposition may be withdrawn.

6. Request for Stipulations

Having just entered the case, Judge Porteous' Article II counsel has not yet prepared proposed stipulations. Judge Porteous will present these stipulations to the House Managers in a timely manner after review of the relevant facts and circumstances related to Article II.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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Counsel for the G. Thomas Porteous Jr.
United States District Court Judge for the
Eastern District of Louisiana

Dated: June 10, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2010, I caused copies of the foregoing to be served by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl

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In The Senate of the United States

Sitting as a Court of Impeachment

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

PRELIMINARY DESIGNATONS BY THE HOUSE OF REPRESENTATIVES OF WITNESSES, REQUESTS FOR SUBPOENAS, REQUESTS FOR IMMUNITY AND STIPULATIONS

Pursuant to the Senate Impeachment Trial Committee's Scheduling Order of May 26, 2010, the House of Representatives ("House"), through its Managers and counsel, respectfully submits this preliminary designation of witnesses, requests for subpoenas, requests for immunity, and stipulations. The House respectfully submits:

I. PRELIMINARY DESIGNATIONS OF WITNESSES AND REQUESTS FOR SUBPOENAS AND IMMUNITY ORDERS

The House seeks subpoenas for several individuals to require their attendance at the impeachment trial.[1] As a practical matter, the House may end up excusing some of these witnesses, as they may become unnecessary because of the stipulation process or as the House makes decisions that may streamline the case. Further, it is possible that some of these witnesses may end up being called solely as rebuttal witnesses, but because of their relationship to Judge Porteous or their reluctance to testify, it is important that they be under subpoena so they are available to provide testimony on short notice if so

[1]Because this is a preliminary designation, the House understands that additional witnesses may be added to the list.

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required. The House expects to work out arrangements with those individuals so that they would be under subpoena but "on call" if their testimony were required.

Several of these witnesses have been immunized in prior proceedings (including the House Impeachment Task Force Hearings), and, accordingly, the House requests that the Senate apply for immunity orders in connection with these witnesses' testimony at the Impeachment trial.

The House seeks trial subpoenas for the following individuals, and seeks immunity orders as indicated below:

1. Hon. G. Thomas Porteous, Jr., (Immunity Order)
   c/o Richard Westling, Esq.

2. Jacob Amato, Jr. (Immunity Order)
   c/o Ralph Capitelli, Esq.

3. Robert Creely (Immunity Order)
   c/o Ralph Capitelli, Esq.

4. Leonard Levenson, Esq. (Immunity Order)
   c/o Franz Zibilich, Esq.

5. Donald Gardner, Esq.
   c/o Ralph Whalen, Esq.

6. Rhonda Danos (Immunity Order)
   c/o Pat Fanning, Esq.

7. Joseph Mole, Esq.

8. Louis Marcotte
   c/o Martin Regan, Esq.

9. Lori Marcotte

10. Jeffrey Duhon

11. Aubrey Wallace

12. Mike Reynolds

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13. Ronald Bodenheimer
c/o Edward Castaing, Esq.

14. Bruce Netterville, Esq. (Immunity Order)
c/o Robert Habans, Esq.

15. Claude Lightfoot, Esq.

16. William Greendyke, Esq.

17. FBI Special Agent DeWayne Horner

18. Former FBI Special Agent Bobby Hamil

19. Former FBI Special Agent Cheyanne Tackett

II. REQUEST FOR STIPULATIONS

The House, by way of a letter to Judge Porteous's counsel dated April 9, 2010, sought stipulations as to the authenticity of all the documents on the exhibit list.[2]

The House, by way of a letter to Judge Porteous's counsel dated April 19, 2010, provided 308 factual stipulations for counsel's consideration.[3]

By way of a letter to the House Impeachment Staff dated April 21, 2010, Judge Porteous's counsel represented that he would "work through both the documents and the factual stipulations as expeditiously as possible and will likely address both of these issues on a rolling basis in an effort to keep this process moving."[4] In that letter, counsel

[2]See Letter from Alan I. Baron, Esq. to Richard Westling, Esq., April 9, 2010 (attached to this pleading as "Attachment 1").

[3]See Letter from Alan I. Baron, Esq. to Richard Westling, Esq., with attachment, April 19, 2010 (attached to this pleading as "Attachment 2").

[4]See Letter from Richard W. Westling, Esq. to Alan Baron, et al, April 21, 2010 at 2 (attached to this pleading as "Attachment 3").

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also represented that he would "begin to evaluate possible stipulations that we might seek on behalf of Judge Porteous."

As of the time of filing this motion, the House has not received any response from counsel to the House's proposed stipulations, nor has the House received proposed stipulations from counsel.

The stipulation process constitutes an important way of focusing the disputed factual issues in this case and reducing the need for testimony or other evidence on facts that are not in genuine dispute. Thus, as a practical matter, there should be no question as to the authenticity of the various business records and bank records of Judge Porteous and other witnesses; nor should there be any legitimate question as to the authenticity of various court records – some of which are certified. Further, many of the requests for factual stipulations are based on the content of those records and, for counsel's convenience, cite evidentiary and other record support.

The House further requests that the Committee follow the practice that the Senate Impeachment Trial Committee employed in the Hastings Impeachment proceeding, and, in essence, accept proposed stipulations which are established by the record where there is not likely to be conflicting evidence, and where there have been no other reasonable grounds offered by a party for a failure to stipulate.[5]

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[5]See Disposition of Proposed Stipulations of Fact Submitted by the House Managers - Sixth Order, Senate Impeachment Trial Committee (Judge Hastings), June 23, 1989, reprinted in Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee Hastings, S. Hrg. 101 194, Pt. 1, 101st Cong., 1st Sess. at 855 (1989). That document is attached as "Attachment 4." More precisely, the categories of the proposed stipulations that were not accepted by the Senate involved stipulations where:

> one or more of the following circumstances was present: where the proposed stipulation was solely or principally dependent on the testimony of witnesses, such as FBI agents, and/or internal FBI documents, whose

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The House further notes that in Judge Porteous's Replication, he did not set forth competing versions of facts, but primarily argued for various reasons that the conduct alleged did not rise to the level of "high crimes or misdemeanors." We request that the Senate direct Judge Porteous to respond to the House's proposed stipulations by a date certain, and to provide specific factual bases to explain any failure to stipulate. We further request that the House be provided the opportunity to file its response addressing Judge Porteous's objections, and that the Senate reserve its right to accept as proven the House's proposed stipulations.

WHEREFORE, the House requests that the Senate Impeachment Trial Committee issue subpoenas and seek immunity orders for the persons identified in this pleading; and further requests that the Senate Impeachment Trial Committee require Judge Porteous to respond promptly and by a certain date to the proposed stipulations by the House.

> credibility and accuracy Judge Hastings has questioned ...; where they were central to a disputed issues, upon which conflicting testimony clearly will be presented at the proceedings ...; where it was concluded that the evidence could be simply and better introduced through a witness' full testimony on a matter or through an unexcerpted transcript of a recorded conversation rather than by excerpts or characterization of testimony or conversations ...; where the proposed stipulations contained characterizations or inferences, rather than simply factual recitations or events ...; where it was not possible to find sufficient support in the evidence known or cited in House filings, where there was a serious question about the admissibility of the evidence which should be considered at the proceedings ... and where Judge Hastings interposed specific and substantial objections. Where it was possible to revise a proposed stipulation to correct factual inaccuracies, correlate it more closely to the documentary materials and evidence from which it was drawn or to accommodate a valid objection or concern of the committee, a proposed revision has been made...."

"Disposition of Proposed Stipulations" at 3-4, Hastings Impeachment Report at 857-58.

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Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

June 8, 2010

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Attachment One

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Congress of the United States
House of Representatives
Washington, DC 20515

April 9, 2010

Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous –
Request for Stipulation as to Authenticity

Dear Mr. Westling,

As part of our attempt to proceed in an orderly fashion and minimize unnecessary delays in connection with the trial, we request that you stipulate to the authenticity of the exhibits on the Exhibit List that we have provided you by separate letter dated March 23, 2010. We specifically recognize that in stipulating to authenticity, you would continue to preserve your right to object to the admissibility of any such exhibit on the basis of relevancy, hearsay, or any other grounds other than authenticity.

If there are specific exhibits referenced on the Exhibit List to which you are unwilling to stipulate as to authenticity, we request that you identify those exhibits and provide the reasons. We are also willing to answer questions you may have concerning any of the exhibits.

If you have any questions, please do not hesitate to contact Mark H. Dubester, 202-226-2404, or Harry Damelin, 202-226-0109, so we can discuss and try to resolve any issue you might have.

Sincerely,

Alan I. Baron
Special Impeachment Counsel

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Attachment Two

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Congress of the United States
Washington, DC 20515

April 19, 2010

Richard Westling, Esq.
Ober Kaler Grimes and Shriver
1401 H Street, N.W. Suite 500
Washington, D.C. 20005

Re: Impeachment of Judge G. Thomas Porteous
Request for Factual Stipulations

Dear Mr. Westling,

As a part of our attempt to proceed in an orderly fashion and minimize unnecessary delays in connection with the impeachment trial of Judge Porteous, and as also suggested by you in your April 9, 2010 letter to Senators McCaskill and Hatch, we are providing the attached list of 308 proposed factual stipulations for your review and agreement.

All of the proposed stipulations are based on documents or testimony that is part of the Task Force's Hearing record. Where appropriate, the proposed stipulation cites to particular documents or testimony that support the stipulation.

We are available to discuss any issues you may have with regard to the proposed stipulations. We are also amenable to consider any additional factual stipulations you may wish to submit on behalf of Judge Porteous. Please feel free to contact Harold Damelin (202-226-0144) or Mark Dubester (202-226-2404) with regard to any issues you have regarding the enclosed stipulations.

Sincerely,

Alan I. Baron
Special Impeachment Counsel

Enclosures

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Stipulations—Impeachment of G. Thomas Porteous, Jr.

III. Judge G. Thomas Porteous[1]

1. Judge Porteous was born on December 14, 1946.

2. Judge Porteous married Carmella Porteous on June 28, 1969.

3. Judge Porteous and his wife Carmella had four children: Michael, Timothy, Thomas and Catherine.

4. Judge Porteous graduated from Louisiana State University Law School in May 1971.

5. From approximately October 1973 through August 1984, Judge Porteous served as an Assistant District Attorney in Jefferson Parish, Louisiana. Judge Porteous was permitted to hold outside employment while working as an Assistant District Attorney.

6. From January 1973 until July 1974, Judge Porteous was a law partner of Jacob Amato, Jr. at the law firm of Edwards, Porteous & Amato.

7. Attorney Robert Creely worked at the law firm of Edwards, Porteous, & Amato for some period of time between January 1973 and July 1974.

8. Judge Porteous was elected to be a judge of the 24th Judicial District Court in Jefferson Parish, Louisiana in August 1984. He took the bench on December 19, 1984, and remained in that position until October 28, 1994.

9. 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.

10. Judge Porteous's confirmation hearing before the Senate Judiciary Committee was held on October 6, 1994.

11. Judge Porteous was confirmed as a United States District Court Judge for the Eastern District of Louisiana by the United States Senate on October 7, 1994.

12. Judge Porteous received his judicial commission on October 11, 1994.

13. Judge Porteous was sworn in as a United States District Court Judge for the Eastern District of Louisiana on October 28, 1994.

14. Judge Porteous's wife, Carmella, passed away on December 22, 2005.

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[1] The numerical designations of the headings in these Stipulations correspond to the related sections in the Report of the House Committee on the Judiciary, which accompanied H. Res. 1031, 111th Cong. 2d Sess. (2010).

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IV. Procedural Background

15. Starting in or about late 1999, the Department of Justice and the Federal Bureau of Investigation commenced a criminal investigation of Judge Porteous. The investigation ended in early 2007, without an indictment being issued.

16. By letter dated May 18, 2007, the Department of Justice submitted a formal complaint of judicial misconduct regarding Judge Porteous to the Honorable Edith H. Jones, Chief Judge of the United States Court of Appeals for the Fifth Circuit. (Ex. 4).

17. Upon receipt of the Department of Justice's May 18, 2007 complaint letter, the Fifth Circuit appointed a Special Investigatory Committee (the "Special Committee") to investigate the Department of Justice's allegations of misconduct by Judge Porteous.

18. Judge Porteous was initially represented by attorney Kyle Schonekas in the Special Committee proceedings.

19. Kyle Schonekas withdrew from representing Judge Porteous in the Special Committee proceedings on or before July 5, 2007.

20. On or before August 2, 2007, attorney Michael H. Ellis represented Judge Porteous in the Special Committee proceedings.

21. On or before October 16, 2007, attorney Michael H. Ellis withdrew from representing Judge Porteous in the Special Committee proceedings because of "irreconcilable differences."

22. A hearing was held before the Special Committee on October 29 and 30, 2007 (the "Fifth Circuit Hearing"). At the Fifth Circuit Hearing, Judge Porteous represented himself, testified pursuant to a grant of formal immunity, cross-examined witnesses and called witnesses on his own behalf.

23. After the Fifth Circuit hearing, the Special Committee issued a report to the Judicial Conference of the Fifth Circuit dated November 20, 2007, which concluded that Judge Porteous committed misconduct which "might constitute one or more grounds for impeachment." (Ex. 5).

24. On December 20, 2007, by a majority vote, the Judicial Council of the Fifth Circuit accepted and approved the Special Committee's November 20, 2007 Report and concluded that Judge Porteous "had engaged in conduct which might constitute one or more grounds for impeachment under Article I of the Constitution." The Judicial Council of the Fifth Circuit thereafter certified these findings and the supporting records to the Judicial Conference of the United States. (Ex. 6 (a)).

25. 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 the United States District Judge G. Thomas Porteous (E.D. La.) may be warranted." (Ex. 7).

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26. On September 10, 2008, the Judicial Council of the Fifth Circuit issued an "Order and Public Reprimand" against Judge Porteous, ordering that no new cases be assigned to Judge Porteous and suspending Judge Porteous's authority to employ staff for two years or "until Congress takes final action on the impeachment proceedings, whichever occurs earlier." (Ex. 8).

27. 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 should inquire whether the House should impeach G. Thomas Porteous, a judge of the United States District Court for the Eastern District of Louisiana."

28. On January 13, 2009, the House of Representatives passed H. Res. 15, continuing the authority of H. Res. 1448 for the 111th Congress.

VIII. Article I—The Liljeberg Case

29. Jacob Amato, Jr. and Robert Creely formed a law partnership in about 1975 that lasted until 2005. (Ex. 16).

30. While Judge Porteous was on the state bench, he requested cash from Robert Creely on several occasions. Creely provided cash to Judge Porteous in response to those requests. (Exs. 11, 12 and 16).

31. Judge Porteous knew that some portion of the money he received from Robert Creely came from Jacob Amato, Jr. as well. (Task Force Hearing I, Exs. 16, 24).

32. There came a time where Robert Creely expressed resistance to providing monies to Judge Porteous while he was on the state bench. (Task Force Hearing I and Ex. 10).

33. Beginning in 1988, Judge Porteous began increasingly to assign Robert Creely curatorships. (Ex. 11).

34. In 1988, Judge Porteous assigned at least 18 curatorships to Robert Creely. (Exs. 189–190).

35. In 1989, Judge Porteous assigned at least 21 curatorships to Robert Creely. (Exs. 189–190).

36. In 1990, Judge Porteous assigned at least 33 curatorships to Robert Creely. (Exs. 189–190).

37. In 1991, Judge Porteous assigned at least 28 curatorships to Robert Creely. (Exs. 189–190).

38. In 1992, Judge Porteous assigned at least 44 curatorships to Robert Creely. (Exs. 189–190).

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39. In 1993, Judge Porteous assigned at least 28 curatorships to Robert Creely. (Exs. 189–190).

40. In 1994, Judge Porteous assigned at least 20 curatorships to Robert Creely. (Exs. 189–190).

41. The Amato & Creely law firm earned a fee of between $150 and $200 for each curatorship that Judge Porteous assigned to Robert Creely.

42. As a result of Robert Creely being assigned at least 192 curatorships by Judge Porteous, the Amato & Creely law firm earned fees of at least $37,500. (Exs. 189 and 190).

43. Judge Porteous received a portion of the fees associated with the curatorships he assigned to Robert Creely. (Ex. 12).

44. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding his receipt of money for Robert Creely and Jacob Amato, Jr.:

> 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. (Ex. 10).

45. At the Fifth Circuit Hearing, Judge Porteous admitted under oath that the cash he received from Robert Creely "occasionally" followed his assignment of curatorships to Creely. (Ex. 10).

46. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding the relationship between Mr. Creely's resistance to giving Judge Porteous money and Judge Porteous's assignment of curatorships to Mr. Creely:

> 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. (Ex. 10).

47. At the Fifth Circuit Hearing, Judge Porteous questioned Jacob Amato, Jr. as follows regarding the reasons why Amato and Creely gave Judge Porteous money:

> Porteous: [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?

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Amato: Tom, it's because we're friends and we've been friends for 35 years. And it breaks my heart to be here. (Ex. 20).

48. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding the amount of money he received from Jacob Amato, Jr. and Robert Creely or their law firm:

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.

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. (Ex. 10).

49. Attorney Donald Gardner is a long time friend of Judge Porteous.

50. While Judge Porteous was a state judge, he assigned more than 50 curatorships to Donald Gardner. (Ex. 36).

51. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding his receipt of cash from Don Gardner:

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?

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A: Absolutely not. (Ex. 10).

52. On January 16, 1996, as a Federal judge, Judge Porteous was assigned a civil case, Lifemark Hospitals of La., Inc. v. Liljeberg Enterprises, Inc. (Ex. 50).

53. The Liljeberg case was filed in 1993 and had been assigned to other judges before being transferred to Judge Porteous on January 16, 1996.

54. The Liljeberg case was set for a non-jury trial before Judge Porteous on November 4, 1996.

55. On September 19, 1996, the Liljebergs filed a motion to enter the appearances of Jacob Amato, Jr. and Leonard Levenson as their attorneys. Judge Porteous granted the motion on September 26, 1996. (Exs. 51 (a) and 51 (b)).

56. Jacob Amato, Jr. and Leonard Levenson were hired by the Liljebergs on a contingent fee basis, and, pursuant to the terms of their retainer, if the Liljebergs prevailed in the litigation they would both receive substantial fees. (Exs. 18 and 52).

57. The motion to enter Jacob Amato, Jr.'s appearance identified him as being with the law firm of Amato & Creely. (Ex. 51 (a)).

58. On October 1, 1996, attorney Joseph Mole on behalf of his client, Lifemark, filed a Motion to Recuse Judge Porteous. (Ex. 52).

59. When the Liljebergs filed their Motion to Recuse, Joseph Mole, counsel for Lifemark, was unaware of any prior financial relationship between Amato & Creely and Judge Porteous. (Ex. 52).

60. The Liljebergs filed their Opposition to the Motion to Recuse, on October 9, 1996. (Ex. 53).

61. Lifemark filed its Reply to the Opposition to the Motion to Recuse on October 11, 1996. (Ex. 54).

62. The Liljebergs filed a Memorandum in Opposition to Lifemark's Reply on October 15, 1996. (Ex. 55).

63. On October 16, 1996, Judge Porteous held a hearing on the Motion to Recuse. (Ex. 56).

64. Both Leonard Levenson and Jacob Amato, Jr. were present in the courtroom on behalf of the Liljebergs at the October 16, 1996 hearing on the Motion to Recuse. (Ex. 56).

65. At the recusal hearing on October 16, 1996, Jacob Amato, Jr. made no statements concerning his prior financial relationship with Judge Porteous. (Ex. 56).

66. At the October 16, 1996 hearing on the Motion to Recuse, the following colloquy occurred:

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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.

* * *

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

* * *

Mr. Mole: The public perception is that they do dine with you, travel with you, that they have contributed to your campaigns.

* * *

The Court: The first time I ran, 1984, I think is the only time when they gave me money.

* * *

The Court: [T]his is the first time a motion for my recusal has ever been filed . . . . But does that mean that any time a person I perceive to be friends who I have dinner with or whatever that I must disqualify myself? I don't think that's what the rule suggests . . . . Courts have held that a judge need not disqualify himself just because a friend, even a close friend, appears as a lawyer

* * *

The Court: Well you know the issue becomes one of, I guess the confidence of the parties, not the attorneys . . . . My concern is not with whether or not lawyers are friends . . . . My concern is that the parties are given a day in court which they can through you present their case, and they can be adjudicated thoroughly without bias, favor, prejudice, public opinion, sympathy, anything else, just on law and facts . . . .

I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off . . . .

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> [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." (Ex. 56).

67. Judge Porteous denied the Motion to Recuse in open court on October 16, 1996. (Ex. 56).

68. On October 17, 1996, Judge Porteous issued a written order confirming the denial of the Motion to Recuse. (Ex. 57).

69. Lifemark retained Donald Gardner on March 11, 1997 to be part of its trial team. (Ex. 60 (a)).

70. Lifemark's contract with Donald Gardner provided that he would be paid $100,000 for entering his appearance and that, among other terms, he would receive another $100,000 if Judge Porteous withdrew or the case settled. (Exs. 64 and 65).

71. Judge Porteous conducted a bench trial in the Liljeberg case from June 16, 1997 through June 27, 1997 and then from July 14, 1997 until its conclusion on July 23, 1997. (Ex. 50).

72. At the conclusion of the Liljeberg trial in July 1997, Judge Porteous took the case under advisement.

73. Jacob Amato, Jr. took Judge Porteous to numerous lunches while Judge Porteous had the Liljeberg under advisement. (Task Force Hearing I and Exs. 21 (b)–(c) and 24).

74. Don Gardner took Judge Porteous to lunches and dinners while Judge Porteous had the Liljeberg case under advisement. (Ex. 36).

75. From May 20 through 23, 1999, while Judge Porteous had the Liljeberg case under advisement, a bachelor party was held in Las Vegas, Nevada, for Judge Porteous's son, Timothy.

76. Among the people present in Las Vegas for Timothy Porteous's bachelor party were Judge Porteous, Robert Creely and Donald Gardner.

77. At the Fifth Circuit Hearing Judge Porteous testified under oath as follows regarding Robert Creely's payment for Judge Porteous's hotel room at Caesars Palace during the trip to Las Vegas for Timothy Porteous's bachelor party:

> Q: Well, once you get to Las Vegas, you have to stay in a room right?

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A: Right.

Q: You didn't pay for the room, did you?

A: It appears I did not.

Q: And do you know who paid for it?

A: It appears Mr. Creely paid for it.

Q: Mr. Creely, that's right. Now, that was over a period of approximately four days, as I recall, from the records?

A: Three or four.

Q: Three or four. That exceeded $250 total for the room, correct?

A: Yea.

Q: Did that ever appear on your judicial - -

A: No, it did not.

Q: – your form that you file with the administrative office?

A: No, it did not.

Q: It did not. Although you considered that a gift, correct?

A: Yea, it was a gift. (Ex. 10, page 140).

78. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows concerning Robert Creely's payment of a portion of the bill for Timothy Porteous's bachelor party dinner in Las Vegas:

A: We had one outside meal that I can recall.

Q: But you didn't pay for that meal, did you?

A. No, I did not.

Q: Who paid for it?

A: A variety – I think Creely did and maybe some other people picked up various portions. (Exs. 10, 11 and 378).

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79. On June 28, 1999, after his son's wedding, and while the Liljeberg case was under advisement, Judge Porteous solicited money from Jacob Amato, Jr. while the two men were on a boat during a fishing trip.

80. After Judge Porteous solicited money from Jacob Amato, Jr. on June 28, 1999, Amato provided cash to Judge Porteous in an envelope.

81. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding his receipt of money from Jacob Amato, Jr. in or about June of 1999:

> 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.
>
> * * *
>
> 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. It is 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.

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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. (Ex. 10).

82. After Judge Porteous received the cash from Jacob Amato, Jr. in or about June of 1999, while he still had the Liljeberg case under advisement, Judge Porteous did not disclose this fact to Joseph Mole, counsel for Lifemark.

83. In late 1999, while Judge Porteous still had the Liljeberg case under advisement, Jacob Amato, Jr. and Robert Creely paid for a party at the French Quarter Restaurant and Bar to celebrate Judge Porteous's fifth year on the Federal bench. (Exs. 24 and 46, and Task Force Hearing I).

84. At some time while the Liljeberg case was pending before Judge Porteous, Jacob Amato, Jr., Leonard Levenson, and Donald Gardner each gave money either to Judge Porteous directly, or to his secretary Rhonda Danos, to help pay for a Washington D.C. externship for one of Judge Porteous's sons. (Exs. 24, 25, 32, 33, 46 and Task Force Hearing I).

85. During the 1996–2000 time-frame, Judge Porteous maintained a close relationship with Leonard Levenson, demonstrated by Judge Porteous and Leonard Levenson traveling together on several occasions.

86. During the 1996–1998 time-frame, Judge Porteous attended at least one hunting trip with Leonard Levenson, at a Mississippi property owned by Allen Usry, an attorney who on occasion worked with Levenson. (Exs. 30, 163).

87. In April 1999, Leonard Levenson attended the Fifth Circuit Judicial Conference in Houston, Texas as an invitee of Judge Porteous.

88. While at the Fifth Circuit Judicial Conference in April 1999, Leonard Levenson paid for meals and drinks for Judge Porteous. (Exs. 26, 31, 291).

89. In October 1999, Leonard Levenson paid for a dinner with Judge Porteous in Las Vegas, Nevada. (Exs. 30, 31, 291, and 299).

90. In December 1999, Judge Porteous went on a multi-day hunting trip to the Blackhawk hunting facility in Louisiana with Leonard Levenson. (Exs. 31, 163, 286).

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91. Judge Porteous did not notify Joseph Mole, counsel for Lifemark, of any of his post-recusal hearing and post trial contacts with Jacob Amato, Jr., Robert Creely, or Leonard Levenson.

92. On April 26, 2000, nearly three years after the trial concluded, Judge Porteous issued a written opinion in Lifemark Hospitals of La., Inc. v. Liljeberg Enterprises, Inc. (Ex. 62).

93. Judge Porteous ruled in favor of Jacob Amato, Jr.'s and Leonard Levenson's client, the Liljebergs.

94. Lifemark appealed Judge Porteous's decision to the Fifth Circuit Court of Appeals.

95. In August 2002, the Fifth Circuit Court of Appeals reversed Judge Porteous's decision. (Ex. 63).

IX. Article II—The Marcottes

96. On numerous occasions when he was a State court judge, Judge Porteous set bonds, reduced bonds, and split bonds in response to requests by Louis Marcotte, Lori Marcotte, or a representative of the Marcottes. (Exs. 350, 351).

97. In or about the summer of 1993, Jeffery Duhon worked for Louis Marcotte's bail bonds business.

98. On or about July 15, 1993, Judge Porteous set aside Jeffery Duhon's burglary conviction. (Exs. 77(a), 77(b)).

99. In September 1994 and October 1994, Aubrey Wallace worked for Louis Marcotte's bail bonds business.

100. On or about September 20, 1994, Judge Porteous held a hearing at which he ordered that Aubrey Wallace's court records in State of Louisiana v. Aubrey N. Wallace, No. 89-2360 (24th Jud. Dist Ct., Jeff. Par., La.) be amended to include removal of the unsatisfactory completion of probation and the entering of the guilty plea under Code of Criminal Procedure 893. (Ex. 69(d)).

101. On or about September 22, 1994, Judge Porteous signed a written Order that stated: "IT IS ORDERED that the sentence on Aubrey WALLACE is hereby amended to include the following wording, 'the defendant plead under Article 893.'" (Ex. 82).

102. In the last few weeks of Judge Porteous's tenure as a State court judge, he set, reduced and split numerous bonds at the request of the Marcottes. (Exs. 350, 351).

103. On October 14, 1994, Judge Porteous entered an order setting aside Aubrey Wallace's burglary conviction in State of Louisiana v. Aubrey N. Wallace, No. 89-2360 (24th Jud. Dist Ct., Jeff. Par., La.).

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104. In or about July 19, 1999, Judge Porteous attended a Professional Bail Agents of the United States (PBUS) convention at the Beau Rivage Resort in Biloxi Mississippi, at which convention he attended a cocktail party hosted by the Marcottes. (Exs. 223, 224).

105. On or about March 11, 2002, Judge Porteous was a guest of the Marcottes at the conclusion of a lunch at Emeril's Restaurant, in New Orleans, Louisiana at which newly elected State judge Joan Benge and State judge Ronald Bodenheimer were also in attendance. (Ex. 375).

X. Article III—Bankruptcy

106. On his Financial Disclosure Form for reporting period 1996, Judge Porteous checked the box for "None (No reportable liabilities)." (Ex. 102(a)).

107. Judge Porteous's balance due on his Citibank credit card account ending in 0426 for the period ending on December 12, 1996 was $14,846.47. (Ex. 167).

108. Judge Porteous signed his Financial Disclosure Form for reporting period 1996 on May 12, 1997. Judge Porteous's signature appeared below a Certification that stated, in part:

> "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." (Ex. 102(a)).

109. On his Financial Disclosure Form for reporting period 1997, Judge Porteous checked the box for "None (No reportable liabilities)." (Ex. 103(a)).

110. Judge Porteous's balance due on his MBNA MasterCard account ending in 0877 for the period ending on December 19, 1997 was $15,569.25. (Ex. 168).

111. Judge Porteous's balance due on his MBNA MasterCard account ending in 1290 for the period ending on December 4, 1997 was $18,146.85. (Ex. 168).

112. Judge Porteous's balance due on his Travelers credit card account ending in 0642 for the period ending on December 30, 1997 was $9,378.76. (Ex. 168).

113. Judge Porteous signed his Financial Disclosure Form for reporting period 1997 on May 13, 1998. Judge Porteous's signature appeared below a Certification that stated, in part:

> "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." (Ex. 103(a)).

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114. On his Financial Disclosure Form for reporting period 1998, in Section VI, "Liabilities," Judge Porteous listed MBNA and Citibank as creditors, each with a value listed as code "J," which indicated liabilities on each card of $15,000 or less. (Ex. 104(a)).

115. Judge Porteous's balance due on his MBNA MasterCard account ending in 0877 for the period ending December 19, 1998 was $16,550.08. (Ex. 169).

116. Judge Porteous's balance due on his MBNA MasterCard account ending in 1290 for the period ending December 4, 1998 was $17,155.76. (Ex. 169).

117. Judge Porteous signed his Financial Disclosure Form for reporting period 1998 on May 13, 1999. Judge Porteous's signature appeared below a Certification that stated, in part:

> "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." (Ex. 104(a)).

118. On his Financial Disclosure Form for reporting period 1999, in Section VI, "Liabilities," Judge Porteous listed MBNA and Citibank as creditors, each with a value listed as code "J," which indicated liabilities on each card of $15,000 or less. (Ex. 105(a)).

119. Judge Porteous's balance due on his MBNA MasterCard account ending in 0877 for the period ending on December 18, 1999 was $24,953.65. (Ex. 170).

120. Judge Porteous's balance due on his MBNA MasterCard account ending in 1290 for the period ending on December 4, 1999 was $25,755.84. (Ex. 170).

121. Judge Porteous's balance due on his Citibank credit card account ending in 0426 for the period ending on December 10, 1999 was $22,412.15. (Ex. 170).

122. Judge Porteous's balance due on his Citibank credit card account ending in 9138 for the period ending on December 21, 1999 was $20,051.95. (Ex. 170).

123. Judge Porteous's balance due on his Travelers credit card account ending in 0642 for the period ending on December 29, 1999 was $15,467.29. (Ex. 170).

124. Judge Porteous signed his Financial Disclosure Form for reporting period 1999 on May 5, 2000. Judge Porteous's signature appeared below a Certification that stated, in part:

> "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." (Ex. 105(a)).

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125. On his Financial Disclosure Form for reporting period 2000, in Section VI, "Liabilities," Judge Porteous listed MBNA and Citibank as creditors, each with a value listed as code "J," which indicated liabilities on each card of $15,000 or less. (Ex. 106(a)).

126. Judge Porteous's balance due on his MBNA MasterCard account ending in 0877 for the period ending on December 20, 2000 was $28,347.44. (Ex. 171).

127. Judge Porteous's balance due on his MBNA MasterCard account ending in 1290 for the period ending on December 5, 2000 was $29,258.68. (Ex. 171).

128. Judge Porteous's balance due on his Citibank credit card account ending in 0426 for the period ending on December 12, 2000 was $24,565.76. (Ex. 171).

129. Judge Porteous's balance due on his Citibank credit card account ending in 9138 for the period ending on December 21, 2000 was $21,227.06. (Ex. 171).

130. Judge Porteous's balance due on his Travelers credit card account ending in 0642 for the period ending on December 29, 2000 was $17,682.35. (Ex. 171).

131. Judge Porteous signed his Financial Disclosure Form for reporting period 2000 on May 10, 2001. Judge Porteous's signature appeared below a Certification that stated, in part:

> "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." (Ex. 106(a)).

132. Judge Porteous opened a $2,000 line of credit at the Grand Casino Gulfport in Gulfport, Mississippi on July 22, 1994. (Ex. 326).

133. Judge Porteous opened a $2,000 line of credit at the Grand Casino Biloxi in Biloxi, Mississippi on August 19, 1995. (Ex. 326).

134. Judge Porteous opened a $2,500 line of credit at the Casino Magic Bay in St. Louis, Mississippi on October 26, 1995. (Ex. 326).

135. Judge Porteous opened a $2,000 line of credit at the Treasure Chest Casino in Kenner, Louisiana on November 25, 1997. (Ex. 326).

136. Judge Porteous opened a $2,000 line of credit at the Isle of Capri Casino in Biloxi, Mississippi on March 31, 1998. (Ex. 326).

137. Judge Porteous opened a $2,500 line of credit at the Beau Rivage Casino in Biloxi, Mississippi on April 14, 1999. (Ex. 326).

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138. Judge Porteous opened a $5,000 line of credit at Caesars Palace Casino in Las Vegas, Nevada on May 12, 1999. (Ex. 326).

139. Judge Porteous's credit limit at the Treasure Chest Casino in Kenner, Louisiana was increased to $3,000 on August 17, 2000. (Ex. 326).

140. Judge Porteous opened a $5,000 line of credit at Caesars Tahoe Casino in Lake Tahoe, Nevada on December 11, 2000. (Ex. 326).

141. Judge Porteous opened a $4,000 line of credit at Harrah's Casino in New Orleans, Louisiana on April 30, 2001. (Ex. 326).

142. On March 2, 2001, Judge Porteous's credit limit at the Treasure Chest Casino in Kenner, Louisiana was increased from $3,000 to $4,000. (Ex. 331).

143. On March 2, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 302).

144. On March 2, 2001, Judge Porteous took out seven $500 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00058997, 00059000, 00059002, 00059011, 00059012, 00059013, and 00059019. On March 3, 2001, Judge Porteous repaid marker numbers 00058997, 00059000, 00059002, and 00059019 with chips. (Ex. 302).

145. Judge Porteous left the Treasure Chest Casino in Kenner, Louisiana on March 3, 2001 owing the casino $1,500. (Ex. 302).

146. On March 27, 2001, Judge Porteous repaid marker numbers 00059011, 00059012, and 00059013 to the Treasure Chest Casino in Kenner, Louisiana with cash. (Ex. 302).

147. On February 27, 2001, Judge Porteous gambled at the Grand Casino Gulfport in Gulfport, Mississippi. (Ex. 301(a)).

148. On February 27, 2001, Judge Porteous took out two $1,000 markers at the Grand Casino Gulfport in Gulfport, Mississippi, identified by marker numbers MK131402 and MK131405. (Ex. 301(a)).

149. On March 27, 2001, Judge Porteous deposited $2,000 into his Bank One checking account. This deposit consisted of $1,960 in cash and a $40 check drawn on Judge Porteous's Fidelity money market account. (Exs. 143, 144, 301(b)).

150. On or about April 5, 2001, the Grand Casino Gulfport collected $1,000 from Judge Porteous after marker number MK131402 was deposited into and cleared Judge Porteous's Bank One checking account. (Ex. 301(b)).

151. On or about April 6, 2001, the Grand Casino Gulfport collected $1,000 from Judge Porteous after marker number MK131405 was deposited into and cleared Judge Porteous's Bank One checking account. (Ex. 301(b)).

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152. On March 20, 2001, Judge Porteous opened a Post Office Box at a Post Office in Harvey, Louisiana. (Ex. 145).

153. On March 23, 2001, Judge Porteous signed his tax return for calendar year 2000, which claimed a tax refund in the amount of $4,143.72. (Ex. 141).

154. On April 13, 2001, Judge Porteous's $4,143.72 tax refund was electronically deposited by the U.S. Treasury directly into Judge Porteous's Bank One checking account. (Ex. 144).

155. Judge Porteous signed his initial Voluntary Petition for Chapter 13 Bankruptcy on March 28, 2001. (Ex. 125).

156. Judge Porteous's signature on his initial Voluntary Petition for Chapter 13 Bankruptcy appears directly below the following declaration:

> I declare under penalty of perjury that the information provided in this petition is true and correct. (Ex. 125).

157. Judge Porteous's initial Voluntary Petition for Chapter 13 Bankruptcy was filed in the United States Bankruptcy Court for the Eastern District of Louisiana on March 28, 2001. (Ex. 125).

158. Judge Porteous's initial Voluntary Petition for Chapter 13 Bankruptcy listed the Name of Debtor as "Ortous, G.T." (Ex. 125).

159. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding the name "Ortous" on his initial Voluntary Petition for Chapter 13 Bankruptcy:

> 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. (Porteous 5th Cir. Hrg. at 55 (Ex. 10)).

160. Judge Porteous's initial Voluntary Petition for Chapter 13 Bankruptcy listed a Street Address of "P.O. Box 1723, Harvey, LA 70059-1723." (Ex. 125).

161. Judge Porteous's street address on March 28, 2001 was 4801 Neyrey Drive, Metairie, LA 70002.

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162. Judge Porteous signed his amended Voluntary Petition for Chapter 13 Bankruptcy on April 9, 2001. (Ex. 126).

163. Judge Porteous's amended Voluntary Petition for Chapter 13 Bankruptcy was filed in the United States Bankruptcy Court for the Eastern District of Louisiana on April 9, 2001. (Ex. 126).

164. Judge Porteous's amended Voluntary Petition for Chapter 13 Bankruptcy listed the Name of Debtor as "Porteous, Jr., Gabriel T." (Ex. 126).

165. Judge Porteous's amended Voluntary Petition for Chapter 13 Bankruptcy listed a Street Address of 4801 Neyrey Drive, Metairie, LA 70002. (Ex. 126).

166. Judge Porteous signed his Bankruptcy Schedules on April 9, 2001. (Ex. 127 at SC00111).

167. Judge Porteous's signature on his Bankruptcy Schedules appears directly below the following declaration:

> I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 16 sheets, plus the summary page, and that they are true and correct to the best of my knowledge, information, and belief. (Ex. 127 at SC00111).

168. Judge Porteous's Bankruptcy Schedules were filed with the United States Bankruptcy Court for the Eastern District of Louisiana on April 9, 2001. (Ex. 127).

169. Category 17 on Judge Porteous's Bankruptcy Schedule B ("Personal Property") required Judge Porteous to disclose "other liquidated debts owing debtor including tax refunds," in response to which the box "none" was marked with an "X." (Ex. 127 at SC00096).

170. Category 2 on Judge Porteous's Bankruptcy Schedule B required Judge Porteous to disclose "Checking, savings or other financial accounts . . . ." and to state the current market value of ins interest in that property, in response to which the Schedule lists only Judge Porteous's Bank One checking account with a current market value of $100." (Ex. 127 at SC00095).

171. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding his response to Category 2 on Schedule B:

> Q: Okay. Let's go through this for a moment. Under Schedule B, "Personal Property."
>
> A: All right.
>
> Q: "Type of property, checking, savings, or other financial accounts, certificates of deposit, shares in banks, savings and loan,

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thrift, building and loan, homestead association, or credit unions, brokerage houses or cooperatives." Did I read that accurately?

A: Yes, sir.

Q: And you listed Bank One Checking Account [account number redacted]. Is that correct?

A: That's correct.

Q: And the current value of that interest is $100, correct?

A: Yes, sir. (Porteous 5th Cir. Hrg. at 79–80 (Ex. 10)).

172. The opening balance of Judge Porteous's Bank One checking account for the time period of March 23, 2001 to April 23, 2001 was $559.07. (Ex. 144).

173. The closing balance of Judge Porteous's Bank One checking account for the time period of March 23, 2001 to April 23, 2001 was $5,493.91. (Ex. 144).

174. Judge Porteous deposited $2,000 into his Bank One checking account on March 27, 2001. (Ex. 144).

175. At no time between March 23, 2001 to April 23, 2001 did the balance in Judge Porteous's Bank One checking account drop to $100 or less. (Ex. 144).

176. On March 28, 2001, Judge Porteous had a Fidelity money market account. This account was held in both his and his wife Carmella's names. (Ex. 143).

177. Judge Porteous's Fidelity money market account was not disclosed in response to Category 2 on Judge Porteous's Bankruptcy Schedule B. (Ex. 127 at SC00095).

178. The opening balance on Judge Porteous's Fidelity money market account for the time period of March 31, 2001 to April 20, 2001 was $623.94. (Ex. 143).

179. The balance on Judge Porteous's Fidelity money market account on March 28, 2001 was $283.42. (Ex. 143).

180. On April 4, 2001, a $200.00 deposit was made into Judge Porteous's Fidelity money market account. (Ex. 143).

181. Judge Porteous wrote four checks from his Fidelity money market account between March 22, 2001 to April 12, 2001. (Ex. 143).

182. On more than one occasion, Judge Porteous withdrew money from his Fidelity IRA account and deposited that money into his Fidelity money market account. The total dollar amount that Judge Porteous transferred from his Fidelity IRA to his Fidelity money market account between 1997 and 2000 was in excess of $10,000. (Ex. 383).

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183. On March 28, 2001, Judge Porteous owed $2,000 in markers to the Grand Casino Gulfport in Gulfport, Mississippi arising from the two $1,000 markers he took out on February 27, 2001. (Ex. 301(a)–(b)).

184. Judge Porteous's Bankruptcy Schedule F ("Creditors Holding Unsecured Nonpriority Claims") required Judge Porteous to "list creditors holding unsecured, nonpriority claims, as of the date of the filing of the petition," in response to which Judge Porteous's debt to the Grand Casino Gulfport was not listed. (Ex. 127 at SC00102–105; Ex. 345).

185. Judge Porteous's Bankruptcy Schedule I ("Current Income of Individual Debtor(s)") required Judge Porteous to disclose "Current monthly wages, salary, and commissions (pro rate if not paid monthly)," in response to which the Schedule listed Judge Porteous's current monthly gross income as $7,531.52 (Ex. 127 at SC00108).

186. Judge Porteous's Bankruptcy Schedule I listed his "total net monthly take home pay" as $7,531.52. (Ex. 127 at SC00108).

187. Attached to Judge Porteous's Bankruptcy Schedule I was Judge Porteous's Employee Earnings Statement issued by the Administrative Office of the United States Court, for the monthly pay period ending on May 31, 2000, which stated that Judge Porteous's gross earnings were $11,775.00, and his net pay was $7,531.52. (Ex. 127 at SC00109).

188. In the summer of 2000, Judge Porteous had provided his Employee Earnings Statement for the monthly pay period ending on May 31, 2000 to Claude Lightfoot.

189. Judge Porteous never provided Claude Lightfoot with an Employee Earnings Statement that was more recent than Judge Porteous's statement for the pay period ending on May 31, 2000.

190. In March and April 2001, Judge Porteous's monthly net pay was $7,705.51. (Ex. 144).

191. Judge Porteous signed his Statement of Financial Affairs on April 9, 2001. (Ex. 127 at SC00112).

192. Judge Porteous's signature on his Statement of Financial Affairs appears directly below the following declaration:

> 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. (Ex. 127 at SC00116).

193. Judge Porteous's Statement of Financial Affairs was filed with the United States Bankruptcy Court for the Eastern District of Louisiana on April 9, 2001. (Ex. 127).

194. Question 3 on Judge Porteous's Statement of Financial Affairs required Judge Porteous to list "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

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the commencement of this case," in response to which the answer given was "Normal Installments." (Ex. 127 at SC00112).

195. On March 27, 2001, Judge Porteous made a $1,500 cash payment to the Treasure Chest Casino in Kenner, Louisiana to repay markers owed to the casino. (Ex. 302).

196. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding his understanding of a marker:

> Q: Judge Porteous, you're familiar with the term "marker," aren't you?
>
> A: Yes, sir.
>
> Q: Would it be fair to state that, "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." Is that accurate?
>
> A: I believe that's correct and probably was contained in the complaint or – or the second complaint. There's a definition contained.
>
> Q: And you have no quarrel with the definition?
>
> A: No, sir. (Porteous 5th Cir. Hrg. at 64–65 (Ex. 10)).

197. Judge Porteous's answer to Question 3 on his Statement of Financial Affairs did not list the $1,500 cash payment that Judge Porteous made to the Treasure Chest Casino in Kenner, Louisiana on March 27, 2001. (Ex. 127 at SC00112; Ex. 302).

198. Question 8 on Judge Porteous's Statement of Financial Affairs required Judge Porteous to list "all losses from fire, theft, other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case," in response to which the box "None" was checked. (Ex. 127 at SC00113).

199. Between March 28, 2000 and March 28, 2001, Judge Porteous accrued gambling losses. (Porteous 5th Cir. Hrg. at 98–99 (Ex. 10)).

200. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding his response to Question 8 on his Statement of Financial Affairs:

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Q: [Item 8] asks you to list all losses for fire, theft, other casualty, gambling within one year immediately preceding the commencement of this case – meaning your case – or since the commencement of this case. And I believe we read this before, about married debtors filing under Chapter 12 and Chapter 13. And you list "none," correct?

A: That's what's listed, correct.

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. (Porteous 5th Cir. Hrg. at 98–99 (Ex. 10)).

201. On April 6, 2001, Judge Porteous requested a one-time credit increase at the Beau Rivage Casino in Biloxi, Mississippi from $2,500 to $4,000. (Ex. 303).

202. On April 7–8, 2001, Judge Porteous gambled at the Beau Rivage Casino in Biloxi, Mississippi. (Ex. 304).

203. On April 7, 2001, Judge Porteous took out two $500 markers at the Beau Rivage Casino in Biloxi, Mississippi, identified by marker numbers 127556 and 127558. (Ex. 304).

204. On April 8, 2001, Judge Porteous took out two $500 markers at the Beau Rivage Casino in Biloxi, Mississippi, identified by marker numbers 127646 and 127658. Judge Porteous also made two $500 payments to the casino on April 8, 2001, identified by transaction numbers 4069177 and 4069190. (Ex. 304).

205. When Judge Porteous left the Beau Rivage Casino in Biloxi, Mississippi on April 8, 2001, he owed $1,000 to the casino. (Ex. 304).

206. On April 24, 2001, Judge Porteous withdrew $1,000 from his Fidelity Individual Retirement Account, which was paid to him in the form of a check issued by National Financial Services LLC. (Ex. 382).

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207. Judge Porteous endorsed the $1,000 check from National Financial Services LLC and signed the check over to Rhonda Danos. (Ex. 382).

208. On April 30, 2001, Rhonda Danos wrote a $1,000 check from her personal checking account, identified by check number 1699, to the Beau Rivage Casino. The check's memo line referenced "Gabriel Thomas Porteous Jr., Acct. # [redacted]." (Ex. 382).

209. On May 2, 2001, Rhonda Danos deposited into her personal checking account the $1,000 check from National Financial Services LLC, which had been issued to Judge Porteous and signed over to her. (Ex. 382).

210. On May 4, 2001, Rhonda Danos's $1,000 check to the Beau Rivage Casino, written on Judge Porteous's behalf, was paid at the cage and was credited against Judge Porteous's Beau Rivage account, identified by transaction number 4071922. The Beau Rivage Casino deposited Ms. Danos's $1,000 check on May 5, 2001. (Ex. 304).

211. On May 8, 2001, 19, 2001, Rhonda Danos's $1,000 check to the Beau Rivage Casino, identified by check number 1699, cleared Danos's bank account. (Ex. 382).

212. On April 10, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 305).

213. On April 10, 2001, Judge Porteous took out four $500 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00060317, 00060319, 00060320, and 00060321. Judge Porteous repaid all four markers the same day with chips. (Ex. 305).

214. On May 7, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 307).

215. On May 7, 2001, Judge Porteous took out four $1,000 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00061209, 00061212, 00061216, and 00061230. (Ex. 307.)

216. When Judge Porteous left the Treasure Chest Casino in Kenner, Louisiana on May 7, 2001, he owed $4,000 to the casino. (Ex. 307).

217. On May 9, 2001, Judge Porteous made a $4,000 cash payment to the Treasure Chest Casino, repaying marker numbers 00061209, 00061212, 00061216, and 00061230. (Ex. 307).

218. On April 30, 2001, Judge Porteous submitted a Casino Credit Application to Harrah's Casino in New Orleans, Louisiana, requesting a $4,000 credit limit. (Ex. 149).

219. On April 30, 2001, Judge Porteous gambled at Harrah's Casino in New Orleans, Louisiana. (Ex. 306).

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220. On April 30, 2001, Judge Porteous took out two $500 markers at Harrah's Casino in New Orleans, Louisiana, identified by marker numbers 0084898 and 0084899. Judge Porteous wrote a $1,000 check to Harrah's Casino the same day to repay both markers. Judge Porteous's check cleared Harrah's Casino on May 30, 2001. (Ex. 306).

221. On May 9, 2001, a Section 341 Creditors Meeting was held in Judge Porteous's Chapter 13 Bankruptcy case. (Ex. 129).

222. Judge Porteous attended the Section 341 Creditors Meeting held on May 9, 2001 with his bankruptcy counsel Claude Lightfoot. (Ex. 130).

223. The Section 341 Creditors Meeting was recorded, and the transcription of that recording is true and accurate. (Ex. 130).

224. At the Section 341 Creditors Meeting on May 9, 2001, bankruptcy trustee S.J. Beaulieu, Jr. gave Judge Porteous a copy of a pamphlet entitled "Your Rights and Responsibilities in Chapter 13." (Ex. 130). Section 6 of the "Rights and Responsibilities" pamphlet, which Judge Porteous received from Bankruptcy Trustee Beaulieu, stated as follows:

> 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. (Ex. 148 at SC00402).

225. At the Section 341 Creditors Meeting on May 9, 2001, Judge Porteous was placed under oath and stated "yes" when asked if everything in his bankruptcy petition was true and correct. (Ex. 130).

226. At the Section 341 Creditors Meeting on May 9, 2001, while under oath, Judge Porteous stated "yes" when asked if he had listed all of his assets in his bankruptcy petition. (Ex. 130 at SC00596).

227. At the Section 341 Creditors Meeting on May 9, 2001, while under oath, Judge Porteous answered in the affirmative when asked if his take home pay was about $7,500 a month. (Ex. 130 at SC00596).

228. At the Section 341 Creditors Meeting on May 9, 2001, Bankruptcy Trustee S.J. Beaulieu, Jr. told Judge Porteous that "Any charge cards that you may have you have [sic] you cannot use any longer. So basically you on a cash basis now." (Ex. 130 at SC00598).

229. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding the Section 341 Creditors Meeting:

> Q: Now, after bankruptcy, you had a meeting with the trustee, SJ Beaulieu, correct?

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A: After what?

Q: After bankruptcy was filed.

A: After it was filed, that's correct.

Q: And you recall that Mr. Beaulieu handed you a pamphlet called "Your Rights and Responsibilities in Chapter 13," which we have marked as the Committee's Exhibit 11?

A: I believe that's – yeah, right.

Q: And it bears the name of Mr. Beaulieu and has his local New Orleans phone number?

A: Yes, sir.

* * *

Q: Calling your attention to this exhibit, there are enumerated paragraphs. Paragraph 6, follow me while I read. "Credit While in Chapter 13. 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."

Did I read that accurately, sir?

A: You did.

Q: And do you recall reading that and discussing that with Mr. Beaulieu?

A: I don't specifically recall it, but I'm not saying it didn't happen.

Q: All right. Do you recall, on or about May 9th, 2001, having a – what's called a 341 bankruptcy hearing, where Mr. Beaulieu as trustee was present; your attorney, Mr. Lightfoot, was present; and you were present?

A: Yes, sir, I remember meeting with Mr. Beaulieu.

Q: And that meeting was recorded, if you – do you recall that?

A: I believe that's correct, yeah, tape recorded.

Q: Right.

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Do you recall Mr. Beaulieu stating the following? "Any charge cards that you may – you have you cannot use any longer. So, basically, you're on a cash basis now. I have no further questions except have you made your first payments."

Did I read that accurately?

A: Yes, sir.

Q: So, you were told by Mr. Beaulieu that you couldn't incur any more credit there, on credit cards, correct?

A: I'm not sure it was there, but I'm sure it was part of the explanation at some point.

Q: Well, going back to –

A: When you ask – I only meant in reference to the statement. Yes, it's –

Q: Right.

A: – contained in there, and I knew that.

Q: And it was your understanding – and that's what I'm trying to find out, sir – that you couldn't incur more credit while in bankruptcy, correct?

A: That's correct. (Porteous 5th Cir. Hrg. at 61–62 (Ex. 10)).

230. On May 16, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 308).

231. On May 16, 2001, Judge Porteous took out a $500 marker at the Treasure Chest Casino in Kenner, Louisiana, identified by marker number 00061520. Judge Porteous repaid that marker the same day with chips. (Ex. 308).

232. On June 20, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 310).

233. On June 20, 2001, Judge Porteous took out a $500 marker at the Treasure Chest Casino in Kenner, Louisiana, identified by marker number 00062678. Judge Porteous repaid that marker the same day with chips. (Ex. 310).

234. On May 26–27, 2001, Judge Porteous gambled at the Grand Casino Gulfport in Gulfport, Mississippi. (Ex. 309).

235. On May 26, 2001, Judge Porteous took out a $500 marker at the Grand Casino Gulfport in Gulfport, Mississippi, identified by marker number MK141028. (Ex. 309).

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236. On May 27, 2001, Judge Porteous took out a $500 marker at the Grand Casino Gulfport in Gulfport, Mississippi, identified by marker number MK141325. Judge Porteous repaid $900 to the casino that same day. (Ex. 309).

237. On May 28, 2001, Judge Porteous wrote a $100 check to the Grand Casino Gulfport, which cleared his Bank One checking account on May 30, 2001. After that check cleared, Judge Porteous's balance due and owing to the Grand Casino Gulfport was $0. (Ex. 309).

238. On June 28, 2001, U.S. Bankruptcy Judge William Greendyke signed an "Order Confirming the Debtor's Plan and Related Orders" in Judge Porteous's bankruptcy case. Judge Porteous received a copy of this order. (Ex. 133).

239. Paragraph 4 of the June 28, 2001 Order signed by Judge Greendyke stated as follows:

> 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. (Ex. 133).

240. At the Fifth Circuit Hearing, Judge Porteous testified under oath as follows regarding the June 28, 2001 Order signed by Judge Greendyke:

> Q: Okay. Now, on June 2nd [sic], are you familiar with the order signed by Bankruptcy Judge Greendyke?
>
> And this is from Exhibit 1, Bates Number SC50, Exhibit 1 being the certified copy of the bankruptcy file.
>
> "It is ordered that," going down to Number 4, "the debtors shall not incur additional debt during the term of this plan except upon written approval of the trustee."
>
> Did I read that correctly?
>
> A: You did.
>
> Q: Was that your understanding at the time?
>
> A: In the order, it was.
>
> Judge Lake: What's the date of that document?
>
> Mr. Finder: July 2nd, 2001, was the docket date. It was signed by Judge Greendyke on June 28th, 2001. (Porteous 5th Cir. Hrg. at 62 (Ex. 10)).

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241. Judge Porteous was subject to the terms of the June 28, 2001 Order until his Chapter 13 bankruptcy was discharged on July 22, 2004. (Ex. 137).

242. In December 2002, Judge Porteous asked his bankruptcy attorney, Claude Lightfoot, to seek permission from the bankruptcy trustee for Judge Porteous to refinance his home.

243. On December 20, 2002, Judge Porteous was granted permission to refinance his home by Chapter 13 Trustee S.J. Beaulieu, Jr. (Ex. 339).

244. In December 2002 or January 2003, Judge Porteous asked his bankruptcy attorney, Claude Lightfoot, to seek permission from the bankruptcy trustee for Judge Porteous and his wife Carmella to enter into new car lease agreements.

245. On January 3, 2003, Judge Porteous was granted permission to enter into two new car lease agreements by Chapter 13 Trustee S.J. Beaulieu, Jr. (Ex. 340).

246. On July 19, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 311).

247. On July 19, 2001, Judge Porteous took out a $500 marker at the Treasure Chest Casino in Kenner, Louisiana, identified by marker number 00063615. Judge Porteous repaid that marker the same day in chips. (Ex. 311).

248. On July 23, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 312).

249. On July 23, 2001, Judge Porteous took out a $500 marker at the Treasure Chest Casino in Kenner, Louisiana, identified by marker number 00063744. Judge Porteous repaid that marker the same day in chips. (Ex. 312).

250. On August 20–21, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 313(a)).

251. On August 20, 2001, Judge Porteous took out three $1,000 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00064677, 00064680, and 00064685. Judge Porteous repaid all three markers the same day with chips. (Ex. 313(a)).

252. On August 21, 2001, Judge Porteous took out five $1,000 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00064729, 00064730, 00064739, 00064744, and 00064746. Judge Porteous repaid marker numbers 00064729 and 00064744 the same day with chips. (Ex. 313(a)).

253. When Judge Porteous left the Treasure Chest Casino in Kenner, Louisiana on August 21, 2001, he owed $3,000 to the casino. (Ex. 309).

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254. On September 9, 2001, Judge Porteous repaid marker number 00064739, in the amount of $1,000, to the Treasure Chest Casino in Kenner, Louisiana with cash, leaving a balance of $2,000 owed to the casino. (Ex. 313(a)).

255. On September 15, 2001, Judge Porteous paid $2,000 in cash to the Treasure Chest Casino in Kenner, Louisiana, repaying marker numbers 00064730 and 00064746. (Ex. 313(a)).

256. On October 13, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 315).

257. On October 13, 2001, Judge Porteous took out two $500 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00066463 and 00066465. Judge Porteous repaid both markers the same day with chips. (Ex. 315).

258. On October 17–18, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 316).

259. On October 17, 2001, Judge Porteous took out three $1,000 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00066625, 00066627, and 00066644, and he also took out five $500 markers, identified by marker numbers 00066630, 00066632, 00066633, 00066640, and 00066645. Judge Porteous repaid marker numbers 00066630, 00066632, and 00066633 the same day with chips. (Ex. 316).

260. On October 18, 2001, Judge Porteous took out a $400 marker at the Treasure Chest Casino in Kenner, Louisiana, identified by marker number M2B459. (Ex. 316).

261. When Judge Porteous left the Treasure Chest Casino in Kenner, Louisiana on October 18, 2001, he owed $4,400 to the casino. (Ex. 309)

262. On October 25, 2001, Judge Porteous withdrew $1,760 from his Individual Retirement Account, which was paid to him in the form of a check issued by National Financial Services LLC. (Ex. 381).

263. On October 30, 2001, Judge Porteous deposited the $1,760 check from his Individual Retirement Account, issued by National Financial Services LLC, into his Fidelity money market account. (Ex. 381).

264. On November 9, 2001, Judge Porteous wrote a check for $1,800 from his Fidelity money market account, identified by check number 589, to the Treasure Chest Casino, repaying marker number 00066625 in its entirety and repaying $800 of marker number 00066627. Judge Porteous repaid the remaining $200 of marker number 00066627 with cash that same day. (Exs. 316, 381).

265. On November 9, 2001, Judge Porteous paid $2,400 in cash to the Treasure Chest Casino in Kenner, Louisiana, repaying marker numbers 00066640, 00066644, 00066645, and M2B459. (Ex. 316).

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266. On November 27, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 318).

267. On November 27, 2001, Judge Porteous took out two $1,000 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00067888 and 00067893. Judge Porteous repaid both markers the same day with chips. (Ex. 318).

268. On December 11, 2001, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 319).

269. On December 11, 2001, Judge Porteous took out two $1,000 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00068410 and 00068415. Judge Porteous repaid both markers the same day with chips. (Ex. 319).

270. On April 1, 2002, Judge Porteous gambled at the Treasure Chest Casino in Kenner, Louisiana. (Ex. 322).

271. On April 1, 2002, Judge Porteous took out two $1,000 markers at the Treasure Chest Casino in Kenner, Louisiana, identified by marker numbers 00072228 and 00072229, and he also took out one $500 marker identified by marker number 00072234. Judge Porteous repaid all three markers the same day with chips. (Ex. 322).

272. On September 28, 2001, Judge Porteous gambled at Harrah's Casino in New Orleans, Louisiana. (Ex. 314).

273. On September 28, 2001, Judge Porteous took out two $1,000 markers at Harrah's Casino in New Orleans, Louisiana, identified by marker numbers 0099123 and 0099130. (Ex. 314).

274. On September 28, 2001 Judge Porteous wrote a check to Harrah's Casino to repay marker numbers 0099123 and 0099130. Judge Porteous's check cleared Harrah's Casino on October 28, 2001. (Ex. 314).

275. On December 20, 2001, Judge Porteous gambled at Harrah's Casino in New Orleans, Louisiana. (Ex. 320).

276. On December 20, 2001, Judge Porteous took out a $1,000 marker at Harrah's Casino in New Orleans, Louisiana, identified by marker number 0106851. (Ex. 320).

277. On December 20, 2001 Judge Porteous wrote a check to Harrah's Casino to repay marker number 0106851. Judge Porteous's check cleared Harrah's Casino on November 9, 2002. (Ex. 320).

278. On October 31–November 1, 2001, Judge Porteous gambled at the Beau Rivage Casino in Biloxi, Mississippi.

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279. On October 31, 2001, Judge Porteous took out five $500 markers at the Beau Rivage Casino in Biloxi, Mississippi, identified by marker numbers 164622, 164628, 164637, 164649, and 164652. (Ex. 317).

280. On November 1, 2001, Judge Porteous took out a $500 marker at the Beau Rivage Casino in Biloxi, Mississippi, identified by marker number 164659. Judge Porteous repaid $2,500 with chips at the cage that day and repaid another $500 with chips at the pit. (Ex. 317).

281. On February 12, 2002, Judge Porteous gambled at the Grand Casino Gulfport in Gulfport, Mississippi. (Ex. 321).

282. On February 12, 2002, Judge Porteous took out a $1,000 marker at the Grand Casino Gulfport in Gulfport, Mississippi, identified by marker number MK169742. Judge Porteous repaid that marker the same day. (Ex. 321).

283. On May 26, 2002, Judge Porteous gambled at the Grand Casino Gulfport in Gulfport, Mississippi. (Ex. 323).

284. On May 26, 2002, Judge Porteous took out a $1,000 marker at the Grand Casino Gulfport in Gulfport, Mississippi, identified by marker number MK179892. Judge Porteous repaid that marker the same day. (Ex. 323).

285. On July 4–5, 2002, Judge Porteous gambled at the Grand Casino Gulfport in Gulfport, Mississippi. (Ex. 325).

286. On July 4, 2002, Judge Porteous took out two $1,000 markers at the Grand Casino Gulfport in Gulfport, Mississippi, identified by marker numbers MK183825 and MK183833. (Ex. 325).

287. On July 5, 2002, Judge Porteous took out a $500 marker at the Grand Casino Gulfport in Gulfport, Mississippi, identified by marker number MK183917. Judge Porteous repaid $1,200 to the casino that day. (Ex. 325).

288. When Judge Porteous left the Grand Casino Gulfport in Gulfport, Mississippi on July 5, 2002, he owed $1,300 to the casino. (Ex. 325).

289. On August 2, 2002, Judge Porteous wrote a $1,300 check to the Grand Casino Gulfport in Gulfport, Mississippi, which cleared his Fidelity money market account on August 6, 2002. After that check cleared, Judge Porteous's balance due and owing to the Grand Casino Gulfport was $0. (Ex. 325).

290. On August 13, 2001, Judge Porteous applied for a Capital One credit card. (Ex. 341(a)).

291. Judge Porteous never sought permission from Bankruptcy Trustee S.J. Beaulieu, Jr. to obtain or use a new Capital One credit card.

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292. Judge Porteous was approved for a Capital One credit card with a $200 limit in August 2001. (Ex. 341(b)).

293. Judge Porteous started using his Capital One credit card on September 17, 2001, when he charged $39.03 at Lucys Restaurant in New Orleans, Louisiana. (Ex. 341(b)).

294. Judge Porteous exceeded his $200 credit limit on his Capital One credit card for the statement period of September 14, 2001 to October 13, 2001, and, as a result, he was charged a $29 "overlimit fee" on October 16, 2001. (Ex. 341(b)).

295. Judge Porteous Capital One credit card statements for the periods ending on December 13, 2001, January 13, 2002, September 13, 2002, December 13, 2002, January 13, 2003, February 13, 2003, and March 13, 2003 all showed that Judge Porteous had not paid his credit card balance in full. (Ex. 341(b)).

296. Judge Porteous's Capital One credit card statement for the time period of May 14, 2002 to June 13, 2002 showed that Judge Porteous's credit limit was increased to $400. (Ex. 341(b)).

297. Judge Porteous's Capital One credit card statement for the time period of November 14, 2002 to December 13, 2002 showed that Judge Porteous's credit limit was increased to $600. (Ex. 341(b)).

298. On July 4, 2002, Judge Porteous requested and was granted a credit limit increase from $2,000 to $2,500 at the Grand Casino Gulfport in Gulfport, Mississippi by filling out a "Credit Line Change Request" form. (Ex. 324).

299. Judge Porteous took out $2,500 in markers at the Grand Casino Gulfport in Gulfport, Mississippi on July 4–5, 2002. (Ex. 325).

300. Judge Porteous never sought permission from Bankruptcy Trustee S.J. Beaulieu, Jr. to apply for an increased credit limit at the Grand Casino Gulfport in Gulfport, Mississippi.

XI. Article IV—Judge Porteous's Confirmation

301. In 1994, Judge Porteous, in connection with his nomination to be a Federal judge, was subject to an FBI background investigation, was required to fill out various forms and questionnaires, and was interviewed by the FBI.

302. In connection with his nomination to be a Federal judge, Judge Porteous filled out and signed a document entitled "Supplement to Standard Form 86." (Ex. 69 (b) at PORT00298).

303. The Supplement to Standard Form 86 filled out by Judge Porteous contains the following question and answer:

> Question 10S: Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there

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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."

304. The Supplement to Standard Form 86 was signed by Judge Porteous 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.

305. On or about July 6, 1994 in connection with his FBI background investigation, Judge Porteous was interviewed by the FBI and, according to their interview memorandum, he stated in substance that "he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgment or discretion." (Ex. 69 (b) at PORT 000000294).

306. On August 18, 1994, in connection with his FBI background investigation, Judge Porteous was interviewed a second time by the FBI and, according to their interview memorandum, he stated in substance that "he was unaware of anything in his background that might be the basis of attempted influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgment or discretion." (Ex. 69 (b) at PORT 000000493–94).

307. During the Senate confirmation process, Judge Porteous was required to complete a United States Senate Committee on the Judiciary Questionnaire for Judicial Nominees. As part of the Questionnaire, Judge Porteous was asked the following question and provided the following answer:

> Question 11: 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. (Ex. 69 (a) at PORT000049).

308. The United States Senate Committee on the Judiciary required that an affidavit be submitted by Judge Porteous along with the completed Questionnaire for Judicial Nominees. The affidavit signed by Judge Porteous and a notary reads as follows:

> Affidavit

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April 19, 2010

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. (Ex. 69 (a) at PORT 000050).

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Attachment Three

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April 21, 2010

By Electronic and Regular Mail

Alan I. Baron, Esquire
Mark Dubester, Esquire
Harold Damelin, Esquire
Special Impeachment Counsel
Congress of the United States
Washington, D.C. 200515

Re: Impeachment of Judge G. Thomas Porteous – Stipulations

Dear Messrs. Baron, Dubester and Damelin:

I am writing in response to Mr. Baron's letters of April 9 & 19, 2010. These letters ask us to stipulate, on behalf of Judge Porteous, to the authenticity of certain documents and to certain factual assertions. As noted in our April 9, 2010 letter to the Chair and Vice Chair of the Senate Impeachment Trial Committee, we are willing to entertain stipulations. To that end, we have begun to review the materials you have provided and offer the following observations.

As to the documentary stipulations, we anticipate that we will be able to agree that the majority of the documents are authentic while reserving all other objections. However, due to the large volume of items included on the exhibit list and the accompanying compact disc we received on March 23, 2010 (a total of 9,702 pages), we are still in the process of reviewing these documents. In addition, there are a number of exhibits on the disc that have either been redacted or that are composite exhibits that appear to be incomplete. Because we cannot stipulate to these exhibits in their current form, we will identify these exhibits and will contact you to discuss them. As our review progresses we will also contact you to discuss agreeing on a method of identifying those documents that fall within a listed composite exhibit so it is clear that both parties understand what is being stipulated to within each composite exhibit.

Finally, the 308 proposed factual stipulations you provided on April 19 will also take some time to review and evaluate. My initial look at these proposals leads me to believe that a number of stipulations will be possible. I should note, however, we are unlikely to agree to a

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stipulation that does little more than recite a portion of an exhibit, given that the relevancy and admissibility of the underlying document is still unresolved.

We will continue to work through both the documents and the factual stipulations as expeditiously as possible and will likely address both of these issues on a rolling basis in an effort to keep this process moving. Similarly, we will begin to evaluate possible stipulations that we might seek on behalf of Judge Porteous and, to the extent we identify any, we will forward them to you for your consideration.

Please let me know if you have any questions. With best regards, I remain,

Sincerely,

Richard W. Westling

RWW/nr

168377

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Attachment Four

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United States Senate

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS
HART SENATE OFFICE BUILDING, ROOM SH-8020
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
DISPOSITION OF PROPOSED STIPULATIONS OF FACT
SUBMITTED BY THE HOUSE MANAGERS
SIXTH ORDER

As recited in its Fourth Order, dated May 24, 1989, the committee has undertaken a review of the Revised Stipulation of Facts proposed by the House on March 31, 1989, in an effort to narrow the issues in the pending impeachment proceedings to those matters which are truly in dispute.

In the course of this review, careful consideration has been given to the proposed stipulations, to Judge Hastings' objections both to the stipulation process as a whole and to particular proposed stipulations, as set forth in his written submissions of April 2, May 18, and June 1, 1989, and to the argument of counsel on April 12 and May 18, 1989. In addition, each of the proposed stipulations has been independently reviewed in light of the testimony and other documents available to the committee from prior proceedings.

Based on the above, those proposed stipulations which may properly be accepted and treated as evidence of fact, without need for the submission of formal or additional proof, have been identified for purposes of the committee's evidentiary proceedings. Those proposed stipulations are enumerated in Section I, below. Where an objection or the

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committee's own review has shown that a proposed stipulation is in some measure factually inaccurate, insufficiently supported by the prior record, or is otherwise objectionable, the proposed fact has either not been accepted (Section II, below) or has been revised to correct inaccuracies or to take account of an objection (Section III, below, and Appendix "A" to this order). Revised stipulations may be treated by the parties as evidence of fact for purposes of the evidentiary hearing, after the parties have had the opportunity, as described below, to review and respond to them.

A number of factors have been used in determining whether each particular proposed stipulation should be accepted and treated as evidence of fact for purposes of the evidentiary proceedings. For example, proposed stipulations generally were accepted where Judge Hastings expressly stated his acceptance or nonobjection (see, e.g., Nos. 156, 182, 198 254-56); where no specific objection was made which called into question the truth or accuracy of the proposed stipulation, and documentary materials and prior testimony, often admitted at prior proceedings without Judge Hastings' objection and often subject to his stipulation, squarely supported the proposed stipulation, (see, e.g, 39, 40, 43-45, 71-72, 77, 90, 186); where undisputed facts were accurately drawn from court docket entries or other court records (see,

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e.g., Nos. 6-8, 11, 13, 15, 215-16, 219, 225, 227, 228, 302, 312); or where Judge Hastings' own testimony at his criminal trial confirmed the contents of the stipulation (see, e.g., Nos. 4, 5, 89, 184, 188, 195, 288).

Proposed stipulations generally were refused where, for example, one or more of the following circumstances was present: where the proposed stipulation was solely or principally dependent on the testimony of witnesses, such as FBI agents, and/or internal FBI documents, whose credibility and accuracy Judge Hastings has questioned (see, e.g., Nos. 29, 30, 32, 144, 147-49); where they were central to a disputed issue, upon which conflicting testimony clearly will be presented at the proceedings (see, e.g., Nos. 171, 173); where it was concluded that the evidence could be simply and better introduced through a witness' full testimony on a matter or through an unexcerpted transcript of a recorded conversation rather than by excerpts or characterizations of testimony or conversations (see, e.g., Nos. 50, 52, 53, 104, 106, 108, 116, 122, 229-36, 239-40, 243, 244, 248-253, 259-262, 264, 265)[4]; where the proposed stipulations contained characterizations or inferences, rather than simply factual

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[4] The committee notes that where the contents or meaning of a recorded conversation are susceptible of varying interpretations, the actual tape recording, in addition to a transcript, should be offered.

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recitations of events, (see, e.g., Nos. 100, 110); where it was not possible to find sufficient support in the evidence known or cited in House filings (see, e.g., Nos. 65, 174, 247, 273), where there was a serious question about the admissibility of the evidence which should be considered at the proceedings (see, e.g., No. 375) and where Judge Hastings interposed specific and substantial objections. Where it was possible to revise a proposed stipulation to correct factual inaccuracies, correlate it more closely to the documentary materials and evidence from which it was drawn or to accomodate a valid objection or concern of the committee, a proposed revision has been made (see Appendix "A").

In issuing this order, the committee has made no determinations as to the relevance of any particular matter. A finding that a particular proposed stipulation will be treated as evidence of fact for purposes of these proceedings is not a determination that that fact is relevant; conversely, a finding that a proposed stipulation should not be accepted does not constitute any ruling that the matters which it concerns are irrelevant. Nor is any party precluded from introducing evidence on or contravening any matter that is the subject of an accepted stipulation. In sum, where a proposed stipulation is accepted, the need for the submission of formal proof to establish the contents

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of that stipulation as fact has been eliminated. Where a proposed stipulation has not been accepted, the proponent of that evidence must resort to other means of proof.

The parties should advise the committee, on or before June 28, 1989, if they believe that the stipulations as revised contain factual errors or if they otherwise object to their acceptance at the evidentiary proceedings. Judge Hastings' general objections to this process of identifying facts that are not in dispute are fully stated in the record of these proceedings, and need not be reiterated in order to be preserved.

SECTION I

Proposed Stipulations Accepted as Evidence of Fact Pursuant to this Order

A. Airline Records

39, 40, 43, 44, 45, 71, 72, 77, 90, 99, 181, 192, 193, 194, 267

B. Telephone Records

36, 38, 186, 187, 189, 191, 285

C. Telephone Messages

None

D. Hotel Record

46, 73, 74, 91, 132

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E. Court Decisions

None

F. Record of United States v. Romano

6, 7, 8, 11, 13, 15, 16, 20, 24, 25, 26, 27

G. Record of United States v. Borders

215, 216

H. Record of United States v. Hastings

206, 213, 219, 225, 227, 228

I. Judge Hastings' Trial Testimony

4, 5, 89, 109, 127, 128, 129, 167, 168, 183, 184, 188, 195, 288

J. Geographical Information

182, 254, 255, 256

K. Nagra Body Recordings

373

L. Other Tape Recordings

101, 103, 107, 115, 117, 121, 123, 125, 361

M. FBI Reports

31, 60, 130, 131, 142, 150, 196, 318

N. 1985 Wiretap Application and Progress Reports

302, 312, 315

O. Miscellaneous Proof

2, 3, 33, 62, 63, 64, 66, 78, 79, 80, 86, 151, 156, 198, 218, 289, 290, 291, 301, 346, 348, 352, 353, 372, 376, 377

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SECTION II

Proposed Stipulations Which Have Not Been Accepted

A. Airline Records

67, 68, 69, 70

B. Telephone Records

171, 173, 174, 247, 273, 283

C. Telephone Messages

102, 275, 282

D. Hotel Records

None

E. Court Decisions

None

F. Record of United States v. Romano

100, 110

G. Record of United States v. Borders

None

H. Record of United States v. Hastings

221, 222

I. Judge Hastings' Trial Testimony

169, 170, 180, 229-236, 239, 240, 243, 244, 248-253, 259-262, 264, 265, 287

J. Geographical Information

185

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K. Nagra Body Recordings

47-57, 92-98, 141

L. Other Tape Recordings

104, 105, 106, 108, 116, 122, 124, 139

M. FBI Reports

29, 30, 32, 134, 143, 144, 147, 148, 149, 152, 153

N. 1985 Wiretap Application and Progress Reports

None

O. Miscellaneous Proof

59, 65, 81, 82, 113, 135, 138, 140, 179, 223, 224, 263, 295, 375

SECTION III

Proposed Stipulations Which Have Been Revised And Are Submitted to the Parties For their Review and Response

A. Airline Records

61

B. Telephone Records

41, 190, 201, 269, 280, 284

C. Telephone Messages

34, 35, 37, 42, 136, 272, 277, 278, 279, 286

D. Hotel Records

175

E. Court Decisions

21, 111

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F. Record of United States v. Romano

12, 270, 14, 271, 17, 18, 19, 118

G. Record of United States v. Borders

202, 203, 214, 217

H. Record of United States v. Hastings

204, 205, 207, 208, 209, 211, 212, 220, 226

I. Judge Hastings' Trial Testimony

163, 164, 165, 166, 266, 281

J. Geographical Information

None

K. Nagra Body Recordings

None

L. Other Tape Recordings

126, 360, 366

M. FBI Reports

133, 145, 146

N. 1985 Wiretap Application and Progress Reports

303, 304, 306, 308, 310, 311, 317, 319, 321, 322, 328, 334

O. Miscellaneous Proof

58, 76, 210, 292, 293, 294, 347, 351, 354, 374, 378

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The full text of the revised stipulations is attached to this order as Appendix "A."

Jeff Bingaman, Chairman

Arlen Specter, Vice Chairman

Dated: June 23, 1989

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In The Senate of the United States

Sitting as a Court of Impeachment

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

SUPPLEMENTAL FILING BY THE HOUSE OF REPRESENTATIVES IN SUPPORT OF ITS PRELIMINARY REQUESTS FOR SUBPOENAS AND IMMUNITY

Pursuant to the Senate Impeachment Trial Committee's Scheduling Order of June 21, 2010[1] and the request made by the Committee's staff at the meeting of counsel on June 10, 2010, the House of Representatives ("House"), through its Managers and counsel, respectfully submits to the Committee: 1) a preliminary list of those individuals for whom the House seeks a subpoena;[2] 2) a proffer as to their expected testimony, and 3) a designation of those individuals for whom formal immunity is sought.[3]

[1]The House recognizes that the updated scheduling order does not require the subpoena/immunity requests be filed until August 2, 2010. However, the House seeks to have its witnesses under subpoena as soon as possible so that they and their counsel may plan their schedules for the trip to Washington D.C. As the House has indicated, it is possible that some of these witnesses may be excused or only called in rebuttal if necessary.

[2]The House reserves the right to seek additional subpoenas if such a request becomes necessary during the trial preparation process.

[3]All witnesses for whom immunity is being requested have sought and been granted immunity at each of the proceedings at which they have testified, including proceedings before the Grand Jury, the Fifth Circuit, the House of Representatives or at depositions conducted by the House Impeachment Task Force staff.

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1. Hon. G. Thomas Porteous, Jr., (Immunity Order Only)

The House expects Judge Porteous to testify consistently with his Fifth Circuit Hearing testimony, in which he admitted receiving cash from Mr. Amato during the pendency of the Liljeberg case, and admitted to engaging in financial conduct which was not truthfully disclosed in his bankruptcy filings or that was in violation of the Order of the Bankruptcy Judge. In addition, the House expects Judge Porteous to admit certain facts surrounding his relationship with Louis and Lori Marcotte. Judge Porteous was provided an immunity order in connection with his being compelled to testify before the Fifth Circuit Special Committee.

2. Jacob Amato, Jr. (Subpoena and Immunity Order)

The House expects Mr. Amato will testify to things of value that he and his former partner, Robert Creely, provided to Judge Porteous over the years. In particular, Mr. Amato will testify that in October 1996, Judge Porteous refused to recuse himself in the Liljeberg case, where Mr. Amato represented one of the parties, notwithstanding the fact that Mr. Amato and his partner, Mr. Creely, had previously given Judge Porteous, over the course of time, approximately $20,000. Mr. Amato will also testify that in June 1999, while the Liljeberg case was pending, Judge Porteous requested that Mr. Amato give him approximately $2,000, and Mr. Amato did so.

3. Robert Creely (Subpoena and Immunity Order)

The House expects Mr. Creely will testify to things of value that he and his former law partner, Jacob Amato, provided to Judge Porteous over the years. Mr. Creely will testify to what was, in substance, a scheme whereby Judge Porteous, when he was a state judge, assigned Mr. Creely "curatorships" for which Mr. Creely received a fee, and

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Mr. Creely in turn provided Judge Porteous cash. He will also testify that in May 1999, while his partner (Mr. Amato) represented a party in the Liljeberg case then pending before Judge Porteous, Mr. Creely paid for Judge Porteous's hotel room and some expenses for Judge Porteous's son's bachelor party dinner in Las Vegas.

4. Leonard Levenson, Esq. (Subpoena and Immunity Order)

The House expects Mr. Levenson to testify that both prior to and during his involvement in the Liljeberg case, which was assigned to Judge Porteous, he treated Judge Porteous to numerous meals and traveled with Judge Porteous to several locations. He will also testify that Judge Porteous failed to disclose their relationship or Judge Porteous's relationship with Mr. Amato (about which Mr. Levenson was unaware) at the October 1996 recusal hearing in the Liljeberg case.

5. Donald Gardner, Esq. (Subpoena Only)

The House expects Mr. Gardner to testify that over the course of his legal career, he has provided Judge Porteous cash and meals, and that while Judge Porteous was a state judge he assigned Mr. Gardner curatorships. He will also testify how it came to be that he was retained to represent Lifemark, a party in the Liljeberg case, after Mr. Levenson and Mr. Amato were retained to represent the opposing party (the Liljebergs).

6. Rhonda Danos (Subpoena and Immunity Order)

The House expects Ms. Danos, Judge Porteous's former secretary, to testify that Louis Marcotte and Lori Marcotte paid for meals, car repairs and at least one trip to Las Vegas for Judge Porteous; that the Marcottes paid for several trips for her to Las Vegas as well; and that Judge Porteous took official actions for the benefit of the Marcottes. She will also testify that Judge Porteous prepared the contents of his financial statements,

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which she thereafter typed as he directed. She will identify some of the financial transactions that she handled at Judge Porteous's request around the time he was filing for personal bankruptcy. Lastly, she will testify to Judge Porteous's close relationship with the attorneys in the Liljeberg case, and will confirm that they provided Judge Porteous things of value over time.

7. Joseph Mole, Esq. (Subpoena Only)

The House expects Mr. Mole to testify that when he learned that the opposing party in the Liljeberg case had retained Mr. Amato and Mr. Levenson, he filed a motion to recuse Judge Porteous. At that time, he was unaware that Judge Porteous had ever received money from Mr. Amato and his partner, Mr. Creely. He will describe Judge Porteous's denial of that recusal motion. He will testify that he was unaware that when the Liljeberg case was pending, Judge Porteous continued to accept things of value from Mr. Amato and Mr. Levenson. He will also testify that he retained Mr. Gardner to assist him in representing Lifemark to "level the playing field" because the Liljebergs had retained Mr. Amato and Mr. Levenson.

8. Louis Marcotte (Subpoena Only)

The House expects Mr. Marcotte to testify that over a period of time, while running a bail bonds business in Jefferson Parish, Louisiana, he gave Judge Porteous numerous things of value, including paying for expensive lunches, car repairs, house repairs, and a trip for Judge Porteous to Las Vegas. He will testify that in return, Judge Porteous signed numerous bond orders sought by Mr. Marcotte, set aside or expunged convictions of two Marcotte employees (Aubrey Wallace and Jeff Duhon), and helped

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vouch for Mr. Marcotte to assist him in forming relations with other state judges. Mr. Marcotte has pleaded guilty to corruption offenses and was incarcerated.

9. Lori Marcotte (Subpoena Only)

The House expects Ms. Marcotte to testify that over a period of time, while helping her brother Louis Marcotte run a bail bonds business in Jefferson Parish, Louisiana, she and her brother gave Judge Porteous numerous things of value, including paying for expensive lunches, car repairs, house repairs, and paying for a trip for Judge Porteous to Las Vegas. She will testify that in return, Judge Porteous signed numerous bond orders sought by her and her brother Louis Marcotte, set aside or expunged convictions of two Marcotte employees (Aubrey Wallace and Jeff Duhon), and helped vouch for Louis Marcotte to assist him in forming relations with other state judges. Ms. Marcotte pleaded guilty to corruption offenses and was placed on home detention and probation.

10. Ronald Bodenheimer (Subpoena Only)

The House expects Mr. Bodenheimer, a former state judge, to testify that while Judge Porteous was a Federal judge, he vouched for Louis and Lori Marcotte and that as a result, Judge Bodenheimer formed a corrupt relationship with the Marcottes that consisted of the Marcottes providing Judge Bodenheimer things of value, and Judge Bodenheimer taking official acts in connection with setting bonds that benefitted the Marcottes. He will also testify that as a result of that relationship, he was prosecuted and pleaded guilty to mail fraud.

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11. Jeffrey Duhon (Subpoena Only)

The House expects Mr. Duhon to testify that while working for Louis Marcotte, he (Duhon) took care of Judge Porteous's cars and did repairs at Judge Porteous's house. He will confirm that Judge Porteous took numerous official actions for the Marcottes, including expunging a criminal conviction of Duhon's as a favor to the Marcottes.

12. Aubrey Wallace (Subpoena Only)

The House expects Mr. Wallace to testify that while working for Louis Marcotte, he (Wallace) took care of Judge Porteous's cars and did home repairs at Judge Porteous's house. He will confirm that Judge Porteous took numerous official actions for the Marcottes, including setting aside a criminal conviction of Wallace's as a favor to the Marcottes.

13. Michael J. Reynolds (Subpoena Only)

The House expects Mr. Reynolds to testify that when he was an assistant district attorney in Jefferson Parish, Louisiana, he appeared before Judge Porteous on behalf of the State when Judge Porteous set aside the conviction of Marcotte employee Aubrey Wallace, and that in his experience as a prosecutor, this act was highly unusual.

14. Bruce Netterville, Esq. (Subpoena and Immunity Order)

The House expects Mr. Netterville will testify that Louis and Lori Marcotte had a close relationship with Judge Porteous, that he (Netterville) was present on a trip to Las Vegas with the Marcottes and Judge Porteous (as to which other testimony would establish that the Marcottes paid for the trip), that he was present when Judge Porteous set aside Aubrey Wallace's felony conviction – an act that Netterville knew from experience as a criminal defense attorney in Jefferson Parish was highly unusual.

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15. Claude C. Lightfoot, Esq. (Subpoena Only)

The House expects Mr. Lightfoot, who was Judge Porteous's counsel in connection with his personal bankruptcy, to testify that he was unaware of numerous of Judge Porteous's financial transactions prior to and during bankruptcy, including Judge Porteous's failure to report certain preferred creditors and his failure to report his receipt of a tax refund, as well Judge Porteous's incurring gambling debts during the pendency of bankruptcy, in violation of the bankruptcy court order.

16. William Greendyke, Esq. (Subpoena Only)

The House expects Mr. Greendyke, a former Federal bankruptcy judge, to testify that when he was assigned Judge Porteous's bankruptcy case, he was unaware of numerous of Judge Porteous's financial transactions prior to and during bankruptcy, including Judge Porteous's failure to report certain preferred creditors and his failure to report his receipt of a tax refund, as well Judge Porteous's incurring gambling debt during the pendency of bankruptcy.

17. Former FBI Special Agent Bobby Hamil (Subpoena Only)

The House expects Mr. Hamil to describe the FBI background check process and identify statements Judge Porteous made to him in two separate interviews in which Judge Porteous denied having anything in his background that could subject him to coercion, leverage or blackmail.

18. Former FBI Special Agent Cheyanne Tackett (Subpoena Only)

The House expects Ms. Tackett to describe the FBI background check process and identify statements Judge Porteous made to her in an interview in which Judge

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Porteous denied having anything in his background that could subject him to coercion, leverage or blackmail.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

June 30, 2010

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S REQUESTS FOR SUBPOENAS AND IMMUNITY

NOW BEFORE THE SENATE, comes Respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and files his requests for subpoenas and immunity for witnesses to be called during the evidentiary hearing in this matter.[1] Like the House Managers, Judge Porteous reserves the right to seek additional subpoenas if such becomes necessary during the trial preparation process. (*See* Supplemental Filing by the House of Representatives in Support of its Preliminary Requests for Subpoenas and Immunity (dated June 30, 2010) at n. 2, requesting the same.)

Judge Porteous requests that the United States Senate subpoena the following individuals to testify at the evidentiary hearing in this matter:

1. **John M. Mamoulides** – Judge Porteous expects former Jefferson Parish District Attorney Mamoulides to testify about Judge Porteous's appointment to the state bench, his experience and relationship with Judge Porteous as a state court judge, the practice of setting bonds in Jefferson Parish, the manner in which Assistant District Attorneys interacted with state court judges in Jefferson Parish, including Judge Porteous, and the overall relationships between

[1] There are a number of witnesses, including certain experts, that Judge Porteous intends to call to testify at the evidentiary hearing who do not require either a subpoena or immunity. Per the Committee's June 21, 2010 Order, Judge Porteous will submit a list of all witnesses that he intends to call to testify at the evidentiary hearing on August 5, 2010.

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state court judges and other participants in the Jefferson Parish legal system during the relevant time period.

2. **Judge M. Joseph Tiemann** – Judge Porteous expects Judge Tiemann to testify about his experience and relationship with Judge Porteous, as well as the practices of Jefferson Parish judges, during the relevant time period, in setting bonds and in interacting with others participants in the legal system.

3. **S. J. Beaulieu, Jr.** – Judge Porteous expects Mr. Beaulieu, the Trustee in his bankruptcy proceeding, to testify about the facts and circumstances regarding the Porteouses' bankruptcy. This includes, but is not limited to, an overview of the history of that bankruptcy proceeding, the applicable legal standards, Mr. Beaulieu's communications with Judge Porteous, his instructions to Judge Porteous, his evaluation of the seriousness of the mistakes made by Judge Porteous during the bankruptcy proceedings, his experience with other bankruptcies, and his communications with Judge Porteous's bankruptcy counsel and others with regard to the Porteouses' bankruptcy proceeding.

4. **Henry Hildebrand** – Judge Porteous expects Mr. Hildebrand to testify as an expert with regard to the allegations in Article III and Chapter 13 bankruptcy petitions generally, including applicable legal principles, standards, and practices relating to personal bankruptcies during the relevant time period. Mr. Hildebrand's expert testimony will specifically focus on his experience as a current Chapter 13 Trustee.

5. **Judge Ronald Barliant** – Judge Porteous expects former United States Bankruptcy Judge for the Northern District of Illinois Ronald Barliant to testify as an expert on issues related to Article III, including the applicable legal principles, standards, and practices

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relating to personal bankruptcies during the relevant time period. Judge Barliant's expert testimony will specifically focus on his experience as a former federal bankruptcy judge.

6. **Dianne Lamulle** – Judge Porteous expects Ms. Lamulle to testify about her handling of curatorships assigned to Robert Creely and her interactions with Judge Porteous and his office.

7. **Michael Porteous** – Judge Porteous expects Michael Porteous to testify about his Court delivery service and his interactions with Louis and Lori Marcotte.

8. **Professor Dane S. Ciolino** – Judge Porteous expects Professor Ciolino to testify as an expert on issues related to the traditions and practices of bond-setting in Jefferson Parish and in the State of Louisiana during the relevant time period. Professor Ciolino is also expected to testify about applicable judicial and ethical standards.

9. **Professor G. Calvin Mackenzie** – Judge Porteous expects Professor Mackenzie to testify as an expert regarding the use of SF-86's, FBI background checks, the federal appointments process, and Senate confirmations.

10. **Robert Rees** – Judge Porteous expects Mr. Rees to testify about the facts and circumstances surrounding the setting aside of Aubrey Wallace's conviction and the expungement of his record, as well as the general practices in Jefferson Parish regarding the setting aside of convictions and expungements.

11. **Melinda Kring (Pourciau)** – Judge Porteous expects Ms. Kring to testify about her work at Bail Bonds Unlimited, her observations of the Marcottes, their interactions with Judge Porteous, and their interactions with other judges and state and federal officials.

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12. **Suzette Lacour Powers** – Judge Porteous expects Ms. Powers to testify about her experience and observations as a law clerk to Judge Porteous during his time on the state and federal bench.

13. **Susan Hoffman, LCSW** – Judge Porteous expects Ms. Hoffman to testify with regard to Judge Porteous's psychiatric and mental health conditions, including depressive and anxiety disorders, as well as his course of treatment for those conditions.

14. **James Barbee, M.D.** – Judge Porteous expects Dr. Barbee to testify with regard to Judge Porteous's psychiatric and mental health conditions, including depressive and anxiety disorders, as well as his course of treatment for those conditions.

15. **Adam Barnett** – Judge Porteous expects Mr. Barnett to testify about his experiences and observations working with the Marcottes and his interactions with Judge Porteous with regard to the setting and splitting of bonds.

16. **Daniel A. Petalas, Esq.** – Judge Porteous expects Mr. Petalas, an attorney with the Public Integrity Section of the Department of Justice, to testify about the government's investigations of Judge Porteous, the decision not to prosecute Judge Porteous, and communications Mr. Petalas had with members of the Fifth Circuit Court of Appeals.

17. **Peter S. Ainsworth, Esq.** – Judge Porteous expects Mr. Ainsworth, an attorney with the Public Integrity Section of the Department of Justice, to testify about the government's investigations of Judge Porteous and the decision not to prosecute Judge Porteous.

The defense does not request that any of the witnesses listed above be granted immunity in connection with their testimony. Judge Porteous will provide contact information for the witnesses listed above under separate cover.

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In its Preliminary Witness Designation and Requests for Subpoenas and Immunity (dated June 8, 2010), the House of Representatives included certain witness that, if not called by the House, will likely be called by the defense. Although duplicative requests for subpoenas and/or immunity is unnecessary, Judge Porteous has included the names of those witnesses (without duplicative summaries of expected testimony) below.[2]

18. **Jacob Amato, Jr.**
19. **Robert Creely**
20. **Louis Marcotte**
21. **Lori Marcotte**
22. **Joseph Mole**
23. **Donald Gardner**
24. **Michael Reynolds**
25. **Bruce Netterville**
26. **Ronald Bodenheimer**
27. **Leonard Levenson**
28. **Claude Lightfoot**
29. **Rhonda Danos**

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[2] The House also listed Judge Porteous on its list of witnesses requiring both a subpoena and immunity and today filed a pleading regarding the propriety and precedent of compelling the accused to testify in an impeachment proceeding. As previously stated, Judge Porteous opposes any attempt by the House to compel his testimony, in violation of his Fifth Amendment rights. Whether Judge Porteous will testify in his own defense, as opposed to being compelled, is an open question that will depend on a number of factors, including the time allotted for the evidentiary hearing. Regardless, Judge Porteous would require immunity as a prerequisite to testifying. The defense does not believe that a subpoena is either appropriate or necessary.

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Judge Porteous reserves the right to call any witnesses not listed above but who are listed on the House of Representatives' witness list. Judge Porteous also reserves the right to call witnesses not listed above that are otherwise required to serve as rebuttal witnesses.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
John C. Peirce
P.J. Meitl
Daniel T. O'Connor
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1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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

Dated: August 2, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ Daniel T. O'Connor

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In The Senate of the United States

Sitting as a Court of Impeachment

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

THE HOUSE OF REPRESENTATIVES' SUPPLEMENTAL DESIGNATION OF WITNESSES AND REQUESTS FOR SUBPOENAS

Pursuant to the Senate Impeachment Trial Committee's (the "Committee's") Scheduling Order of June 21, 2010 and the request made by the Committee's staff at the meeting of counsel on June 10, 2010, the House of Representatives (the "House"), through its Managers and counsel, respectfully submits to the Committee this supplemental designation of three additional witnesses, with requests for subpoenas, and a proffer of those witnesses' expected testimony.[1]

1. The Honorable Duncan Keir (Subpoena Only)

The Honorable Duncan Keir is the Chief Judge of the United States Bankruptcy Court for the District of Maryland. Judge Keir will provide expert testimony regarding Judge Porteous's Chapter 13 bankruptcy filing, which will include (i) the necessity that debtors be candid and act in good faith in bankruptcy filings, (ii) the effect of filing a bankruptcy petition under a false name, (iii) whether Judge Porteous's "no harm, no foul" defense to his false bankruptcy filings is legitimate, (iv) whether Judge Porteous violated the bankruptcy confirmation order, and (v) the

[1] This "Supplemental Designation of Witnesses and Requests for Subpoenas" is filed in addition to the June 8, 2010 "Preliminary Designations by the House of Representatives of Witnesses, Requests for Subpoenas, Requests for Immunity and Stipulations," and the June 30, 2010 "Supplemental Filing By the House of Representatives in Support of Its Preliminary Requests for Subpoenas and Immunity."

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impact on the administration of the bankruptcy laws in light of the fact that the debtor in this case is a federal judge, as opposed to an ordinary citizen.

2. Professor Charles G. Geyh (Subpoena Only)

Professor Charles Geyh is the Associate Dean for Research and the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law. Professor Geyh will provide expert testimony regarding the ethical implications of Judge Porteous's alleged conduct, with a focus on the Code of Conduct for United States Judges.

3. Rafael C. Goyeneche III (Subpoena Only)

Rafael Goyeneche is the President of the Metropolitan Crime Commission (the "MCC") – a nonprofit public service, citizens' organization in New Orleans, Louisiana, dedicated to improving the administration of justice, reducing the incidence of violent crime, and stamping out public corruption. Mr. Goyeneche will testify regarding his November 9, 1994 interview of Judge Porteous, in which Judge Porteous made statements concerning his relationship with Louis Marcotte and the circumstances surrounding his setting aside Aubrey Wallace's conviction.

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Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

August 2, 2010

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In The Senate of the United States

Sitting as a Court of Impeachment

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

MEMORANDUM ON BEHALF OF THE HOUSE OF REPRESENTATIVES IN SUPPORT OF CALLING JUDGE PORTEOUS AS A WITNESS

The House of Representatives (the "House"), through its Managers and counsel, submits the following Memorandum in Support of Calling Judge Porteous as a Witness and states as follows:

The House has listed Judge Porteous as a potential witness to be called at the forthcoming impeachment trial. The House, however, is not seeking immunity for Judge Porteous. Accordingly, at this point, the Senate is not being asked by the House to take any steps regarding Judge Porteous.

The Senate has asked the House to submit a memorandum in support of the House calling Judge Porteous as a witness.[1] It appears that in the limited number of judicial impeachments that have gone to trial in the Senate, many, if not all, of the judges have testified and have been subject to cross-examination. The issue therefore is not whether testimony and cross-examination are appropriate, but rather whether there is any bar to the judge being called as a

[1] Congress's power to issue subpoenas in the impeachment context extends to sitting federal judges. Article I, § 3 of the Constitution explicitly provides that "the Senate shall have the sole Power to try all Impeachments." This constitutional framework creates the implied power of Congress to issue subpoenas for documents and testimony in furtherance of its constitutionally assigned role. C.f. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

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witness by the House. The House is not aware of an instance in which a judge was compelled to be a witness in a Senate impeachment trial. There is ample precedent, however, in a proceeding closely related to an impeachment trial, which requires federal judges to testify concerning allegations against them, even if their appearance is involuntary. Indeed, this process has taken place in connection with this very matter.

Title 28 of the United States Code, Section 351, *et seq.*, sets forth the rules governing complaints against federal judges and judicial misconduct. The statute authorizes each judicial council and the Judicial Conference of the United States to "prescribe such rules for the conduct of proceedings under this chapter . . . as each considers to be appropriate." 28 U.S.C. § 358(a). Pursuant to that statutory provision, the Judicial Conference of the United States, chaired by the Chief Justice of the Supreme Court, promulgated Rules for Judicial-Conduct and Judicial-Disability Proceedings (the "Judicial Conference Rules") "to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges."[2]

The Judicial Conference Rules specifically address the procedures to be utilized at Special Committee hearings of judicial misconduct – such as the Fifth Circuit Special Committee hearing regarding Judge Porteous – and provide as follows:

> **14. Conduct of Hearings by Special Committee**
>
> (a) Purpose of Hearings. The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may hold joint or separate hearings.
>
> (b) Committee Evidence. Subject to Rule 15, the committee must obtain material, nonredundant evidence in the form it considers appropriate. In the committee's discretion, evidence may be obtained by committee

[2] See the Judicial Conference Rules at p. 1 (March 11, 2008). A copy of the Judicial Conference Rules is attached to this Memorandum as Attachment 1.

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> members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.[3]

The Judicial Conference Commentary to Rule 14 further states: "[w]ith respect to testimonial evidence, the subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges."[4] The subpoena powers available to the Special Committees are laid out in 28 U.S.C. § 356, which states:

> (a) Judicial councils and special committees. In conducting any investigation under this chapter the judicial council, or a special committee appointed under section 353, shall have full subpoena powers as provided in section 332(d).
>
> (b) Judicial Conference and standing committees. In conducting any investigation under this chapter the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 shall have full subpoena powers as provided in that section.

Thus, under the authority prescribed by the United States Code, the Judicial Conference of the United States, chaired by the Chief Justice, and the United States circuit courts have explicitly established rules and procedures by which a judge who is the subject of a misconduct inquiry can be required to testify in those proceedings.

Moreover, Title 28 U.S.C. § 355(b)(1) clearly contemplates that the record of all proceedings before both a circuit court judicial council and the Judicial Conference shall, in cases where impeachment may be warranted, be transmitted "to the House of Representatives for whatever action the House of Representatives considers to be necessary."

The proceedings in the Circuit Court tribunals are an integral adjunct to impeachment proceedings in the House and Senate. The fact that they are empowered by legislation and

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[3] Id. at Rule 14, p. 21 (emphasis added).

[4] Id. at p. 22 (Commentary on Rule 14) (emphasis added).

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implemented by Court rules to call the judge in question to testify is a powerful statement that federal judges are not wholly unaccountable for their conduct, even if it means requiring them to testify under oath.

Judge Porteous was elevated to the federal bench by the Senate, which confirmed his appointment. He is now alleged to have engaged in serious misconduct and to have misled the Senate by not disclosing corrupt conduct which, if true, would undoubtedly have terminated his candidacy for the office. The Senate confirmed his appointment based in part on his sworn statements. Now that the veracity of those statements has been seriously questioned, the Senate should have the opportunity to hear from Judge Porteous.

The Senate's processes, as well as the public interest, require that all of the relevant facts be made available to the Senate, not just those facts that counsel, in an adversarial posture, decide to put before the Senate.[5] It must be recalled that an impeachment trial is not a criminal proceeding. As Alexander Hamilton stated, it is "a method of NATIONAL INQUEST into the conduct of public men."[6] The federal rules of evidence and procedure do not apply because they may artificially hinder the Senate's ability to hear all of the evidence in order to make a profoundly important determination. Judge Porteous was willing to answer questions under oath to obtain his lofty position. He should be required to answer questions when the propriety of his remaining in that position is brought into serious question.

It is clear that Judge Porteous hopes that this case will be tried without his participation. He opposes the House using his prior immunized testimony in the Fifth Circuit. He opposes the

[5] To be sure, the citizens of this country have a stake in the integrity of the judiciary. When a federal judge, who passes judgment over the matters of private citizens, is himself alleged of misconduct and wrongdoing, it would be a disservice to the public interest to truncate artificially the evidence pertaining to that judge's conduct.

[6] THE FEDERALIST NO. 65, at 440 (Alexander Hamilton) (Cooke, ed., 1961).

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House being allowed to call him as a witness. He suggests that he may not be called as a witness in his own defense.[7] The Senate's access to vital evidence should not be so limited when it has granted to the judiciary, in a process intimately related to impeachments proceedings, the power to call a judge as a witness to account for his conduct. It makes no sense for the Senate to have less power to conduct an inquiry than that granted and exercised by the circuit judicial council in this very case.

The House emphasizes that this approach is premised on the fact that Congress has granted to the judiciary the power to require a federal judge to testify at a hearing conducted to investigate allegations against that judge. Moreover, judges attain their lofty position through Senate confirmation. They should be subject to questioning in a Senate impeachment trial when the propriety of continuing to remain in that position is brought into serious question.[8]

Finally, the *in terrorum* argument advanced by counsel for Judge Porteous that they will go to court to try to stop Judge Porteous from being called to testify is unavailing. Certainly Judge Porteous can go to court, but this issue is clearly non-justiciable in light of the Supreme Court's ruling in Walter Nixon v. United States.[9] For the Senate to conduct its proceedings in a

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[7] See Judge G. Thomas Porteous, Jr.'s Motion for an Extended Evidentiary Hearing at 2, fn. 1 ("Whether Judge Porteous will testify in his own defense is still an open question.").

[8] This approach adopted by the House would, by its terms, have no application to an elected official such as the President or the Vice President.

[9] 113 S. Ct. 732 (1992). In Nixon, the Supreme Court clearly explained:

> The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers.
>
> * * *

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manner which echoes the very manner in which an inquiry is conducted pursuant to the Rules of the Judicial Conference of the United States, will not result in any impediment to the Senate trial.

For all the foregoing reasons, the House respectfully submits that at this time it is not seeking immunity for Judge Porteous, but continues to list him as a potential witness in a Senate trial.

> Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Id. at 233, 235 (internal citations omitted).

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Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

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August 2, 2010

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Attachment 1

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JUDICIAL CONFERENCE OF THE UNITED STATES

RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Adopted March 11, 2008

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RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Preface

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

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ARTICLE I. GENERAL PROVISIONS

1. Scope

These Rules govern proceedings under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364 (the Act), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

Commentary on Rule 1

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the "Breyer Committee," presented a report, known as the "Breyer Committee Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. The Breyer Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. Id. at 212-15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. Id. at 238.

Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present Rules were promulgated by the Judicial Conference on March 11, 2008.

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2. Effect and Construction

(a) Generally. These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) Exception. A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

Commentary on Rule 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

3. Definitions

(a) Chief Judge. "Chief judge" means the chief judge of a United States Court of Appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) Circuit Clerk. "Circuit clerk" means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) Complaint. A complaint is:

(1) a document that, in accordance with Rule 6, is filed by any person in his or her individual capacity or on behalf of a professional organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) Court of Appeals, District Court, and District Judge. "Courts of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) Disability. "Disability" is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

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(f) Judicial Council and Circuit. "Judicial council" and "circuit," where appropriate, include any courts designated in 28 U.S.C. § 363.

(g) Magistrate Judge. "Magistrate judge," where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa–12(c).

(h) Misconduct. Cognizable misconduct:

(1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) having improper discussions with parties or counsel for one side in a case;

(D) treating litigants or attorneys in a demonstrably egregious and hostile manner;

(E) engaging in partisan political activity or making inappropriately partisan statements;

(F) soliciting funds for organizations; or

(G) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

(2) is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(3) does not include:

(A) an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it attacks the merits.

(B) an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(i) Subject Judge. "Subject judge" means any judge described in Rule 4 who is the subject of a complaint.

Commentary on Rule 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by complainants under Rule 6.

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Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. See 28 U.S.C. § 351(a) and (b). Under Rule 3(c)(1), complaints may be submitted by a person, in his or her individual capacity, or by a professional organization. Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief judges are expected in some circumstances to trigger the process -- "identify a complaint," see 28 U.S.C. § 351(b) and Rule 5 -- and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief judge, the complainant lacks many rights that a litigant would have, and the chief judge, instead of being limited to the "four corners of the complaint," must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Committee Report, 239 F.R.D. at 183-84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be an accusation. This definition is codified in (c)(2).

Rule 3(e) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available.

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (h)(1) therefore provides some specific examples. Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.

Even where specific, mandatory rules exist -- for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations -- the distinction between the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these Rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge solicited funds for a charity or participated in a partisan political event are cognizable under the Act.

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On the other hand, judges are entitled to some leeway in extra-official activities. For example, misconduct may not include a judge being repeatedly and publicly discourteous to a spouse (not including physical abuse) even though this might cause some reasonable people to have diminished confidence in the courts. Rule 3(h)(2) states that conduct of this sort is covered, for example, when it might lead to a "substantial and widespread" lowering of such confidence.

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge -- without more -- is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related -- in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint -- even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation -- however unsupported -- that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness -- "the merits" -- of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper ex parte communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by a chief judge until the appellate proceedings are concluded in order to avoid, inter alia, inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand -- for example a statement that a claim is legally or factually "frivolous" -- then the judge's choice of language is presumptively

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merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11 is necessary.

With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge -- in other words, assigning a low priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules to the various kinds of courts covered.

4. Covered Judges

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

Commentary on Rule 4

This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of complaints against persons not covered by the Act, such as other court personnel, or against both covered judges and noncovered persons.

ARTICLE II. INITIATION OF A COMPLAINT

5. Identification of a Complaint

(a) Identification. When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) Noncompliance with Rule 6(d). Rule 6 complaints that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

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Commentary on Rule 5

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245-46.

The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, see Rule 11(d), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a complaint is identified, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once the chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for the chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 3(h)(3)(A), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only: (i) the chief judge of the home circuit of a potential subject judge, or

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(ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

Subsection (b) provides that complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d), must be considered under this Rule. For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information, and proceed to follow the process described in Rule 5(a).

6. Filing a Complaint

(a) Form. A complainant may use the form reproduced in the appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) Brief Statement of Facts. A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

- **(1) what happened;**
- **(2) when and where the relevant events happened;**
- **(3) any information that would help an investigator check the facts; and**
- **(4) for an allegation of disability, any additional facts that form the basis of that allegation.**

(c) Legibility. A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) Complainant's Address and Signature; Verification. The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the complaint will be accepted for filing, but it will be reviewed under only Rule 5(b).

(e) Number of Copies; Envelope Marking. The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

Commentary on Rule 6

The Rule is adapted from the Illustrative Rules and is self-explanatory.

7. Where to Initiate Complaints

(a) Where to File. Except as provided in (b),

- **(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States**

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magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) Misconduct in Another Circuit; Transfer. If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291–293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

Commentary on Rule 7

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the circuit." However, in many circuits, this role is filled by circuit executives. Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar -- ex parte contact between an attorney and a judge, for example -- it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

8. Action by Clerk

(a) Receipt of Complaint. Upon receiving a complaint against a judge filed under Rule 5 or 6, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.

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(b) Distribution of Copies. The clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 5 or 6 to each subject judge. The clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) Complaints Against Noncovered Persons. If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) Receipt of Complaint about a Judge and Another Noncovered Person. If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge and must inform the complainant of the limitation.

Commentary on Rule 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

9. Time for Filing or Identifying a Complaint

A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(1)(E).

Commentary on Rule 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

10. Abuse of the Complaint Procedure

(a) Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) Orchestrated Complaints. When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated

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campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept further ones. The clerk must send a copy of any such order to anyone whose complaint was not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

11. Review by the Chief Judge

(a) Purpose of Chief Judge's Review. When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25. If the complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing the complaint, the chief judge must determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) Inquiry by Chief Judge. In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any

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others who may have knowledge of the matter, and may review transcripts or other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue.

(c) Dismissal.

(1) Allowable grounds. A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

(A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of judicial office;

(B) is directly related to the merits of a decision or procedural ruling;

(C) is frivolous;

(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;

(E) is based on allegations which are incapable of being established through investigation;

(F) has been filed in the wrong circuit under Rule 7; or

(G) is otherwise not appropriate for consideration under the Act.

(2) Disallowed grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.

(d) Corrective Action. The chief judge may conclude the complaint proceeding in whole or in part if:

(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6, or

(2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.

(e) Intervening Events. The chief judge may conclude the complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.

(f) Appointment of Special Committee. If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) Notice of Chief Judge's Action; Petitions for Review.

(1) When special committee is appointed. If a special committee is appointed, the chief judge must notify the complainant and the subject judge that the matter has been referred to a special committee and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

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(2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of the complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum, which may be one document, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(3) Right of petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If a petition for review is filed, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the judicial council.

(h) Public Availability of Chief Judge's Decision. The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

Commentary on Rule 11

Subsection (a) lists the actions available to a chief judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. A chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a complaint regarding disability. Some formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243-45. The Act states that dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together, so that a matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to a special committee and the judicial council. An allegation of fact is ordinarily not "refuted" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's -- in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability -- then there must be a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

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However, dismissal following a limited inquiry may occur when the complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. Id. The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. Id. In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. Id.

Similarly, under (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 3 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 3 and its accompanying Commentary.

Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation." 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as "frivolous," under Rule 11(c)(1)(C), will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly

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persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. Id. The subject judge denies it. The chief judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness's account. Id. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. Id. at 243-44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. Id.

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of reliability warranting dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should be foregone, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. 244-45. The Act authorizes the chief judge to conclude the proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Id. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. Id. The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. Id. Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on the identical conduct.

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"Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. Id. Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). Id. Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. Id.

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. Id. While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. Id. In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the subject judge, or otherwise. Id.

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244-45. In other words, minor corrective action will not suffice to dispose of a serious matter. Id.

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. Id.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the subject

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judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief judges, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See also Commentary on Rule 24, dealing with public availability.

Rule 11(g) provides that the complainant and subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. A copy of a chief judge's order and memorandum, which may be one document, disposing of a complaint must be sent by the circuit clerk to the Judicial Conference Committee on Judicial Conduct and Disability.

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ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

12. Composition of Special Committee

(a) Membership. Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

(b) Presiding Officer. When appointing the committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) Bankruptcy Judge or Magistrate Judge as Adviser. If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a committee member.

(d) Provision of Documents. The chief judge must certify to each other member of the committee and to any adviser copies of the complaint and statement of facts in whole or relevant part, and any other relevant documents on file.

(e) Continuing Qualification of Committee Members. A member of a special committee who was qualified to serve when appointed may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) Inability of Committee Member to Complete Service. If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) Voting. All actions by a committee must be by vote of a majority of all members of the committee.

Commentary on Rule 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question of committee size is one that should be weighed with care in

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view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another committee member as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge.

Subsection (c) also provides that the adviser will have all the privileges of a committee member except a vote. The adviser, therefore, may participate in all deliberations of the committee, question witnesses at hearings, and write a separate statement to accompany the special committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the members of a committee should participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

13. Conduct of an Investigation

(a) Extent and Methods of Special-Committee Investigation. Each special committee must determine the appropriate extent and methods of the investigation in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must refer the new matter to the chief judge for action under Rule 5 or Rule 11.

(b) Criminal Conduct. If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to

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the extent permitted by the Act to avoid compromising any criminal investigation. The committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) Staff. The committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judicial branch or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) Delegation of Subpoena Power; Contempt. The chief judge may delegate the authority to exercise the committee's subpoena powers. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. Id. Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of judicial councils by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. See Rule 12(g).

14. Conduct of Hearings by Special Committee

(a) Purpose of Hearings. The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) Committee Evidence. Subject to Rule 15, the committee must obtain material, nonredundant evidence in the form it considers appropriate. In the committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

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(c) Counsel for Witnesses. The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.

(d) Witness Fees. Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) Oath. All testimony taken at a hearing must be given under oath or affirmation.

(f) Rules of Evidence. The Federal Rules of Evidence do not apply to special-committee hearings.

(g) Record and Transcript. A record and transcript must be made of all hearings.

Commentary on Rule 14

This Rule is adapted from Section 353 of the Act and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges the next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

15. Rights of Subject Judge

(a) Notice.

(1) Generally. The subject judge must receive written notice of:

(A) the appointment of a special committee under Rule 11(f);

(B) the expansion of the scope of an investigation under Rule 13(a);

(C) any hearing under Rule 14, including its purposes, the names of any witnesses the committee intends to call, and the text of any statements that have been taken from those witnesses.

(2) Suggestion of additional witnesses. The subject judge may suggest additional witnesses to the committee.

(b) Report of the Special Committee. The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) Presentation of Evidence. At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness

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under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine committee witnesses, in person or by counsel.

(d) Presentation of Argument. The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) Attendance at Hearings. The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the committee.

(f) Representation by Counsel. The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

Commentary on Rule 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings -- for example, meetings at which the committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

16. Rights of Complainant in Investigation

(a) Notice. The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) Opportunity to Provide Evidence. If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.

(c) Presentation of Argument. The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) Cooperation. In exercising its discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

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Commentary on Rule 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed and it determines that the complainant may have additional evidence, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, subsection (e) provides that a special committee may consider the degree to which a complainant has cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant.

17. Special-Committee Report

The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held under Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

Commentary on Rule 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statement to the Judicial Conference Committee is new.

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ARTICLE V. JUDICIAL-COUNCIL REVIEW

18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e)

(a) Petitions for Review. After the chief judge issues an order under Rule 11(c), (d), or (e), a complainant or subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) When to File; Form; Where to File. A petition for review must be filed in the office of the circuit clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order. The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . . " and state the reasons why the petition should be granted. It must be signed.

(c) Receipt and Distribution of Petition. A circuit clerk who receives a petition for review filed within the time allowed and in proper form must:

- (1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;
- (2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:
  - (A) copies of the complaint;
  - (B) all materials obtained by the chief judge in connection with the inquiry;
  - (C) the chief judge's order disposing of the complaint;
  - (D) any memorandum in support of the chief judge's order;
  - (E) the petition for review; and
  - (F) an appropriate ballot;
- (3) send the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability. Unless the Judicial Conference Committee requests them, the clerk will not send copies of the materials obtained by the chief judge.

(d) Untimely Petition. The clerk must refuse to accept a petition that is received after the deadline in (b).

(e) Timely Petition Not in Proper Form. When the clerk receives a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within 21 days of the date of the clerk's letter about the deficiencies or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

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Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits a subject judge, as well as the complainant, to petition for review of a chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, a chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. See Fed. R. App. P. 25(a)(2)(A) and (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

19. Judicial-Council Disposition of Petitions for Review

(a) Rights of Subject Judge. At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) Judicial-Council Action. After considering a petition for review and the materials before it, a judicial council may:

- **(1) affirm the chief judge's disposition by denying the petition;**
- **(2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;**
- **(3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or**
- **(4) in exceptional circumstances, take other appropriate action.**

(c) Notice of Council Decision. Copies of the judicial council's order, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

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(d) Memorandum of Council Decision. If the council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a council order must not include the name of the complainant or the subject judge.

(e) Review of Judicial-Council Decision. If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented on the ground that a special committee should be appointed under Rule 11(f), the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely on the issue of whether a special committee should be appointed.

(f) Public Availability of Judicial-Council Decision. Materials related to the council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

Commentary on Rule 19

This Rule is largely adapted from the Act and is self-explanatory.

The council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

20. Judicial-Council Consideration of Reports and Recommendations of Special Committees

(a) Rights of Subject Judge. Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral, as determined by the council. The judge must not otherwise communicate with council members about the matter.

(b) Judicial-Council Action.

(1) Discretionary actions. Subject to the judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351–364.

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(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference of the United States with the council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa–12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(E) take any combination of actions described in (b)(1)(A)–(D) of this Rule that is within its power.

(2) Mandatory actions. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) Inadequate Basis for Decision. If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) Council Vote. Council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the council.

(e) Recommendation for Fee Reimbursement. If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office of the United States Courts use funds appropriated to the Judiciary to reimburse the judge for reasonable expenses incurred during the

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investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) Council Action. Council action must be by written order. Unless the council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The order and the supporting memorandum must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not otherwise communicate with council members about the matter.

Rule 20(c) provides that if the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1) (A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and

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the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

21. Committee on Judicial Conduct and Disability

(a) Review by Committee. The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its disposition of petitions for review is ordinarily final. The Judicial Conference of the United States may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

(b) Reviewable Matters.

(1) Upon petition. A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f); in that event, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) Upon Committee's initiative. At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) Committee Vote. Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. If only six members are qualified to vote on a petition for review, the decision must be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. The members who will determine the petition must be selected based on committee membership as of the date on which the petition is received. Those members selected to hear the petition should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only four members are qualified to vote, the Chief Justice must appoint, if available, an ex-member of the Committee or, if not, another United States judge to consider the petition.

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(d) Additional Investigation. Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) Oral Argument; Personal Appearance. There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions from the complainant or subject judge.

(f) Committee Decisions. Committee decisions under this Rule must be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) Finality. All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

Commentary on Rule 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of such dispositions by the Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed, the complainant or subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2), the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in its sole discretion, whether or not such a dissent occurred, and only as to the appointment of a special committee. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.

22. Procedures for Review

(a) Filing a Petition for Review. A petition for review of a judicial-council decision may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

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Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office will send a copy of the petition to the complainant or subject judge, as the case may be.

(b) Form and Contents of Petition for Review. No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the judicial council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition should not normally exceed 20 pages plus necessary attachments.

(c) Time. A petition must be submitted within 63 days of the date of the order for which review is sought.

(d) Copies. Seven copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) Action on Receipt of Petition for Review. The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

Commentary on Rule 22

Rule 22 is self-explanatory.

ARTICLE VII. MISCELLANEOUS RULES

23. Confidentiality

(a) General Rule. The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules. In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(b) Files. All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) Disclosure in Decisions. Except as otherwise provided in Rule 24, written decisions of the chief judge, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of

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members of the council or Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(d) Availability to Judicial Conference. On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee to records of proceedings under the Act at the site where the records are kept.

(e) Availability to District Court. If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) Impeachment Proceedings. If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) Subject Judge's Consent. If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a chief judge, a special committee, or the judicial council, not be revealed.

(h) Disclosure in Special Circumstances. The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. Disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(j) Assistance and Consultation. Nothing in this Rule precludes the chief judge or judicial council acting on a complaint filed under the Act from seeking the help of qualified staff or from consulting other judges who may be helpful in the disposition of the complaint.

Commentary on Rule 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not

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be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, judicial council, the Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the federal judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the chief judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (c) is subject to Rule 24(a) which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in

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investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special committee. Another example might involve evidence of criminal conduct by a judge discovered by a special committee.

Subsection (h) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or that constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(j), chief judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition; the confidentiality requirement does not preclude this. The chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

24. Public Availability of Decisions

(a) General Rule; Specific Cases. When final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.

(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.

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(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders disclosure.

(b) Manner of Making Public. The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the circuit clerk or by placing the orders on the court's public website. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability will make available on the Federal Judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) Orders of Judicial Conference Committee. Orders of this Committee constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the clerk of the relevant court of appeals. The Committee will also make such orders available on the Federal Judiciary's website, www.uscourts.gov. When authorized by the Committee, other orders related to complaint proceedings will similarly be made available.

(d) Complaints Referred to the Judicial Conference of the United States. If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

Commentary on Rule 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

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Rule 24 provides for public availability of orders of the chief judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject judge must not be disclosed. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest -- particularly if a judicial officer resigns in the course of an investigation -- to make the identity of the judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Finally, Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

25. Disqualification

(a) General Rule. Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) Subject Judge. A subject judge is disqualified from considering the complaint except to the extent that these Rules provide for participation by a subject judge.

(c) Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge's Order. If a petition for review of a chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is not disqualified from participating in the council's consideration of the petition.

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(d) Member of Special Committee Not Disqualified. A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) Subject Judge's Disqualification After Appointment of a Special Committee. Upon appointment of a special committee, the subject judge is automatically disqualified from participating in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) Substitute for Disqualified Chief Judge. If the chief judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these Rules must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Judicial-Council Action When Multiple Judges Are Disqualified. Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) Disqualification of Members of the Judicial Conference Committee. No member of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

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Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference Committee. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings; Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these Rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

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A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of a chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference Committee contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

26. Transfer to Another Judicial Council

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such

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a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

Commentary on Rule 26

Rule 26 is new; it implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to begin consideration of the complaint -- for example, reference to the transferee chief judge, appointment of a special committee, etc.

27. Withdrawal of Complaints and Petitions for Review

(a) Complaint Pending Before Chief Judge. With the chief judge's consent, a complainant may withdraw a complaint that is before the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent a chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) Complaint Pending before Special Committee or Judicial Council. After a complaint has been referred to a special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) Petition for Review. A petition for review addressed to a judicial council under Rule 18, or the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22 may be withdrawn if no action on the petition has been taken.

Commentary on Rule 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection 27(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

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If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

28. Availability of Rules and Forms

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules and the complaint form available on the court's website, or provide an Internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

29. Effective Date

These Rules will become effective 30 days after promulgation by the Judicial Conference of the United States.

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APPENDIX

COMPLAINT FORM

A two-page complaint form follows.

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Judicial Council of the _____ Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 5 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The rules are available in federal court clerks' offices, on individual federal courts' Web sites, and on www.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. For the number of copies to file, consult the local rules or clerk's office of the court in which your complaint is required to be filed. Enclose each copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: _____

Contact Address: _____

_____

Daytime telephone: (___) _____

2. Name(s) of Judge(s): _____

Court: _____

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

[ ] Yes [ ] No

If "yes," give the following information about each lawsuit:

Court: _____

Case Number: _____

Docket number of any appeal to the ____ Circuit: _____

Are (were) you a party or lawyer in the lawsuit?

[ ] Party [ ] Lawyer [ ] Neither

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If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

_____

_____

_____

4. Have you filed any lawsuits against the judge?

[ ] Yes [ ] No

If "yes," give the following information about each such lawsuit:

Court: _____

Case Number: _____

Present status of lawsuit: _____

Name, address, and telephone number of your lawyer for the lawsuit against the judge:

_____

_____

_____

Court to which any appeal has been taken in the lawsuit against the judge:

_____

Docket number of the appeal: _____

Present status of the appeal: _____

5. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

6. **Declaration and signature:**

I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature)_____ (Date)_____

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION
REQUESTING FUNDING FOR HIS DEFENSE

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and files this Motion Requesting Funding for His Defense. In support, Judge Porteous respectfully submits as follows:

On June 29, 2010, the Senate Impeachment Trial Committee (the "Committee") Staff held a conference call with counsel for all parties. During that conference call, the Committee Staff advised that Judge Porteous did not need to file a separate motion requesting funds to reimburse witnesses for the costs associated with their travel to Washington to testify at the evidentiary hearing, as the Committee had construed language in one of Judge Porteous's prior filings as just such a request, and would be issuing guidance on that issue. Judge Porteous appreciates the Committee's assistance in this regard. Judge Porteous now submits the instant motion to request additional funding, which is necessary to prepare his defense.

Constitutional due process, as well of basic notions of fundamental fairness, requires that a federal officer accused of improper conduct allegedly warranting removal

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from office be afforded a meaningful opportunity to defend himself.[1] Such an opportunity requires that the officer have access to the resources and funds necessary to properly prepare and present his defense. Moreover, to fulfill its Constitutional duty "to try all Impeachments" (U.S. CONST. art. I, § 3, cl. 6), the Senate must have before it a complete record, adduced in a fair proceeding, upon which to deliberate and render a decision.[2] That record should not be limited to only that evidence selected and presented by the House Managers – in their capacity as prosecutors.

To ensure that each of these requirements is satisfied in this case, Judge Porteous requests that the Senate provide certain, limited funding, which is necessary to permit

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[1] Indeed, impeachment trials "must be conducted in keeping with the basic principles of due process that have been enunciated by the court and ironically, by the Congress itself," and "[f]airness and due process must be the watchword whenever a branch of the United States government conducts a trial, whether it be in a criminal case, a civil case or a case of impeachment." *Hastings v. United States*, 802 F. Supp. 490, 492, 504 (D.D.C. 1992).

See also Rules and Administration Meeting of the Impeachment Trial Committee Against Judge G. Thomas Porteous, Jr., April 13, 2010, http://www.senate.gov/general/impeachment_hearing_porteous_041310.htm (Senator and Committee Chair McCaskill stating that the "guiding force of this matter has to be due process"; Senator and Committee Vice-Chair Hatch stating that "we must proceed with the utmost seriousness and dedication to fairness").

[2] Indeed, as a prior Senate Impeachment Trial Committee has held:

> [T]he Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make.

Impeachment Trial Committee, Disposition of Pretrial Issues [First Order], 101st Cong., 1st sess., 135 Cong. Rec. S. 6449-02 (June 9, 1989) (relating to the articles of impeachment against Judge Alcee L. Hastings).

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him to present his defense.[3] Specifically, in addition to the travel and related expenses (including applicable *per diem* fees) of witnesses subpoenaed at Judge Porteous's request to testify in the trial of this matter,[4] Judge Porteous requests that the Senate provide funds for the following:

1. The travel and related expenses of Judge Porteous so that he may travel to Washington, D.C., assist in his own defense, and participate in all necessary proceedings – including the trial of this matter;
2. Legal expenses (including items such as postal charges, courier fees, and reproduction costs, but excluding attorneys' fees) incurred by Judge Porteous in his defense of this matter; and
3. Other necessary and reasonable expenses incurred by Judge Porteous's new counsel to investigate and prepare Judge Porteous's defense in this matter (including travel and related expenses, *per diem* fees, and deposition fees and transcript costs, but excluding attorneys' fees).

Given his limited financial resources, which have been significantly strained by this litigation, Judge Porteous is presently unable to pay these costs himself. He, therefore, lacks the financial wherewithal necessary to properly defend himself in this case. The House Managers, and House Impeachment Counsel, on the other hand, have

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[3] Payment of such funds by the Senate Impeachment Trial Committee is authorized by Section 6(a) of Senate Resolution 458, which provides that "[t]he actual and necessary expenses of the committee ... shall be paid from the contingent fund of the Senate...." S. Res. 458, 111th Cong. (Mar. 17, 2010).

[4] Based on the statements of Committee Staff during the June 29, 2010 conference call, Judge Porteous understands that the Committee intends to issue guidance on this issue.

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had access to vast federal funds and resources to investigate and pursue their charges against Judge Porteous. Moreover, the House Managers and their counsel will be able to continue to call upon government funding and resources, pay for travel and *per diem* expenses of witnesses, and pay for associated costs necessary to prosecute the impeachment. To ensure that Judge Porteous has an equal opportunity to call witnesses to testify in his defense, and thus provide the Senate with a complete record in this matter, fundamental due process requires that the Senate provide Judge Porteous with the funding needed to present his defense.

In addition to being mandated by Constitutional and equitable considerations, granting Judge Porteous the funding that he requests is supported by long-standing Senate precedent and custom. Specifically, in connection with his 1989 impeachment, U.S. District Court Judge Walter L. Nixon, Jr. requested that the Senate provide funds to cover (among other things) the costs associated with bringing testifying witnesses to Washington. The then-presiding Senate Impeachment Trial Committee considered Judge Nixon's request and, on July 25, 1989, issued a pretrial order stating that:

> The Senate will follow its usual practice of paying the costs of bringing the witnesses for whom it issues subpoenas to Washington to testify in this proceeding.

See Impeachment Trial Committee, Disposition of Pretrial Motions, First Order, 101st Cong., 1st sess., 135 Cong. Rec. S. 10673 (Sept. 6, 1989).[5] Judge Porteous requests that

[5] While the 1989 Senate Impeachment Trial Committee ultimately declined to grant Judge Nixon's request to provide funds to cover his attorney's fees and out-of-pocket defense costs, there is no indication in the Committee's Order that Judge Nixon was financially unable to pay those expenses – as is the case with Judge Porteous. There is also no indication that Judge Nixon requested that the Senate pay the costs of his travel to Washington, nor is there any indication that the Senate would not have paid those

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the Senate continue to follow its "usual practice" and make available funds to cover the expenses outlined above.

WHEREFORE, Judge Porteous respectfully requests that the Senate authorize payment of the expenses requested in this Motion.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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

Dated: June 29, 2010

---

expenses had he so requested. Due to the extremely limited financial resources available to Judge Porteous, and in order to ensure the fairness of these proceedings, the Senate should provide the additional, yet limited, funding that Judge Porteous requests.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ Daniel T. O'Connor

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United States Senate
SENATE IMPEACHMENT
TRIAL COMMITTEE
WASHINGTON, DC 20510–6326

DISPOSITION OF JUDGE G. THOMAS PORTEOUS, JR.'S MOTION REQUESTING FUNDING FOR HIS DEFENSE

On June 29, 2010, Judge G. Thomas Porteous, Jr., filed a Motion Requesting Funding for His Defense. This Motion included requests for reimbursement of travel expenses incurred by witnesses and Judge Porteous as well as various legal and counsel costs. The House of Representatives has not filed any response to this Motion.

Consistent with past Committee practice, the Committee denies Judge Porteous's request for reimbursement of his travel expenses as well as for funds to cover legal and counsel costs.

The Committee grants the Motion with respect to the travel expenses of subpoenaed witnesses. Travel arrangements are to be made through the Chief Clerk of the Impeachment Trial Committee at government rates consistent with Senate travel regulations.

Dated: July 26, 2010

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

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II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

c. Attorney Disqualification

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

June 9, 2010

By Electronic and Regular Mail

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous

Dear Senator McCaskill and Senator Hatch:

I am writing to you as co-lead counsel in the impeachment case of Judge Thomas Porteous to inform the Senate Impeachment Trial Committee of the completion of a conflicts review that requires a substantial change in Judge Porteous' defense team.

As you are know, counsel for the House Managers has objected to an alleged conflict of interest related to Louis Marcotte. As noted in the October 29, 2009 letter from the House Impeachment Task Force, Mr. Marcotte was represented by co-lead counsel Richard Westling from 2004 through 2006 in a criminal case, and Mr. Westling also currently represents Louis and Lori Marcotte and their company, Bail Bonds Unlimited, Inc., in a separate civil proceeding. When Louis and Lori Marcotte were called as witnesses during the hearings before the House Impeachment Task Force, Mr. Westling moved immediately to address any conflict and was not present during his testimony. However, the House then proceeded to frame Article II of the Articles of Impeachment against Judge Porteous around the Marcotte matter. The conflict was raised again by Senate counsel recently in our last meeting.

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY

J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

I was recently asked to join the defense team, in part to review this alleged conflict of interest raised by House and Senate counsel. I completed that review this week and now believe it is necessary for Mr. Westling to remove himself from representing Judge Porteous in relation to Article II and Marcotte-related issues to avoid even the appearance of a conflict of interest in this case. To that end, I have secured new counsel to work with me exclusively on Article II and I will continue to serve as co-lead counsel generally with Mr. Westling and his team on the representation of Judge Porteous on Articles I, III and IV. Attorneys from the law firm Bryan Cave LLP will be working with me on Article II as well as the other articles. Bryan Cave was added to the team this morning after a final discussion of the ethics review and recommendations.

For the record, I wish to note that Mr. Westling not only asked for this independent review but has agreed to this step to avoid any ethical concerns in the case. Since we are both continuing as co-lead counsel, I would ask that any further communications be sent to both Mr. Westling and myself.

It is my understanding that there is a meeting scheduled tomorrow in the Senate. I would like to discuss this matter further and the need for a continuance to allow the new team to fully review the facts underlying Article II and offer informed advice to our client, Judge Porteous. A continuance is necessary to address current matters on the schedule, including but not limited to our designation of witnesses. I will invite Dan Schwartz and P.J. Meitl of Bryan Cave to attend the meeting with us.

I appreciate counsel raising this issue with the defense and I apologize for any delay caused by this change in representation. I look forward to discussing the matter further with you on at the Thursday meeting.

Respectfully,

Jonathan Turley

Jonathan Turley
Co-Lead Counsel to Judge G. Thomas Porteous

Cc: Alan I. Baron, Esq.
Mark Dubester, Esq.
Harold Damelin, Esq.
Special Impeachment Counsel
Washington, D.C. 20515

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Congress of the United States
Washington, DC 20515

June 10, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this correspondence is to address the June 9, 2010 letter from Mr. Turley, in which he raises the possibility of a continuance arising from his entry into this case and the decision that Mr. Westling can play no part in addressing Article II involving Judge Porteous's relationship with bail bondsmen Louis Marcotte and his sister Lori Marcotte.

We explicitly raised Mr. Westling's conflict of interest in a letter we sent to him on October 29, 2009 – over seven months ago.[1] That letter put Mr. Westling and Judge Porteous on notice of the conflict of interest and stressed our concern that Judge Porteous would exploit the conflict issue for delay. In that letter, we stated:

> As we are also sure you are aware, because of your duties of loyalty to current and prior clients and duties to protect confidential information, if there were to be a hearing where the relationship between the Marcottes and Judge Porteous is at issue, there would be significant conflict of interest issues arising from your participation. Further, those conflict issues may be implicated by your participation in the formulation of a factual defense of Judge Porteous where you are constrained from providing advice due to your ongoing ethical obligations.[2]

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[1]See Letter from Reps. Schiff and Goodlatte to Richard W. Westling, Esq., Oct. 29, 2009, (attached as Attachment 1).

[2]Id.

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That letter goes on to cite pertinent Bar rules. In an attempt to head off this issue, we stressed to counsel and Judge Porteous:

> We write now to put you and Judge Porteous on notice of the House's concern and so that you and he can take appropriate steps promptly to deal with this situation. We are aware that, in the past, Judge Porteous sought delays in Fifth Circuit proceedings in order for him to obtain new counsel. No delays in our schedule will be permitted to accommodate any search for additional or replacement counsel for Judge Porteous.[3]

The Marcottes testified on December 10, 2009, before the Impeachment Task Force, some seven weeks after our letter raising the conflict issue. Mr. Westling and Judge Porteous addressed that issue by having Mr. Westling absent himself from the Marcotte hearing. It was further represented that co-counsel, Mr. Remy Starns, would appear in Mr. Westling's stead, but he too did not appear. Articles of Impeachment containing Article II relating to Judge Porteous's relationship with the Marcottes were filed in the House on January 21, 2010, and the House voted the Articles on March 11, 2010.

In our letter to you of April 13, 2010, we again explicitly raised the conflict issue. In that letter we stated:

> In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.[4]

Finally, we are informed that on May 18, the conflict issue was raised yet again – this time in connection with an informal meeting of staff. We are informed that in response to direct questioning by Senate Legal Counsel Morgan Frankel, Mr. Westling provided assurances that there would be no delays arising from this conflict of interest issue. Mr. Turley was present at

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[3]Id. (emphasis added).

[4]See Letter from Reps. Schiff and Goodlatte to Sens. McCaskill and Hatch, Apr. 13, 2001, at 5, fn. 5 (attached as Attachment 2).

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that meeting, and we understand that he did not contradict Mr. Westling's assurances.

In short, notwithstanding our having raised the conflict issue at the earliest occasion, it was apparently not until June 9 of this year – over seven months after we first raised the issue – that Judge Porteous's defense team determined that Mr. Westling could have no role in matters involving the Marcottes and that a continuance was necessary. No reason was provided for the failure to address this issue over the many months since it was first raised by the House. Despite being on notice that such a claim would be viewed as little more than a cynical attempt to game the system, counsel has nonetheless pursued precisely that very strategy of delay. In light of the record in this case, and the inexcusable delay of Judge Porteous to address the conflict issue until now, Judge Porteous's request for a continuance should be summarily denied.[5]

Sincerely,

Adam Schiff, Manager Bob Goodlatte, Manager

Attachments

cc: Richard W. Westling, Esq.
Jonathan Turley, Esq.

Morgan Frankel
Senate Legal Counsel

[5]Moreover, the Marcotte allegations are very straight-forward. They are described in detail in the Report; they are primarily supported by witness testimony; and the defense has the transcripts of their Task Force depositions, their House Impeachment Task Force testimony, and the FBI "302s" of both Marcottes as they relate to Judge Porteous.

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Attachment One

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ONE HUNDRED ELEVENTH CONGRESS

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House of Representatives
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THOMAS ROONEY, Florida
GREGG HARPER, Mississippi

October 29, 2009

Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W., Suite 500
Washington, D.C. 20005

Re: Impeachment Inquiry of Judge G. Thomas Porteous, Jr.

Dear Mr. Westling:

It has come to the attention of the Impeachment Task Force that you may currently represent Louis M. Marcotte, III, and Lori M. Marcotte in connection with civil litigation arising out of their operation of Bail Bonds Unlimited, Inc. (Bartholomew v. Bail Bonds Unlimited, Inc. et al, Case No. 2:05-cv-04165-ILRL-JCW (E.D. La.), and that you previously represented Louis M. Marcotte, III, in his criminal case (U.S. v. Marcotte, Crim. No. 04-061 (E.D. La.)).

As you know, Judge Porteous's relationship with Louis Marcotte and Lori Marcotte may be at issue in the pending Impeachment Inquiry being conducted by the Task Force for the House of Representatives, Committee on the Judiciary, and either or both may be called as witnesses at a hearing adverse to Judge Porteous.

As we are also sure you are aware, because of your duties of loyalty to current and prior clients and duties to protect confidential information, if there were to be a hearing where the relationship between the Marcottes and Judge Porteous is at issue, there would be significant conflict of interest issues arising from your participation. Further, those conflict issues may be implicated by your participation in the formulation of a factual defense of Judge Porteous where you are constrained from providing advice due to your ongoing ethical obligations.

As you know, the ethical bar rules in the District of Columbia, Maryland and Louisiana require informed consent by all clients in order to permit waivers of conflicts, and two of these jurisdictions require that such informed consent be in a signed writing. See, e.g., District of Columbia Rules of Professional Conduct, Rule 1.7(c); Louisiana Rules of Professional Conduct, Rule 1.7(b)(4) (requires writing); Maryland Lawyer's Rules of Professional Conduct, Rule 1.7(b)(4) (requires writing). We request that you promptly provide the Task Force with signed consent forms from all three of these clients. Until the Task Force and Committee are fully apprised, we will not be in a position to make a determination of the appropriate treatment of this situation in the event that the Marcottes are called as witnesses adverse to Judge Porteous.

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We write now to put you and Judge Porteous on notice of the House's concern and so that you and he can take appropriate steps promptly to deal with this situation. We are aware that, in the past, Judge Porteous sought delays in Fifth Circuit proceedings in order for him to obtain new counsel. No delays in our schedule will be permitted to accommodate any search for additional or replacement counsel for Judge Porteous. If a hearing is scheduled at which the Marcottes are to testify, the Task Force will not postpone it in order for Judge Porteous to obtain new or different counsel.

We look forward to your providing the Task Force with the information we seek and your response to our concerns at your earliest opportunity so that the Task Force and the Committee can determine how we will proceed in light of this situation.

Please respond to Alan I. Baron, Esq., Seyfarth Shaw, 975 F. Street, N.W., Washington, D.C., 20004 (202-828-3589).

Sincerely,

Adam Schiff
Chairman
Impeachment Task Force

Bob Goodlatte
Ranking Member
Impeachment Task Force

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Attachment Two

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Congress of the United States
Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

Pretrial Motions. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;

- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;

- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the Liljeberg proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;

- Motion to permit or admit expert testimony; and

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- Motion relating to stipulations, if appropriate.

Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely – including his financial relationship with them prior to becoming a Federal judge, his handling of the Liljeberg case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true."[1] The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

[1] "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 169 (1989).

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substantial dispute.[2]

Witnesses. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

Article 1

1. Robert Creely [Immunity]
2. Jacob Amato [Immunity]
3. Leonard Levenson [Immunity]
4. Donald Gardner
5. Joseph Mole
6. Rhonda Danos [Immunity]

Article 2

7. Louis Marcotte
8. Lori Marcotte
9. Ronald Bodenheimer
10. Bruce Netterville [Immunity]
11. Mike Reynolds
12. Jeffrey Duhon
13. Aubrey Wallace

Article 3

14. Claude Lightfoot
15. FBI Special Agent DeWayne Horner
16. FBI Financial Analyst Gerald Fink
17. Richard Greendyke

Article 4

18. Former FBI Agent Cheyanne Tackett
19. Former FBI Agent Robert Hamill

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[2]See, e.g., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 170 (1989).

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Length of the case-in-chief. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Hearing.[3] Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the Liljeberg case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.[4]

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations – such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy – a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

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[3]These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

[4]Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are Liljeberg court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

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Article I. Judge Porteous has been aware of the details and substance of the Liljeberg allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the Liljeberg case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole – the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations – having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.[5] The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte – information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

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[5]In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

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We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

cc: Morgan Frankel
Senate Legal Counsel

Attachments

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CLAIRE McCASKILL, MISSOURI, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN

AMY KLOBUCHAR, MINNESOTA
SHELDON WHITEHOUSE, RHODE ISLAND
TOM UDALL, NEW MEXICO
JEANNE SHAHEEN, NEW HAMPSHIRE
EDWARD E. KAUFMAN, DELAWARE

JIM DeMINT, SOUTH CAROLINA
JOHN BARRASSO, WYOMING
ROGER F. WICKER, MISSISSIPPI
MIKE JOHANNS, NEBRASKA
JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE
WASHINGTON, DC 20510-6326

June 10, 2010

VIA E-MAIL
Alan I. Baron, Esq.
Special Impeachment Counsel
U.S. House of Representatives
Washington, D.C. 20515

VIA E-MAIL
Richard W. Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W., Suite 500
Washington, D.C. 20005

VIA E-MAIL
Jonathan Turley, Esq.
George Washington University Law School
2000 H Street, N.W.
Washington, D.C. 20052

Dear Counsel:

I write to memorialize the matters covered in today's meeting of all counsel.

On behalf of the House, Mr. Baron indicated that he did not anticipate any problems complying with the Committee's Disposition of Discovery Issues. It is his belief that the House is well on its way to compliance and that full compliance (subject to the discovery of additional documents, etc.) is expected within a few days. Mr. Baron indicated that the House had not yet received any discovery documents from counsel for Judge Porteous. Mr. Westling stated that he did not believe that there was much to turn over but that Judge Porteous's team is working on producing responsive documents. The Committee intends to issue an Order specifying a date when discovery must be completed.

Counsel was reminded that the Committee's Scheduling Order of May 26, 2010 remains the operative Order. Per that Order, all remaining pre-trial motions must be filed by 5:00 p.m., June 15, 2010. The Scheduling Order requires that applications for modification of the Scheduling Order be filed two (2) business days prior to the applicable due date. Thus, any application to modify the Scheduling Order as it relates to the June 15, 2010 motions deadline must be filed by 5:00 p.m., Friday, June 11, 2010. Moreover, counsel was advised that if an application for modification is filed, any opposition must be filed by noon on Monday, June 14, 2010.

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After a lengthy discussion where both parties, the Committee staff and Senate Legal Counsel expressed concerns regarding the conflict of interest stemming from Mr. Westling's representation of Judge Porteous in this matter and his concurrent representation of Louis and Lori Marcotte and their company, Bail Bonds Unlimited, Inc., in a separate civil matter, the Committee requests that counsel for Judge Porteous provide a detailed analysis of Mr. Westling's representation conflict, how the conflict is being screened, and how the screening permits him to continue representation of both clients under the applicable rules of professional conduct. This is to be filed by noon on Monday, June 14, 2010.

We also discussed the logistics of the Committee issuing subpoenas and requesting immunity orders. The filings made by the parties to date are preliminary and are subject to supplementation; however, if either party seeks assistance in securing the presence of a witness or obtaining immunity for a witness, the Committee requires additional information and adequate notice. Counsel was informed that under the Scheduling Order, the Committee must vote on all immunity requests at the July 1, 2010 hearing in order to allow time for review by the Attorney General and consideration by the court. Therefore, all immunity requests must be filed by 5:00 p.m., June 30, 2010. Additionally, all subpoenas must be issued with sufficient time for service on the witnesses. Thus, all subpoena requests must be filed by 5:00 p.m., July 13, 2010. Each subpoena request must be accompanied by a proffer sufficient to apprise the Committee of the scope of that witness's testimony and must include contact information for each witness. I cannot stress enough that any subpoena and immunity requests should be made as expeditiously as possible.

Counsel was also notified that the Committee staff will be recommending that the Committee issue an additional Order adding the following deadlines to the existing Scheduling Order:

- **June 18, 2010 - Stipulation Requests**
- **June 25, 2010 - Responses to Stipulation Requests**
- **July 2, 2010 - Replies to Responses to Stipulation Requests**

I appreciate the cooperation exhibited by counsel regarding these matters.

Sincerely,

DERRON R. PARKS
Staff Director

cc: Morgan Frankel
Senate Legal Counsel

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

June 13, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous

Dear Senator McCaskill and Senator Hatch:

In the June 10, 2010 meeting with Senate and House counsel, I was asked to address concerns raised by Senate Counsel whether it was sufficient under governing legal ethics rules to wall off Mr. Richard Westling and the Ober/Kaler firm from defense of Judge Porteous regarding Impeachment Articles II and IV. I was asked to supply our rationale for recommending that Mr. Westling remove himself and Ober/Kaler from matters related to Louis and Lori Marcotte as opposed to a complete withdrawal from the case. I outline roughly below my analysis of the conflict and the basis for the proposed use of a firewall.

Factual Background

The conflict arises from Mr. Westling's prior (and continuing) representation of Louis and Lori Marcotte. As we understand it, Mr. Westling was first contacted around June 2002 concerning a federal grand jury investigation of the Marcottes and their corporation, Bail Bonds Unlimited, Inc. ("BBU") in New Orleans, Louisiana. In early 2004, he began representing Louis Marcotte individually in an effort to resolve the on-going criminal investigation by negotiating a plea agreement with the government. A plea agreement was reached and Louis Marcotte pleaded guilty on March 18, 2004. As part of that plea agreement, Louis Marcotte agreed to cooperate with the government, which continued until 2006. As part of this cooperation, Mr. Westling participated in various meetings with the government, including but not limited to a meeting with the Justice Department's Public Integrity Section which was investigating Judge Porteous. On September 18, 2006, Louis Marcotte was sentenced in the case *United States v. Louis*

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H STREET, NW • WASHINGTON, DC 20052 • 202-994-7001 • 202-994-9811

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M. Marcotte, III, Criminal No. 04- 061 (E.D. La.) to serve 37 months in prison.

In addition to the criminal matter, in 2005, Mr. Westling also assumed representation in another case involving the Marcottes. In September 2005, Louis Marcotte, Lori Marcotte, and their corporations were sued by a competing bail bondsman for alleged violations of the Civil Rights Act, the Sherman Antitrust Act, and RICO in a civil matter entitled *Bartholomew v. Bail Bonds Unlimited, Inc.*, No. 2:05-cv-04165-ILRL (E.D. La.). Mr. Westling continues to represent the Marcottes and their entities in this civil action. The allegations of the complaint were based upon the same underlying facts which formed the basis for Marcotte's guilty plea. We understand that the civil case, however, does not involve any allegations directly related to Judge Porteous.

In September 2008, Mr. Westling agreed to represent Judge Porteous in the House Impeachment Task Force Inquiry and has continued to represent him to this day.

The conflict posed by Mr. Westling's representation of the Marcottes and Judge Porteous was raised during the House proceedings. On October 29, 2009, the House Impeachment Task Force raised the matter with Mr. Westling in a letter, stating:

> As you know, Judge Porteous' relationship with Louis Marcotte and Lori Marcotte may be at issue in the pending Impeachment Inquiry being conducted by the Task Force for the House of Representatives, Committee on the Judiciary, and either or both may be called as witnesses at a hearing adverse to Judge Porteous.
>
> As you are also aware, because of your duties of loyalty to current and prior clients and your duties to protect confidential information, if there were to be a hearing where the relationship between the Marcottes and Judge Porteous is at issue, there would be significant conflict of interest issues arising from your participation. Further, those conflict issues may be implicated by your participation in the formulation of a factual defense of Judge Porteous where you are constrained from providing advice due to your ongoing ethical obligations.

Thereafter, Mr. Westling wrote to Louis and Lori Marcotte explaining the possible conflict issues and seeking the waiver of any possible conflict. They declined to consent to such a waiver. Mr. Westling also sought to have another lawyer, Rémy Voisin Starns, appear in the House proceedings when Louis Marcotte was called as a witness. When Mr. Starns was not able to be present, Mr. Westling elected to avoid any immediate conflict by leaving the proceedings. Judge Porteous continued without an attorney during that testimony.

The House later approved Article II that specifically referenced the matters related to the Marcottes:

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> G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court Judge. That conduct included the following: Beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, and continuing while he was a Federal Judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail 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

The House also approved Article IV, which again references the Marcotte matter. Article IV reads in pertinent part:

> . . . 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

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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.

After the impeachment of Judge Porteous on March 11, 2010, the United States Senate took up the matter on March 17, 2010. The conflict pertaining to Mr. Westling's representation of the Marcottes was raised by House and Senate Counsel and placed on the agenda for a meeting of all counsel on May 18, 2010. Around this time, Judge Porteous, through Mr. Westling, asked me to join the defense team in part to review this alleged conflict of interest as well as to serve as trial counsel. Having just entered the case, I agreed to attend the May 18th meeting where the conflict was raised by opposing counsel. At that time, Mr. Westling informed the Senate and House counsel that I was asked to examine the conflict. At that meeting, Mr. Westling explained his prior dealings with the Marcottes and stated that, at most, he believed the conflict rules would require him to avoid direct or cross examination of the Marcottes. He also stressed that, when he took the case, he did not have reason to believe that the Marcottes would play a role in the impeachment proceedings. He explained he had reached that conclusion by specifically reviewing the record of the proceedings before the Special Investigatory Committee of the Fifth Circuit Judicial Council and the Report of the Fifth Circuit Judicial Council to the House of Representatives. Once the conflict was raised in the House, he declined to be present during the Marcotte testimony and later asked me to provide an independent review of the ethics issue. He explained that he was working on the case on a pro bono basis and was always open about his representation of the Marcottes.[1]

Neither House nor Senate Counsel has demanded specific action or withdrawal. Indeed, House Counsel indicated that they were not pressing the matter and expressed satisfaction with Mr. Westling continuing to participate in the case. Following the meeting, I started a review of the requirements under the District of Columbia (D.C.) Bar rules. I did not review the matter under Louisiana Bar rules.

Governing Conflict of Interest Rule

The D.C. Bar rules address possible conflicts of interest presented by multiple past or present clients in Rule 1.7.[2] The rule in its entirety states:

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[1] At the most recent meeting with House and Senate Counsel, Mr. Westling further disclosed that Louisiana lawyers Sam Dalton and Rémy Voisin Starns – also advising Judge Porteous – have potential representational conflicts with parties or witnesses in this case. It was suggested at the meeting that they withdraw as counsel in light of those possible conflicts and that matter has been raised with them. Their role, however, has been to advise Judge Porteous, and they will have no role in the trial.

[2] This rule is, in my view, the relevant provision because of the ongoing representation by Mr. Westling of the Marcottes. *See, e.g., IBM Corp. v. Levin.* 579 F.2d 271, 281 (3d Cir. 1978). However, Rule 1.9 also addresses conflicts and specifically

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Rule 1.7—Conflict of Interest: General Rule

(a) A lawyer shall not advance two or more adverse positions in the same matter.

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation;

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if

(1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and

(2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

(d) If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

Analysis of the Conflict

My analysis of the conflict raised in this case begins with the view that there is indeed a conflict of interest in Mr. Westling's prior (and continuing) representation of the Marcottes. As with a prior conflict of interest of the House Counsel,[3] a continuance has

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states "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."

[3] This would not be the first delay based on a conflict of interest for one of the primary attorneys involved in this matter. The impeachment proceedings in the House were delayed three months after it was determined that Mr. Baron, who was hired to

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been requested in this case. The issue, in my view, is not whether there is a conflict but whether the conflict can be cured in a way that allows Mr. Westling to contribute to Judge Porteous' defense, as Judge Porteous clearly desires. I concluded that the conflict could not be cured simply by having Mr. Westling refrain from participating in direct or cross examination of the Marcottes. This left the options of either Mr. Westling's complete withdrawal from the case, thus depriving Judge Porteous of Mr. Westling's substantial preparation and experience in the case so far, or the use of a firewall to bar Mr. Westling from working on Marcotte-related matters. While compelling arguments could be made for either option, I was mindful of the desire of both the Senate and Judge Porteous for a final resolution of this matter without unnecessary delay as well the concern over Judge Porteous's loss of the effective assistance of counsel. In fact, the Senate Impeachment Trial Committee's insistence on maintaining its schedule and trying the impeachment case in the next several months was a significant factor in my analysis. Therefore, I recommended a firewall, or partial withdrawal, that would allow Mr. Westling to continue to work on the case as co-lead counsel while protecting the Marcottes by having only new counsel work on Marcotte-related matters.

A. Is this a Rule 1.7 (a) Conflict?

The first issue raised under D.C. rules is whether this is a Rule 1.7(a) conflict.[4] To

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oversee the probe for the House, was subject to House conflict of interest rules that threatened to cut into his law firm's lobbying business. Brice Alpert, *Conflict of Interest Delayed Porteous Impeachment Probe*, Times-Picayune, April 27, 2009. It was reported that Mr. Baron's firm, Holland and Knight, realizing the potential losses to its lobbying business as a result of his involvement in the case, told Baron in January that he should drop the Judiciary Committee work or join another law firm. *Id.* Mr. Baron decided to leave the firm and keep the case. *Id.* It was also reported that and additional cause of the delay was that three lawyers from Holland & Knight, who helped Baron with the investigation last fall, decided to remain at the firm. *Id.* As a result, Mr. Baron sought time for new associates assigned to the case to get up to speed with the facts underlying the matter.

[4] The D.C. Bar sought to emphasize the absolute prohibition in Rule 1.7(a) to make clear that withdrawal is mandatory. In *Griva v. Davison*, 637 A.2d 830 (D.C. 1994), the Court quoted the following language from the legislative history to the D.C. rule:

> The absolute prohibition provided in subparagraph (a) [of the D.C. Bar Committee's recommended Rule 1.7] is a codification of the absolute prohibition held to exist in case law decided under the "appearance of impropriety" test. *See, e.g., Westinghouse v. Kerr-McGee*, 580 F.2d 1311 (7th Cir. 1978); *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). The standard stated in the Committee's proposal is, however, far preferable to the "appearance of impropriety" test because [the Committee's proposal] is stated in clear and objective terms. It is also preferable to the ABA draft because the ABA rule does not make clear in so many words that there are some types of representation that are, in fact, absolutely forbidden.

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the extent that it is viewed as falling under this provision, total withdrawal would appear necessary for both Mr. Westling and his firm. *See Griva v. Davison*, No. 92-CV-992 (D.C. Ct. App. Feb. 10, 1994) ("Rule 1.7(a) mandates an absolute prohibition of dual or multiple representation when the lawyer would represent clients with 'adverse' 'position[s]' in the 'same matter.' Client consent cannot cure such a conflict.").

The rule states that "[a] lawyer shall not advance two or more adverse positions in the same matter." In my view, the interests of the Marcottes are presumptively adverse to those of Judge Porteous. The factual assertions made by the Marcottes are the basis for Article II and part of Article IV. However, Mr. Westling can claim that this conflict falls outside of Rule 1.7(a), including the argument that much of this analysis is speculative as to the ultimate positions that would be taken in the case vis-à-vis the Marcottes.[5]

The D.C. Bar has stressed that although Rule 1.7(a) is "absolute," its "reach . . . is relatively narrow." D.C. Bar Legal Ethics Comm., Op. 217 (1991). The provision "relates only to actual conflicts of position, not to mere formalities . . . [A] lawyer is not absolutely forbidden to provide joint or simultaneous representation if the clients' positions are only nominally but not actually adverse." D.C. Rules of Professional Conduct 1.7(a), cmt. 6; *see also Iacangelo v. Georgetown University,* 2010 U.S. Dist. LEXIS 44721 (May 7, 2010).

The first question related to 1.7(a) is whether the Impeachment of Judge Porteous is "the same matter" as Mr. Westling's representation of the Marcottes. Often such conflicts arise in the same case where it is clearly "the same [legal] matter." However, the language could be construed apply more broadly to the same factual matter. The comments to Rule 1.7(a) state that "Rule 1.7(a) sets out the limited circumstances in which representation of conflicting interests is absolutely prohibited even with the informed consent of all involved clients." According to the D.C. Bar's Legal Ethics Committee, Rule 1.7(a) applies only to situations where a lawyer **actually** asserts two incompatible arguments on behalf of two different clients on the same issue in the same **proceeding**:

> Rule 1.7(a) precludes a firm that takes a position on behalf of Client A

> Thus, this court's Rule 1.7 (a) mandates an absolute prohibition of dual or multiple representation when the lawyer would represent clients with "adverse" "position[s]" in the "same matter." . . . Client consent cannot cure such a conflict."

[5] One must be mindful, however, that actual harm is not viewed as the test. As noted by the Michigan Bar, "[t]o establish an ethical violation under Rule 1.7(a), one does not have to prove prejudicial impact, negative result, or an exchange of confidential information. The only prerequisites for the establishment of an ethical violation are those clearly set forth in the rule itself. . . . The 'directly adverse' language does not imply that a bad result must occur before representation is impermissible. It is the interests of the clients with which the rule is concerned, not the result obtained." Michigan Committee on Ethics in Opinion RI-218.

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> from representing Client B in the same proceeding only if Client B actually takes or will take an adverse position on the issue. If the benefits of joint representation are sufficiently great or the likelihood of prevailing on a position that would increase its individual recovery is sufficiently small, each of the clients might after "consultation" choose to forgo such arguments. . . . Accordingly, if Client B chooses to forgo taking an adverse position on the particular issue, Rule 1.7(a) would be inapplicable by its terms. Rule 1.7(b) governs in any case in which simultaneous representation of clients with potentially adverse interests would not actually require the firm to take inconsistent positions in the same proceeding.

D.C. Bar Legal Ethics Comm., Op. 217 (emphasis added); *see also Iacangelo v. Georgetown Univ.*, 2010 U.S. Dist. LEXIS 44721 (D.D.C. May 7, 2010).

There is also a question of whether Mr. Westling, if he continues to represent Judge Porteous only in connection with Articles I and III, would be in a position of advancing two or more adverse positions in this case. Moreover, even if Mr. Westling is viewed as taking two adverse positions in the case, there remains the question of whether Mr. Westling is representing Judge Porteous in the "same matter" if he has no involvement in any Marcotte-related matters and will not offer advice or argument under either Article II or Article IV. *But cf. Florida Ins. Guar. Ass'n., Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255, 259 (S.D. Fla. 1990) ("Loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent even if the adverse representations are wholly unrelated."). Frankly, there are strong arguments on either side of the applicability of Rule 1.7(a). To the extent that it is found by the Senate to be applicable, complete disqualification is the obvious remedy. However, Rule 1.7(b) appears to have a closer nexus to the facts in this case.

B. Is This A Rule 1.7(b) Conflict?

To the extent that this conflict is not a Rule 1.7(a) conflict, it is most certainly a conflict under Rule 1.7(b). Rule 1.7(b)(1) also uses "the same matter" limiting language and could be distinguished from this case on the same grounds as discussed above – again depending on a broad or narrow reading of the language.

Rule 1.7(b)(2) or Rule 1.7(b)(3) appear applicable even if Rule 1.7(b)(1) does not apply. Mr. Westling's dual representation would raise questions over whether it would result in a less than zealous representation of Judge Porteous vis-à-vis the Marcottes (Rule 1.7(b)(2)) or, if zealous, might undermine the position of the Marcottes by challenging their prior sworn testimony. I believe that, absent the proposed firewall, the conflict would violate either Rule 1.7(b)(2) or Rule 1.7(b)(3) or both. While still speculative, it is possible that Judge Porteous could challenge the sworn assertions of the Marcottes – producing an obvious adversity of interests.

C. The Need for Consent

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Regardless of which provision of Rule 1.7(b) applies, Mr. Westling would have to satisfy Rule 1.7(c). First, under Rule 1.7(c)(2), Mr. Westling would have to "reasonably believe[ ] that [he] will be able to provide competent and diligent representation to each affected client." Mr. Westling has indicated that he believes that he can do so. Also, however, under Rule 1.7(c)(1), he must secure from both the Marcottes and Judge Porteous "informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." *See* ABA Committee on Ethics & Professional Responsibility, Formal Opinion 384 (1994) ("If the lawyer cannot reasonably conclude that the representation will not be adversely affected, if he is unwilling to make the necessary disclosure to the client, or if the client does not consent, withdrawal would be required."). While the Marcottes have reportedly not objected to Mr. Westling representing Judge Porteous in this matter, they declined to provide formal consent in satisfaction of Rule 1.7(c)(1).

D. The Basis for a Claimed Exception

This analysis would appear to establish there is a conflict in the case absent satisfaction of the exception under Rule 1.7(d). To the extent that this is a conflict under Rule 1.7(b)(2-4), no exception is allowed under the rules. Since I view those provisions as applicable, there is not a basis for an exception in this case. As he stated in the last meeting with Senate and House Counsel, Mr. Westling takes the position that, under Rule 1.7(b)(1), the conflict was "not reasonably foreseeable" from his reading of the record of the Fifth Circuit before assuming representation, having seen no reliance on the Marcotte matter. There is support for this claim since it was not until the House proceeding that the Marcottes appear to have taken on such a central role in the case. On the other hand, given the early articles linking Mr. Marcotte and Judge Porteous as early as 2004, an exception under Rule 1.7(b)(1) – even if it were the only basis for the conflict – would be highly questionable.

Possible Remedies for the Conflict

As noted above, there were three possible options for addressing the Westling/Marcotte conflict: (1) avoiding direct or cross examination of the Marcottes, (2) the use of a firewall or partial withdrawal to separate Mr. Westling and his firm from any Marcotte-related matters, and (3) complete withdrawal. Obviously, the Senate must also determine whether it believes that a complete withdrawal is necessary since it is sitting as an effective court in this matter. See, e.g., *S.D. Warren Co. v. Duff-Norton,* 302 F. Supp. 2d 762, 766 (W.D. Mich. 2004) ("The power to disqualify an attorney from a case is incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession.").

Moreover, Judge Porteous accepts that the House Managers have a role and obligation to challenge what they consider to be a failure to comply with governing ethics rules. To that end, all parties must resolve what they consider to be mandatory elements of the conflicts rules including whether a firewall can be used in this case. Courts often order corrective measures to ensure that the public is assured that it has maintained " the

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integrity of the legal profession and its high standing in the community." *Int'l Bus. Mach. Corp. v. Levin,* 579 F.2d 271, 283 (3d Cir. 1978). Clearly, a constitutionally mandated trial requires the same, if not higher commitment, to such ethical matters.

The first option was based on an American Bar Association opinion suggesting that such conflicts could be resolved by avoiding such examination. *See* ABA Formal Ethics Opinion, No. 92-367. As indicated above, I felt that this opinion and the underlying case authority were distinguishable from this case. The absence of consent from the Marcottes also weighs heavily in such a determination. *Cf.* DC Ethics Opinion 269 (1997) (attorneys can continue representation of one client in a joint representation if he terminates the representation and the terminated client consents). The avoidance of direct and cross examination was, in my view, insufficient to satisfy the governing ethics rules and fully protect the interests of the Marcottes because it would leave open possible conflicts (conscious or unconscious) related to strategy as to those specific Articles and the sharing and review of information.

Serious consideration was given to the third option of complete withdrawal. In the absence of a client waivers or an exception under the rules, the rule appears to contemplate withdrawal. *See* DC Ethics Opinion 248 (1994).

However, complete disqualification or withdrawal of Mr. Westling and his firm raise an additional and perhaps equal ethical concern. If Mr. Westling and his firm were disqualified or removed, Judge Porteous would be deprived of the only counsel who has formally represented him for the past two years in the buildup to this impeachment trial. Mr. Westling and his associates have substantial experience in this matter, including knowledge related to the pertinent documents, witnesses, and testimony. Moreover, Mr. Westling was selected by Judge Porteous and courts give considerable weight to an accused's choice of counsel. The Senate Impeachment Trial Committee and the House Managers have insisted on a trial before the August recess. This was made clear in the May 18th meeting that I attended. That schedule magnifies the harm to Judge Porteous and weighed heavily in my proposal for a partial withdrawal in the case. If Mr. Westling and his firm are removed or disqualified, new counsel will be placed at a significant disadvantage given their limited knowledge of the facts and circumstances underlying the matter. Such a result would make a fair trial virtually impossible since new counsel could not hope to review fully the underlying claims and record – let alone prepare for a trial on four separate Articles of Impeachment, given the current (or even slightly extended timeframe). In effect, Judge Porteous would be deprived of effective assistance of counsel and fundamental due process, causing him serious and actual harm. For that reason, courts have held that the "the extreme sanction of disqualification should only be utilized when there is a "reasonable possibility that some specifically identifiable impropriety" actually occurred, and where the public interest in requiring professional conduct by an attorney outweighs the competing interest of allowing a party to retain counsel of his choice. *El Camino Resources, Ltd v. Huntington National Bank,* 623 F. Supp. 2d 863, 875 (W.D. Mich. 2007) quoting *Id.* (quoting *SST Castings, Inc. v. Amana Appliances, Inc.,* 250 F. Supp. 2d 863, 865 (S.D. Ohio 2002)).

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Nonetheless, in the interest of complete candor, I believe a compelling argument can be made, with sufficient time to prepare a defense for new counsel, that there is no alternative to complete withdrawal. Courts have cited the possibility of a "leaking" firewall and the need for consent from all parties to avoid withdrawal. *See, e.g., In re Cendent Corporation Securities Litigation*, 124 F. Supp. 2d 235 (D. N.J. 2000). However, with the current abbreviated schedule for trial, it is difficult to view complete withdrawal as an option when it would protect the Marcottes from a possible conflict at the cost of an actual denial of a fair trial for Judge Porteous.[6]

A remaining option is the implementation of a robust firewall that removes Mr. Westling and his firm from any activity related to the Marcottes and Articles II and IV. While firewalls are more commonly used for law firms as opposed to trial teams, Mr. Westling could be withdrawn from all parts of the case related to the Marcottes – half of the trial matters.[7] I, along with the attorneys from Bryan Cave, would be solely responsible for all matters related to Articles II and IV, as well as any issues related to the Marcottes, ensuring that Mr. Westling does not violate any duties owed to the Marcottes while protecting Judge Porteous' due process rights. This proposal would require some overlap in briefing (a small inconvenience when compared to the alternatives). Although certain motions and arguments will apply to all four articles of impeachment, we believe that counsel and the Committee can navigate these difficult waters. This proposal might also, for the purposes of efficiency, require that the Senate Impeachment Trial Committee waive certain procedural rules that limit questioning of a witness to one attorney for each side (Rule XVII).[8] For example, if Mr. Westling calls a witness in relation to Article I and subsequently examines the witness, I might also seek to question the same witness if something is revealed that relates to the Marcotte or Article II and IV. I, along with the

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[6] As he stated in the last meeting with Senate and House Counsel, Mr. Westling has represented that, while the Marcottes were not willing to sign a waiver or consent form, they did not object to his representing Judge Porteous in the impeachment proceedings.

[7] In a conventional case, this matter would likely be resolved in addressing misjoinder questions. In reality, this case is like the consolidation of separate cases since it is likely that all of these articles would not have been tried together in a conventional trial. In such a case, there would be a simple motion for severance of some of the articles under Rule 8 of the Federal Rules of Criminal Procedure. In such a circumstance, a court could order separate trials on misjoinder grounds and, as a byproduct, resolve the representational issue. Obviously, such misjoinder motions are not made in the impeachment process. Fed. R. Crim. Pro. 8 ("The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan."); *see also United States v. Lane,* 474 U.S. 438 (1986).

[8] This would not unique. The Senate Impeachment Trail Committee has already waived one of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials. At the April 13, 2010 Organizational meeting, the Committee waived Rule XIX, which required Senators to put all questions they had in writing.

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attorneys for Bryan Cave would be solely responsible for trial strategy related to Article II and IV and would take an equal role, along with Mr. Westling in relation to Articles I and III.

Senate Counsel also asked how the Committee can be assured that future issues related to Mr. Westling's conflicts are not subsequently raised relating in further delay. Of course, we can provide no assurance but we do feel that we have proposed a course that would minimize such conflict – short of a complete disqualification. As noted above, courts have ordered complete withdrawal out of a concern for "leaking" firewalls. Given the segregated issues, we believe such a firewall could be maintained.

Around June 4, 2010, after being brought into the case for this purpose two weeks earlier, I discussed these issues with Mr. Westling and the legal team in a series of telephone calls. As a result, we agreed that: (1) Mr. Westling and I would continue as co-lead counsel in the case; (2) Mr. Westling and the Ober/Kaler law firm would be removed from any Marcotte-related matters, including the entirety of Article II and any such matters under Article IV (subsequently expanded to cover all aspects of Article IV); (3) we would invite the law firm of Bryan Cave LLP to join the case as new counsel to work in the case, including but not limited to those excluded areas for Mr. Westling and his firm; and (4) Mr. Westling and his firm would be excluded from examination of individuals whose testimony would encompass Marcotte-related matters as well as such arguments in opening or closing the trial.

A decision was made by the team and Judge Porteous on June 8, 2010 to adopt my recommended course of action. On that day, Mr. Westling contacted the Senate staff to inform them that the defense team had undergone a major change and that I would be in contact with them. Due to the conflict and the addition of new counsel, the legal team worked to try to address the designations scheduled to be filed that week. Senate Counsel informed Mr. Westling that the Committee would not allow more than a day's delay in receiving the designations due for Article I, III, and IV. Senate Counsel also declined to provide more than one additional day's extension to the new counsel to file designations on Article II matters. It was made clear to counsel that the failure to do so would result in significant penalties for Judge Porteous despite objections that the Senate was forcing new counsel to file pleadings largely in the blind. Given no alternative, new counsel agreed to submit both filings while reserving the right to amend the preliminary filings when once they were allowed an opportunity to familiarize themselves with the underlying facts.

The conflicts question again was addressed in the meeting of counsel on June 10, 2010. At that time, Senate Counsel expressed skepticism over the use of a firewall to address the conflict posed by Mr. Westling's prior or continuing representation. I was asked to explain why complete withdrawal was not mandatory in this circumstance. Those questions are addressed above. In addition, I was asked whether, even if withdrawal by Mr. Westling was not mandatory, conflicts would continue despite the firewall, particularly with regard to Article IV. Of course, there can be no assurance that collateral conflicts will not arise but the proposed firewall seemed to be the best option

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for preserving adequate counsel for Judge Porteous while maintaining something approaching the current schedule.[9] The previous firewall extended to that part of Article IV that dealt with the Marcotte matter. However, in order to maintain the clearest possible lines and to offer further assurance for conflict avoidance, the firewall has been extended over the entirety of Article IV. Under this arrangement, Mr. Westling and his firm will be confined to litigation under Article I and Article III.

On a final note, I wish to emphasize that from the moment Mr. Westling asked me to look at this matter, he has repeatedly expressed his willingness to do whatever is necessary to protect his clients and to satisfy his ethical obligations, including (if necessary) withdrawal from the case. *Cf.* Model Rules Rule 1.7 comment (1983) (stating that, "when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot . . . provide representation on the basis of the client's consent."). In meetings with House and Senate Counsel, he has been exceptionally open and candid about the conflict and his prior actions. He took this case pro bono and has worked without compensation to guarantee representation for Judge Porteous. While different people can reach reasonable but different conclusions as to the demands of the D.C. Bar rules, the record shows that he was responsive to concerns of a conflict of interest and struggled in good faith to try to resolve these questions without depriving Judge Porteous of the effective assistance of counsel.

The Senate Counsel obviously can render a judgment on whether withdrawal of Mr. Westling and his firm is necessary under Rule 1.7. I hope that the Committee appreciates that the firewall created in this case was an effort to minimize the delay that would be caused by the addition of new counsel in the case while seeking to protect Judge Porteous' fundamental due process interests. We are prepared to meet with Counsel to resolve this matter at your earliest opportunity so that we can resolve both representational and scheduling matters in this case.

Respectfully,

Jonathan Turley /PSM

Jonathan Turley
Co-Lead Counsel to Judge G. Thomas Porteous

cc: Alan I. Baron, Esq.
Mark Dubester, Esq.
Harold Damelin, Esq.
Morgan Frankel, Esq.

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[9] As all parties are aware, New Counsel has requested an extension of time to complete preparation of Judge Porteous' defense in connection with Articles II and IV, which still would permit completion of the trial during calendar 2010. A further extension will be required if New Counsel must also take on the defense of Judge Porteous as to Article I and III.

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR A CONTINUANCE

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and files this Motion for a Continuance of All Proceedings, including the trial dates, as listed in the Committee's May 26, 2010 Scheduling Order.[1] There is good cause for this Motion and Judge Porteous will suffer considerable and actual prejudice if this Motion is denied.

FACTUAL BACKGROUND

Judge Porteous has retained new counsel to represent him in relation to Article II and Article IV of the Articles of Impeachment (hereinafter "New Counsel").[2] This change was prompted initially by House and Senate counsel's suggestion of a conflict of interest related to Article II arising from other representations by lead counsel Richard Westling and his law firm. After New Counsel conducted an independent review of the issue, they determined that, at a minimum, a bifurcation of representation was necessary, with New Counsel taking responsibility

[1] In its May 26, 2010 Scheduling Order, the Committee refers to the "trial" as "evidentiary hearings." For purposes of this motion, those terms will be used interchangeably.

[2] "New Counsel" consists of co-lead counsel Professor Jonathan Turley, retained a few weeks ago, and Daniel Schwartz, P.J. Meitl, and Daniel O'Connor of the law firm of Bryan Cave LLP, retained just this week.

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for Article II. At the June 10, 2010 Meeting of All Counsel, Senate Legal Counsel also raised concerns over whether the firewall put into place following this review was sufficient to avoid a potential conflict arising from Mr. Westling's continued representation of Judge Porteous regarding the other Articles of Impeachment. Senate Counsel also expressed specific concern that Article IV was not formally within the firewall as it also raises issues related to the Marcottes. In reality, the firewall already extended to any matters related to the Marcottes, including any such issues under Article IV. However, the defense team agrees that the firewall should expressly exclude Mr. Westling from involvement with both Article II and Article IV. While Mr. Westling and the Ober Kaler firm already were segregated, under the agreement of defense counsel, from any Marcotte-related matters under Article IV, the entire article has now been placed under the New Counsel's responsibility.[3] New Counsel will continue to represent Judge Porteous on the other Articles of Impeachment, along with Mr. Westling. New Counsel has not been privy to any confidential files or information from Mr. Westling's representation of the Marcottes. This motion for continuance is made with regard to all four Articles of Impeachment.

As a result of this bifurcation of representation as to the Articles of Impeachment, New Counsel will not have the benefit of the experience and preparation of Mr. Westling and the other lawyers who have been working on this matter for the past year with regard to Article II and Article IV. In effect, New Counsel are not only brand new to the matter, but they must also start over and review the facts and circumstances related to Articles II and IV from the beginning. This is an arduous and complex task for New Counsel, particularly because Articles

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[3] This matter will be addressed more fully by new counsel in a conflicts analysis to be submitted by Monday, June 14, 2010, at noon.

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II and IV are premised on factual accusations that were never pursued or examined in a criminal court.

Although New Counsel is committed to working as diligently and quickly as possible, the current deadlines imposed by the May 26, 2010 Scheduling Order do not allow for proper and ethical representation for Judge Porteous as to Article II and IV. Indeed, requiring the filing of important pre-trial motions under the current schedule would require New Counsel to violate the requirements of governing ethical standards. For example, Rule 1.1 of the D.C. Bar's Rules of Professional Conduct mandates that:

> [c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Under the current schedule, "all other pre-trial motions" are due by next Tuesday, June 15, 2010. Based on a review of the scheduling order, this category of pleadings includes, among other pleadings, all (1) dispositive motions (*i.e.*, motions to dismiss), (2) motions in limine, and (3) other unique impeachment related motions (*i.e.*, motions for funding). Some of the New Counsel were brought into this case only on Wednesday, June 9, 2010 – less than a week before the deadline – and have spent the first several days of their representation, at the demand of the Committee, working on preliminary designations, this Motion for a Continuance, and the letter detailing the ethical analysis of the conflict issues, as well as reviewing previous filings and the facts underlying the allegations. New Counsel will be unable to adequately review all relevant facts and materials to ensure that all necessary and proper motions are filed by the currently imposed deadline.

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Judge Porteous's due process rights would be violated by the rigid retention of the current deadlines. As Judge Sporkin of the United States District Court for the District of Columbia stated, impeachment trials "must be conducted in keeping with the basic principles of due process that have been enunciated by the court and ironically, by the Congress itself." *See Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992).[4] Judge Sporkin went on to state that "[f]airness and due process must be the watchword whenever a branch of the United States government conducts a trial, whether it be in a criminal case, a civil case or a case of impeachment," and that "there is no question but that due process protections apply to congressional activities." *Id.* at 492 and 504.

At the Committee's April 13, 2010 Organizational Meeting regarding Judge Porteous's Impeachment, Senator and Chair of the Committee McCaskill echoed this notion, stating that the "guiding force of this matter has to be due process."[5] Senator and Vice-Chair of the Committee Hatch similarly stated that "we must proceed with the utmost seriousness and dedication to fairness." *Id.*

As the Supreme Court stated in *Powell v. Alabama*, 287 U.S. 45, 59 (1932), "[t]he prompt disposition of [an action] is to be commended and encouraged. But in reaching that result a defendant ... must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." The Eighth Circuit stated the point even more precisely, noting that "it has long been recognized that an accused's right to due process and effective

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[4] In the same ruling, Judge Sporkin vacated Judge Hastings's impeachment by the Senate, a ruling that was reversed by the U.S. Court of Appeals and remanded for reconsideration in light of the Supreme Court's decision in *Walter Nixon v. United States*, 506 U.S. 224 (1993). On remand, Judge Sporkin dismissed Hastings's lawsuit as nonjusticable (as opposed to violative of due process concerns). *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993).

[5] Rules and Administration Meeting of the Impeachment Trial Committee Against Judge G. Thomas Porteous, Jr., April 13, 2004, http://www.senate.gov/general/impeachment_hearing_porteous_041310.htm

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assistance of counsel requires adequate time for preparation and presentation of a defense." *Heffernan v. Lockhart*, 834 F.2d 1431, 1437 (8th Cir. 1987).

These issues and concerns rise to the level of "good cause" – the standard employed by Courts in considering Motions for Continuances.[6] It is clear that, under the present circumstances, Judge Porteous would suffer considerable and actual prejudice if this Motion is denied.

PROPOSED SCHEDULE

The Committee asked that counsel for Judge Porteous provide a proposed schedule along with its Motion for a Continuance.[7] Judge Porteous has done so below but notes that the proposed schedule is exclusively premised on the retention of Richard Westling and his firm as counsel for Judge Porteous as to Articles I and III. If the Committee determines that Mr. Westling and his firm are somehow disqualified from continuing as counsel for Judge Porteous, the schedule below would need to be extended even further, as New Counsel (if appointed to handle the fact and document-intensive Articles I and III) would require significant additional time. With that caveat, Judge Porteous suggests the following schedule to replace the May 26, 2010 Scheduling Order:

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[6] Among other factors considered by Courts in considering Motions for Continuances are whether (1) the defendant's motion for a continuance was the first and only request for a continuance; (2) counsel was permitted hardly any or a very short time for trial preparation, without any fault on the part of the defendant; (3) the charge against defendant was a grave one; and (4) the case was an intricate one, involving difficult legal questions. *See* Carl T. Drechsler, *Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance*, 73 A.L.R.3d 725. All of these standards are met in the instant case.

[7] As noted in the last meeting, the current schedule was approved by Mr. Westling in an earlier meeting with the express reservation that discovery would have to be produced for review by the defense. Discovery still has not been fully produced – forcing the defense to file pre-trial motions before seeing the full evidence in the case. It was also premised on Mr. Westling continuing as counsel vis-à-vis all four Articles.

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1. Dispositive Motions Due	July 14, 2010
2. Responses to Dispositive Motions Due	July 28, 2010
3. Committee Hearing on Dispositive Motions	August 4, 2010
4. Committee Rulings on Dispositive Motions Due	August 18, 2010
5. Completion of All Depositions	August 20, 2010
6. Requests for Immunity Orders and Subpoenas Due	August 20, 2010
7. Motions in Limine, Proposed Stipulations, and All Other Pre-Trial Motions Due	August 20, 2010
8. Responses to Motions in Limine, Responses to Proposed Stipulations, and Responses to All Other Pre-trial Motions Due	September 3, 2010
9. Committee Hearing on Motions in Limine and All Other Pre-Trial Motions	September 15, 2010
10. Pre-Trial Statements and Exhibits Due	September 22, 2010
11. Committee Rulings on Motions in Limine and All Other Pre-Trial Motions	September 24, 2010
12. Commencement of Committee Evidentiary Hearings	September 27, 2010
13. Post-Hearing Briefs Due	2 Weeks After Conclusion of Hearings

Judge Porteous proposes that this schedule apply to all counsel in the case. For example, if Mr. Westling is retained as counsel for Articles I and III, New Counsel sees no reason to implement one schedule for Articles I and III and another for Articles II and IV. As such, the deadlines for both Mr. Westling and the House Managers would be extended according to the schedule proposed above.

The proposed schedule would result in only a fifty-seven day continuation of the evidentiary hearings while still allowing the hearings to take place a mere six months after the

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House Managers presented the Articles of Impeachment to the Senate. This would be far less than the eleven months that passed between the House Managers presentation of the Articles of Impeachment against Judge Alcee Hastings on August 9, 1988, and the commencement of his impeachment trial proceedings on July 10, 1989. Applying the prior Hastings schedule, Judge Porteous would not be tried until February 2011.

The procedural and practical problems presented by this schedule are due in large part to the insistence of a trial before the August recess. Such concern for an abbreviated schedule should not trump basic procedural and constitutional protections for Judge Porteous. To the extent that this date was set out of concern that Judge Porteous is scheduled to return to the bench on September 10, 2010, Judge Porteous wishes to make clear that he has no intention of requesting that he be assigned cases or otherwise retake the bench until these allegations are resolved in a Senate trial.[8]

The proposed schedule also makes a distinction, in terms of applicable due dates, between dispositive motions and other pre-trial motions, such as motions in limine. The proposed schedule provides that dispositive motions, such as motions to dismiss, be filed well in advance of trial, and prior to motions in limine that may become moot as a result of the Committee's rulings on certain dispositive motions. As the Committee is aware, such distinction between dispositive and other pre-trial motions is typical in both civil and criminal litigation and is an efficient method for handling such matters. Judge Porteous plans to file a number of

[8] Indeed, when New Counsel raised the possibility of a resolution of this matter without a trial, the House Managers declined to respond and have indicated no interest in discussing such a resolution. While the defense recognizes that Mr. Baron and his staff have made personal and professional sacrifices to be able to try this case, it would seem in neither the interest of the accused or the public to hold a trial when a resolution is possible. Since the Managers have declined discussion of such a resolution, New Counsel remains focused on assuring a fair trial for Judge Porteous.

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motions to dismiss, but does require additional time for New Counsel to review the relevant facts and materials in order to properly frame and draft these crucial pleadings.

The proposed schedule also incorporates dates for the submission of proposed stipulations and responses to those proposals. Judge Porteous's counsel is committed to the reasonable pursuit and/or negotiation of stipulations but New Counsel requires additional time to undertake the complicated and time-consuming task of responding to the wide swath of proposed stipulations from the House Managers and in crafting Judge Porteous's own proposed stipulations.

CONCLUSION

Judge Porteous respectfully requests the entry of the schedule proposed above to replace the Committee's May 26, 2010 Scheduling Order.

Respectfully submitted,

/s/ Jonathan Turley
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Counsel for the G. Thomas Porteous Jr.
United States District Court Judge for the Eastern District of Louisiana

Dated: June 11, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl

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In The Senate of the United States

Sitting as a Court of Impeachment

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

HOUSE OF REPRESENTATIVES' OPPOSITION TO
JUDGE G. THOMAS PORTEOUS, JR.'S
MOTION FOR CONTINUANCE

The House of Representatives (the "House"), through its Managers and counsel, respectfully opposes Judge G. Thomas Porteous, Jr.'s Motion for a Continuance.[1] In support of this opposition, the House respectfully submits:

I. OVERVIEW

Judge Porteous is once again "gaming" the system in order to delay and derail the proceedings as much as possible. The fact is that Judge Porteous and his counsel were put on notice in October of 2009 that there appeared to be a conflict of interest because Mr. Westling was representing both the Marcottes and the Judge. Mr. Westling concluded that a "firewall" would solve the matter and designated Mr. Remy Starns to handle the Marcotte related-aspects of the proceedings. We note that Mr. Starns appeared in the House proceedings and has been listed as counsel on every pleading filed

[1] It does not appear Judge Porteous's motion is contemplated by the June 10, 2010 letter sent by Derron Parks to counsel. That letter indicated that counsel was authorized to file any "application to modify the Scheduling Order as it relates to the June 15, 2010 motions deadline" by close of business on Friday, June 11. The House in this pleading addresses the request for a continuance of the trial date. As a courtesy to counsel, the House would not object to a brief continuance for filing motions so long as it would not inconvenience the Senate Committee or require a postponement of the trial.

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in this matter.[2] There is no reason why Mr. Starns should not be held to the role he has been playing: counsel to Judge Porteous on matters relating to the Marcottes.

If Mr. Starns's role was just window dressing, then it is overwhelmingly clear that Judge Porteous sat back for over seven months without resolving the conflict and is now "sandbagging" the process by bringing in new counsel and demanding months of delay. It is the same tactic he used in the Fifth Circuit by seeking continuances on two separate occasions on the grounds that he lacked counsel, or that counsel needed additional time. This conduct should not be rewarded by giving Judge Porteous the delay he seeks. If new counsel are coming into the case, they should take the case "as is," with the trial date intact.

II. JUDGE PORTEOUS HAS BEEN ON NOTICE THAT HE WOULD NEED TO OBTAIN NEW COUNSEL TO ADDRESS THE MARCOTTE ALLEGATIONS SINCE OCTOBER 29, 2009

On October 29, 2009 – over seven months ago, and over nine months prior to the scheduled trial date – the House sent a letter to Judge Porteous's attorney clearly putting Judge Porteous on notice that he would need to obtain counsel other than Mr. Westling to address any Marcotte-related allegations.[3] The significance of this letter as impacting Mr. Westling's ability to represent Judge Porteous was well-understood by Judge

[2]Under Rules 11 of the Federal Civil Rules, when an attorney signs a pleading he is certifying, inter alia, that he has read the pleading and that it is well grounded in fact.

[3]See Letter from Reps. Schiff and Goodlatte to Richard W. Westling, Esq., Oct. 29, 2009, (Attachment 1). In fact, Judge Porteous was on practical notice of the likelihood that the Marcotte-related allegations would be part of the inquiry prior to that date. On October 8, 2009, the House filed a Motion with the District Court for the Eastern District of Louisiana to obtain "Wrinkled Robe" grand jury materials which clearly related to the Marcottes. Messrs. Westling, Samuel Dalton and Remy Starns signed the opposition to the House's Motion on October 16, 2009.

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Porteous and Mr. Westling and is underscored by the fact that Mr. Westling absented himself from the December 10, 2009 House Impeachment Task Force Hearing when the Marcottes testified (and at which Judge Porteous was in attendance). Indeed, Mr. Westling informed House Impeachment Task Force Staff that his co-counsel Remy Starns would handle the Marcotte allegations.[4] The House's intention to include the Marcotte-related allegations in the Articles of Impeachment was reinforced at the December 15, 2009 Task Force Hearing – at which Mr. Westling was in attendance – where a panel of Constitutional experts testified regarding the propriety of including pre-Federal Bench conduct in the Articles of Impeachment.

It would have been further apparent to Judge Porteous that the Marcotte allegations were not going away and that he would need to obtain an attorney other than Mr. Westling to address them when: (i) those allegations were included in the draft Articles of Impeachment considered by the Impeachment Task Force on January 21, 2010; (ii) the House Committee on the Judiciary voted the Articles out of Committee by unanimous vote on January 27, 2010; and, finally (iii) those Articles were approved unanimously by the House on March 13, 2010. Yet Judge Porteous still failed to obtain an attorney in addition to Mr. Westling so he could be prepared to address Article II and Article IV. The need for separate counsel was further highlighted by the House Managers' letter of April 13, 2010 in response to the request by Senate Counsel Morgan Frankel for certain information related to procedural issues, where the conflict of interest

[4]Mr. Starns in fact was present with Mr. Westling and Judge Porteous at some of the Impeachment Task Force Hearings but was not present when the Marcottes testified for reasons unknown to House counsel.

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was again pointed out.[5] Yet again, Judge Porteous made no attempt to identify or procure separate counsel to address Articles II or IV (or a separate counsel to address all four of the Articles if he thought that would be a more prudent approach to his defense). As a state and Federal judge with more than 20 years experience on the bench who would have dealt with attorney conflict issues, Judge Porteous would have understood that such an unresolved issue provides the litigant leverage and power to confound a tribunal's attempts to move proceedings forward in an orderly fashion.

At the initial Senate Committee meeting on April 13, 2010, the Senate Trial Committee set forth a schedule that provided for the trial to commence August 2, 2010.

It was not until May of 2010 that Judge Porteous added Mr. Turley to his defense team. The inclusion of Mr. Turley thus occurred more than six months after the House's October 29, 2009 letter, approximately four months after the Judiciary Committee markup of the Impeachment Resolution containing the Marcotte allegations, and over two months after the Articles of Impeachment were voted by the full House. It was represented at the May 18, 2010 meeting of Senate Trial Committee staff and counsels for the parties that Mr. Turley was added to the defense team and would handle the Marcotte-related allegations, and that his inclusion as part of the defense team would not occasion any delay in the August 2 trial date, which was still more than two and a half months away.[6]

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[5]See Letter from Reps. Schiff and Goodlatte to Sens. McCaskill and Hatch, Apr. 13, 2001, at 5, fn. 5 (Attachment 2).

[6]We note by analogy that under the Speedy Trial Act that would pertain to Federal criminal trials, Judge Porteous would have been required to stand trial within 70 days of indictment. Title 18, United States Code, Section 3161(c)(1) ("[T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date ... of the information or indictment.").

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Now, less than two months prior to trial – Judge Porteous seeks a two month continuance of the August 2 trial date so that his new attorneys – Mr. Turley and three attorneys from Bryan Cave, a major international law firm with vast resources[7] – may get up to speed.[8] It is unknown what has happened to Mr. Starns and Mr. Dalton (who signed Judge Porteous's Answer to the Articles and are listed as counsel on Judge Porteous's motion response filed on June 4, 2010), or why, if they are still part of the defense team, they cannot handle the Marcotte-related Articles.

In light of Judge Porteous's inexcusable delay in obtaining new counsel despite being on notice of the need to do so since October 2009, his request for a continuance of the trial should be denied.

Here, as more fully discussed in the next section, not only has Judge Porteous had actual knowledge of the essential aspects of the Marcotte allegations for over 6 years – they were reported in the press in 2003 – he will have had over 5 months between the House's passage of the Impeachment Resolution and the trial on the Articles of Impeachment. Further, unlike a criminal case, Judge Porteous has the advantage of a complete discussion of the evidence in the House Report that accompanied the Impeachment Resolution, as well as discovery that is far broader than he would have received if this were a criminal case and which includes, most significantly, transcripts of testimony of the critical witnesses. (A witness's transcript would not be available in a criminal prosecution unless and until that witness were to be called at trial, in which case it would be turned over to the defense as "Jencks material." See 18 U.S.C. 3500(b) ("After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement ... of the witness in the possession of the Untied States which relates to the subject matter as to which the witness has testified.")).

[7]The Bryan Cave web site notes that the firm has over 1000 attorneys and other professionals, and 19 offices worldwide.

[8]Bluntly stated, new counsel should never have agreed to enter an appearance in this case or participate in the defense with the understanding that they would be unable to meet the dates that had already been set by the Senate Trial Committee for motions and trial. They joined the defense team fully aware of the trial date; now that they have entered they want the United States Senate to change its schedule - which for all intents and purposes requires a trial prior to the August recess so that the matter may be voted by the Senate in September to accommodate them.

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III. THE MARCOTTE ALLEGATIONS ARE STRAIGHTFORWARD AND INVOLVE MINIMAL DISCOVERY

The allegations in Article II (and by extension, Article IV) are straightforward, witness-intensive (as opposed to document-intensive) and involve minimal discovery. Article II alleges that Judge Porteous took a series of official acts for the Marcottes – setting and splitting bonds, setting aside convictions and generally vouching for them and helping them form relationships with other state judges – and, in return, the Marcottes gave him numerous things of value, including numerous expensive lunches, one or two trips to Las Vegas, car repairs and home repairs. This course of conduct is described in detail in the House Report. The evidence relating to this Article is found in the testimony of Louis Marcotte and Lori Marcotte, the testimony of third party witnesses – which testimony has been provided to the defense – as well as certain corroborative documents that have been provided in discovery to which there is really no question of authenticity, such as the bail orders and the orders setting aside or expunging convictions. In addition, the House has marked, and has available for inspection, various credit card records and calendars of the Marcottes. In short, this is not the sort of white collar, document-intensive case involving proof of subtle financial facts that is so complicated as to demand delays in trial for preparation. To the contrary, the essentials of the allegations have been well-understood by Judge Porteous for years, and the witnesses who would shed light on this relationship are similarly well-known to Judge Porteous.[9]

[9]The House will provide new counsel with discovery on the Marcotte allegations.

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Further, Judge Porteous has had practical knowledge of the Marcotte allegations since 2004,[10] was further informed of the Marcotte allegations in the DOJ complaint letter of May 18, 2007, and was present when the Marcottes testified before the House Impeachment Task Force on December 10, 2009. The allegations of judicial corruption have never changed. There is no reason that the four attorneys who are now involved could not be prepared to address the relatively few witnesses and documents associated with Articles II and IV within the existing schedule.

IV. THE SENATE SHOULD FOLLOW THE EXAMPLE OF THE FIFTH CIRCUIT, WHICH DENIED JUDGE PORTEOUS'S CONTINUANCE MOTION BASED ON HIS CLAIM THAT HE DID NOT HAVE AN ATTORNEY

In considering Judge Porteous's request for a continuance, the Senate should consider that in connection with the Fifth Circuit Hearing, Judge Porteous sought two continuances because of claimed difficulties obtaining counsel. The first of these requests was granted; the second was denied. The chronology of events associated with the Fifth Circuit Hearing provides insight into Judge Porteous's strategy in dealing with tribunals, and the Fifth Circuit's handling of this issue provides a model for the Senate Committee to follow.

On June 11, 2007, Judge Porteous's attorney at the time, Kyle D. Schonekas, Esq., who had represented Judge Porteous in connection with the criminal investigation, sent a letter to Ronald Woods – investigative counsel for the Fifth Circuit Special Committee – proposing a resolution whereby Judge Porteous would retire voluntarily

[10]As an example, we note that Judge Porteous's initial lawyer, Mr. Schonekas, was actively engaged in defending Judge Porteous from being criminally prosecuted as part of the Department of Justice's Wrinkled Robe investigation.

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"with all customary retirement benefits, with the (necessary) provision that ordinary length-of-service requirements would be waived."

On June 25, 2007, in a letter to Mr. Schonekas, Chief Judge Jones, Judge Benavides and Judge Lake rejected Judge Porteous's offer, explaining that "[t]he Committee lacks authority to offer or to recommend what amounts to a preemptive settlement to Judge Porteous short of the completion of the investigation." The June 25, 2007 letter further designated August 27-29, 2007 as the Special Investigatory Committee hearing dates.

On July 2, 2007, Mr. Schoenaks sent a letter withdrawing from his representation of Judge Porteous.

On July 5, 2007, Judge Porteous wrote a letter to Chief Judge Jones requesting a continuance of the August 27 trial date "in order to allow me adequate time in which to obtain counsel and bring counsel up to date...." Judge Jones responded on July 10, 2007 and granted Judge Porteous his requested extension, re-scheduling the hearing dates to September 26 and 28, 2007.

On August 2, 2007, attorney Michael H. Ellis wrote a letter to Chief Judge Jones stating that he would "assist" Judge Porteous and requesting a second continuance of the hearing dates until after October 17, 2007. Subsequent correspondence makes reference to the fact that the Hearing was initially postponed to late September and was thereafter postponed again until October 29, 2007.

In September and October, 2007, Ron Woods provided voluminous discovery to Mr. Ellis, during which time Mr. Ellis attempted to gather materials in support of a disability retirement for Judge Porteous.

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On October 12, 2007, Chief Judge Jones signed a Memorandum of Understanding that would have involved the dismissal of the complaint against Judge Porteous. This was never signed by Judge Porteous.

On October 16, 2007, Mr. Ellis withdrew as counsel for Judge Porteous. In the letter to Mr. Woods, Mr. Ellis wrote:

> Yesterday, I had a very lengthy discussion with my client, Judge Porteous, in which we reviewed the proposal you submitted to him, as well as other aspects of this inquiry. After considering those things discussed in our meeting, I feel compelled to withdraw as counsel for Judge Porteous in this matter. He and I are at an impasse with respect to the future course of my representation, which causes me to take this action. In that regard, I am writing a letter to the judge advising him of my withdrawal.

In his letter to Judge Porteous, Mr. Ellis wrote:

> After our lengthy conversation yesterday, it is glaringly apparent that we have irreconcilable differences regarding my representation of you in this matter. Friends can disagree, but it is my professional opinion that I can no longer properly represent you under these circumstances.[11]

[11]In his email associated with his initial entry into the case, Mr. Turley noted that: "I recently learned that Judge Porteous has a retirement date of next year. It seems to me that a possible resolution is worth exploring to avoid both a trial and a problematic precedent. I do not want to waste time and effort but I was frankly surprised to find no record of any discussion of such a resolution." Email from Jonathan Turley to Derron Parks, et al, May 25, 2010. Judge Porteous's Continuance Motion repeated this same message: "Indeed, when New Counsel raised the possibility of a resolution of this matter without a trial, the House Managers declined to respond and have indicated no interest in discussing such a resolution. While the defense recognizes that Mr. Baron and his staff have made personal and professional sacrifices to be able to try this case, it would seem in neither the interest of the accused or the public to hold a trial when a resolution is possible. Since the Managers have declined discussion of such a resolution, New Counsel remains focused on assuring a fair trial for Judge Porteous." Judge G. Thomas Porteous, Jr.'s Motion for Continuance at 7, fn. 8.

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On October 18, 2007, Judge Porteous wrote yet another letter to Mr. Woods, this time seeking a second continuance of the hearing dates, this time for 90 days, in light of Mr. Ellis's withdrawal.

On October 19, 2007, Mr. Woods responded to Judge Porteous's letter of October 18, and, on behalf of the Special Committee, denied the request for a continuance. From Mr. Woods's letter, it appears that the Fifth Circuit had believed they had reached an agreement with Judge Porteous as to his resignation, but that Judge Porteous had walked away from that agreement.

On October 29, 2007, at the Hearing, Judge Porteous again sought a continuance. The colloquy between Judge Porteous and two of the Judges parallels the issues in this

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Of course, as noted above, there were substantial "discussion[s] of ... a resolution" in the Fifth Circuit – notwithstanding counsel's stated "surprise" to find "no record" of them. In connection with the Fifth Circuit proceedings, Judge Porteous sought disability retirement. This was rejected by Chief Judge Jones who noted that Judge Porteous handled his case load in a manner inconsistent with his claim of disability. The reference to Judge Porteous's eligibility for retirement "next year" omits the fact that he is eligible in December of 2011 – still a year and a half away, and over four years from the date of the Fifth Circuit Hearing.

If Judge Porteous truly wanted to satisfy the public interest he should resign his Office.

Finally, in considering the equities of a possible disposition, the House notes that those who have given Judge Porteous things or taken acts to benefit Judge Porteous throughout his career have paid a profound price for their conduct. Mr. Amato and Mr. Creely have turned in their law licenses, other attorneys who have given him things have been investigated by the Bar, his secretary Rhonda Danos – who Judge Porteous used to help him hide his financial affairs in connection with his bankruptcy – has been fired, Louis Marcotte and Lori Marcotte are convicted felons (and Louis Marcotte went to jail), and Mr. Lightfoot has been investigated by the Bar. Judge Porteous's attempts to leverage the procedural difficulties of an impeachment trial to negotiate lifetime income from the United States, after having taken so much from so many, reflects much of the same sort of entitlement to wealth from others that underlies his conduct in the Articles.

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case, and the reasoning of Chief Judge Jones in denying the request provides a clear example of how such arguments were considered in 2007.

> Judge Porteous: I'd like to reurge my motion to continue. I know the Court has looked at it and denied it; but I was left without counsel approximately two weeks ago, or right up in that vicinity. ...
>
> I am not doing this out of some dilatory tactic; but I believe that the ends of justice in this particular case warrant a short continuance, that the government has had this particular matter for at least four years, if not longer. They've had access to the FBI agents and all the parties involved; and I would just like to reurge my motion, your Honor.
>
> Mr. Woods: ... The charge itself is very detailed. He knows the allegations and the – it could not be more specific, naming what the offense is, what – the date of the offense, what document was falsified, what witness will testify to certain events. He's been notice since May the 24th of very specific allegations, and we've offered the documents as soon as we got them from the Department of Justice.
>
> Judge Benavides: Mr. Woods, you refer to the May 24th date. Is that a date that the complaint was forwarded to Judge Porteous?
>
> Mr. Wood: Yes, your honor.
>
> * * *
>
> Judge Benavides: So, the factual allegations have been made known with reference to the complaints since at least May the 24th?
>
> Mr. Woods: Yes your Honor. And Judge Porteous was under criminal investigation by the Department of Justice, as he pointed out, for a number of years. His attorney at that time, Kyle Schonekas, appeared to be very much on top of the case, appeared at grand jury, and instructed various witness – well, one witness, Claude Lightfoot, Judge Porteous' bankruptcy counsel, not to answer certain questions. So, he was on top of the investigation, knew the allegations, and I'm sure [Schonekas] kept this counsel [Ellis] of Judge Porteous advised.
>
> Judge Benavides: Is there anything with in reference to the actual complaint that was tendered later, that wasn't the subject of – or already information contained in the complaint from the Justice Department of May 24?

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> Mr. Woods: No, your Honor. ...
>
> * * *
>
> Chief Judge Jones: All right. We're familiar with the procedures in this case and with your level of acquaintance with the issues, and we would deny the motion to continue.[12]

Just as Judge Porteous attempted to thwart the Fifth Circuit from holding the Special Committee Hearing according to its schedule, Judge Porteous has reverted to that very same pattern to defeat the orderly functioning of the Senate Committee in this case. Moreover, even after this experience with the Fifth Circuit Special Committee, in which he sought unsuccessfully to obtain a continuance by claiming that he needed counsel and that counsel would need time to prepare, Judge Porteous failed to secure proper representation for the Impeachment trial in a timely fashion and has made a request for a continuance in this case. And, just as the Fifth Circuit concluded that Judge Porteous had ample knowledge of the charges and ample opportunity to prepare a defense, so should the Senate Committee reach a similar conclusion in this case. The existing trial date should be kept.

WHEREFORE, the House requests that Judge G. Thomas Porteous, Jr.'s Motion for a Continuance be Denied.

---

[12]Transcript of Proceedings, In re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr., Eastern District of Louisiana, Dckt. No. 07-05-351-0085 (Special Comm. for the Fifth Cir. Jud. Council) at 5-9.

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Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam B. Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

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

June 14, 2010

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Attachment 1

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JOHN CONYERS, JR., Michigan
CHAIRMAN

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ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

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JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
THOMAS ROONEY, Florida
GREGG HARPER, Mississippi

October 29, 2009

Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W., Suite 500
Washington, D.C. 20005

Re: Impeachment Inquiry of Judge G. Thomas Porteous, Jr.

Dear Mr. Westling:

It has come to the attention of the Impeachment Task Force that you may currently represent Louis M. Marcotte, III, and Lori M. Marcotte in connection with civil litigation arising out of their operation of Bail Bonds Unlimited, Inc. (Bartholomew v. Bail Bonds Unlimited, Inc. et al, Case No. 2:05-cv-04165-ILRL-JCW (E.D. La.), and that you previously represented Louis M. Marcotte, III, in his criminal case (U.S. v. Marcotte, Crim. No. 04-061 (E.D. La.)).

As you know, Judge Porteous's relationship with Louis Marcotte and Lori Marcotte may be at issue in the pending Impeachment Inquiry being conducted by the Task Force for the House of Representatives, Committee on the Judiciary, and either or both may be called as witnesses at a hearing adverse to Judge Porteous.

As we are also sure you are aware, because of your duties of loyalty to current and prior clients and duties to protect confidential information, if there were to be a hearing where the relationship between the Marcottes and Judge Porteous is at issue, there would be significant conflict of interest issues arising from your participation. Further, those conflict issues may be implicated by your participation in the formulation of a factual defense of Judge Porteous where you are constrained from providing advice due to your ongoing ethical obligations.

As you know, the ethical bar rules in the District of Columbia, Maryland and Louisiana require informed consent by all clients in order to permit waivers of conflicts, and two of these jurisdictions require that such informed consent be in a signed writing. See, e.g., District of Columbia Rules of Professional Conduct, Rule 1.7(c); Louisiana Rules of Professional Conduct, Rule 1.7(b)(4) (requires writing); Maryland Lawyer's Rules of Professional Conduct, Rule 1.7(b)(4) (requires writing). We request that you promptly provide the Task Force with signed consent forms from all three of these clients. Until the Task Force and Committee are fully apprised, we will not be in a position to make a determination of the appropriate treatment of this situation in the event that the Marcottes are called as witnesses adverse to Judge Porteous.

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We write now to put you and Judge Porteous on notice of the House's concern and so that you and he can take appropriate steps promptly to deal with this situation. We are aware that, in the past, Judge Porteous sought delays in Fifth Circuit proceedings in order for him to obtain new counsel. No delays in our schedule will be permitted to accommodate any search for additional or replacement counsel for Judge Porteous. If a hearing is scheduled at which the Marcottes are to testify, the Task Force will not postpone it in order for Judge Porteous to obtain new or different counsel.

We look forward to your providing the Task Force with the information we seek and your response to our concerns at your earliest opportunity so that the Task Force and the Committee can determine how we will proceed in light of this situation.

Please respond to Alan I. Baron, Esq., Seyfarth Shaw, 975 F. Street, N.W., Washington, D.C., 20004 (202-828-3589).

Sincerely,

Adam Schiff
Chairman
Impeachment Task Force

Bob Goodlatte
Ranking Member
Impeachment Task Force

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Attachment 2

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Congress of the United States
Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. – Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

Pretrial Motions. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;

- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;

- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the Liljeberg proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;

- Motion to permit or admit expert testimony; and

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- Motion relating to stipulations, if appropriate.

Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely – including his financial relationship with them prior to becoming a Federal judge, his handling of the Liljeberg case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true."[1] The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

[1] "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 169 (1989).

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substantial dispute.[2]

Witnesses. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

Article 1

1. Robert Creely [Immunity]
2. Jacob Amato [Immunity]
3. Leonard Levenson [Immunity]
4. Donald Gardner
5. Joseph Mole
6. Rhonda Danos [Immunity]

Article 2

7. Louis Marcotte
8. Lori Marcotte
9. Ronald Bodenheimer
10. Bruce Netterville [Immunity]
11. Mike Reynolds
12. Jeffrey Duhon
13. Aubrey Wallace

Article 3

14. Claude Lightfoot
15. FBI Special Agent DeWayne Horner
16. FBI Financial Analyst Gerald Fink
17. Richard Greendyke

Article 4

18. Former FBI Agent Cheyanne Tackett
19. Former FBI Agent Robert Hamill

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[2]See, e.g., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101st Cong., 1st Sess. 170 (1989).

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Length of the case-in-chief. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Hearing.[3] Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the Liljeberg case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.[4]

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations – such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy – a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

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[3]These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

[4]Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are Liljeberg court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

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Article I. Judge Porteous has been aware of the details and substance of the Liljeberg allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the Liljeberg case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole – the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations – having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.[5] The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte – information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

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[5]In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

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We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

cc: Morgan Frankel
Senate Legal Counsel

Attachments

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

June 14, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire C. McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous, Jr.

Dear Senator McCaskill and Senator Hatch:

As you know, the new counsel representing Judge G. Thomas Porteous, Jr. have asked for a continuance in this case in light of substantial changes to the legal team due to a conflict of interest that requires either the partial or complete withdrawal of prior counsel. I am writing to raise a collateral issue relating to the pre-trial motions due on June 15, 2010. While this issue may be moot if a continuance is granted, we seek clarity regarding this concern.

As you know, discovery is not yet complete in this matter. Requiring the defense to file dispositive motions prior to receiving all relevant information from the House Managers, would substantially impair Judge Porteous' due process rights. As you know, in federal litigation, it is customary for dispositive motions to be submitted and briefed on a different date than other pre-trial motions. Such a date is always set after the completion of discovery since it would be unfair to require parties to file dispositive motions without the benefit of all of the evidence in the case. The current schedule in this matter, however, does not provide for completing discovery before the filing of dispositive motions, which new counsel for Judge Porteous has sought to remedy in the proposed continuance schedule previously submitted.

Moreover, it is apparent that dispositive motions cannot be resolved solely by the Chair and Vice Chair or even by the Committee. Presumably, only the full Senate can dismiss an Article of Impeachment, since it is the only constitutionally mandated body able to properly decide whether to dismiss an Article of Impeachment whether done through trial or pre-matter matters. Therefore, I request confirmation that, should the Committee deny Judge Porteous' Motion for Continuance, the June 15, 2010 pre-trial motion due date applies only to motions that can be resolved by the Chair and Vice

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Chair, and not dispositive motions that would be submitted on a later date to be determined after the completion of discovery and resolution of the conflict of interest issues.

I would appreciate your attention to this matter so that counsel fully understand what is expected tomorrow if a continuance is not granted. If a continuance is granted, we ask that a separate date for dispositive motions be established.

Respectfully,

Jonathan Turley /pjm

Jonathan Turley
Co-Lead Counsel to Judge G. Thomas Porteous, Jr.

cc: Thomas Jipping, Esq.
Derron Parks, Esq.
Morgan Frankel, Esq.
Alan I. Baron, Esq.
Mark Dubester, Esq.
Harold Damelin, Esq.

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

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

JUDGE G. THOMAS PORTEOUS, JR.'S EXPEDITED MOTION
FOR A HEARING ON HIS PENDING MOTION FOR A CONTINUANCE

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and files this Expedited Motion for a Hearing before the Senate Impeachment Trial Committee (the "Committee") or, alternatively, before the Chair and Vice-Chair of the Committee regarding Judge Porteous' previously filed Motion for a Continuance.

The issues raised in the Motion for a Continuance present critical issues of fundamental fairness and due process. Moreover, resolution of the Motion for a Continuance will require consideration of complex ethical issues. The parties have briefed these issues on an extremely truncated schedule and a reasonable resolution of these issues are potentially outcome determinative in this case since a full defense would be virtually impossible under the current schedule. As a result, Judge Porteous requests a brief hearing before the full Committee or, at a minimum, the Chair and Vice-Chair of the Committee, on the Motion for Continuance and the proper resolution of the conflict of interest in this case.

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Further, if the Committee is inclined to grant such a hearing, Judge Porteous respectfully requests that the current deadlines – particularly the June 15, 2010 deadline for submitting all pre-trial motions – to be held in abeyance until the Motion for a Continuance is resolved.

WHEREFORE, Judge Porteous respectfully requests that the Senate Impeachment Trial Committee schedule a hearing, either before the full Committee, or alternatively, the Chair and Vice Chair of the Committee, regarding the pending Motion for a Continuance.

Respectfully submitted,

/s/ Jonathan Turley
Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-7001

/s/ Daniel C. Schwartz
Daniel C. Schwartz
P.J. Meitl
Daniel T. O'Connor
BRYAN CAVE LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
(202) 508-6000

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

Dated: June 14, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

Harold Damelin – Harold.damelin@mail.house.gov

Kirsten Konar – kkonar@seyfarth.com

Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl

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CLAIRE McCASKILL, MISSOURI, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN

AMY KLOBUCHAR, MINNESOTA
SHELDON WHITEHOUSE, RHODE ISLAND
TOM UDALL, NEW MEXICO
JEANNE SHAHEEN, NEW HAMPSHIRE
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JIM DeMINT, SOUTH CAROLINA
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ROGER F. WICKER, MISSISSIPPI
MIKE JOHANNS, NEBRASKA
JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE
WASHINGTON, DC 20510–6326

ORDER VACATING MOTION FILING DEADLINES

On June 11, 2010, Judge G. Thomas Porteous filed a Motion for a Continuance requesting modification of the Committee's Scheduling Order of May 26, 2010. The House of Representatives filed its Opposition on June 14, 2010. The Committee will issue a formal order on Judge Porteous's Motion; however, due to the approaching deadlines under the Committee's Scheduling Order of May 26, 2010, the following deadlines are hereby vacated at this time:

All Other Pre-Trial Motions Due	June 15, 2010
Response to Pretrial Motions Due	June 22, 2010

Dated: June 14, 2010

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

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CLAIRE McCASKILL, MISSOURI, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN

AMY KLOBUCHAR, MINNESOTA
SHELDON WHITEHOUSE, RHODE ISLAND
TOM UDALL, NEW MEXICO
JEANNE SHAHEEN, NEW HAMPSHIRE
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JIM DeMINT, SOUTH CAROLINA
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ROGER F. WICKER, MISSISSIPPI
MIKE JOHANNS, NEBRASKA
JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510-6326

DISPOSITION OF JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR A CONTINUANCE

On June 11, 2010, Judge G. Thomas Porteous filed a Motion for a Continuance requesting modification of the Committee's Scheduling Order of May 26, 2010. On June 14, 2010, the House of Representatives filed its Opposition, and Judge Porteous filed an Expedited Motion for a Hearing on His Pending Motion for a Continuance. For the reasons stated below, the Committee grants in part and denies in part Judge Porteous's Motion for a Continuance. The Expedited Motion for a Hearing is denied.

BACKGROUND

Judge Porteous seeks a continuance of all pending deadlines under the May 26 Scheduling Order based on his retention of new counsel on Articles II and IV of the Articles of Impeachment. Last week, Judge Porteous removed lead counsel Richard Westling and his firm Ober, Kaler, Grimes & Shriver, P.C. from his defense team on Articles II and IV; in their place, Judge Porteous appointed Jonathan Turley, who was initially retained in mid-May, as co-lead counsel and also brought on Daniel Schwartz, P.J. Meitl, and Daniel O'Connor from Bryan Cave LLP. According to the Motion, this change in representation was made after Mr. Turley completed an independent conflicts review of Mr. Westling's representation of Judge Porteous in this matter and his previous and ongoing representation of Louis and Lori Marcotte, who will likely be key impeachment trial witnesses against Judge Porteous. Specifically, Mr. Westling previously represented Louis Marcotte in the federal criminal investigation on judicial corruption and bribery in the 24th Judicial District Court of Louisiana[1] and currently represents Louis and Lori Marcotte and Bail Bonds Unlimited, Inc., in another related civil proceeding.

The House strenuously objects to a continuance of the evidentiary hearings and maintains that Judge Porteous is "once again 'gaming' the system in order to delay and derail the proceedings as much as possible."[2] The House first raised the potential conflict of interest to Judge Porteous and his defense team (including Mr. Westling) on October 29, 2009. Judge Porteous, the House claims, has declined to replace Mr. Westling on numerous occasions in the House impeachment proceedings and again at the commencement of impeachment trial proceedings before the Senate.

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[1] *See* H.R. Rep. No. 111-427, Ex. 71 (March 4, 2010).
[2] House of Representative's Opposition to Judge G. Thomas Porteous, Jr.'s Motion for Continuance at 2-4 (June 14, 2010).

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Counsel for the House and Judge Porteous, Senate Legal Counsel, and the Committee staff discussed this conflict at a meeting on May 18, 2010. At this meeting, Mr. Westling assured the Committee staff that the conflicts issue had been explored and resolved to his satisfaction, in part, by retaining Mr. Turley to handle the Article II allegations relating to the Marcottes. He also assured all present (including Mr. Turley) that Judge Porteous could work with the proposed deadlines and the Committee's hearing dates.

On June 8, 2010, Judge Porteous missed a filing deadline under the Scheduling Order. After an inquiry regarding the missed deadline by the Committee staff, Mr. Turley provided a letter on June 9, 2010, indicating that he joined the defense team "in part to review this alleged conflict of interest raised by House and Senate counsel" and that after completing this review he now believed "it is necessary for Mr. Westling to remove himself from representing Judge Porteous in relation to Article II and Marcotte-related issues to avoid even the appearance of a conflict of interest in this case."[3] The letter then stated that "[a] continuance is necessary to address current matters on the schedule." This was the first notice given to the Committee of Mr. Turley's conflicts review and the resulting change in representation.

At a June 10, 2010, meeting with the Committee staff, Mr. Turley reiterated Judge Porteous's request for a continuance and was advised to file promptly a motion for modification of the Scheduling Order. In addition, the Committee requested that Judge Porteous file a memorandum addressing the conflicts review and analysis under the appropriate rules of professional responsibility. In response, Judge Porteous filed the pending Motion for a Continuance on June 11, 2010, and Mr. Turley submitted a letter on June 13, 2010, outlining his conflicts analysis.[4]

Counsel for Judge Porteous proposes a bifurcation of representation on the Articles of Impeachment whereby the full team including Mr. Westling would defend against Articles I and III but only Mr. Turley, Mr. Schwartz, Mr. Meitl, and Mr. O'Connor will defend against Articles II and IV. With the start of the Committee's evidentiary hearings still six weeks away, Judge Porteous seeks an eight-week continuance of the hearings.

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[3] Letter of Jonathan Turley to the Honorable Claire McCaskill and the Honorable Orrin G. Hatch at 2 (June 9, 2010). Both the Motion and the Mr. Turley's letter mistakenly assert that the House objects to this alleged conflict of interest. This is incorrect. The House has consistently stated that even as it raises the potential conflict for the record, it does not seek the disqualification of Mr. Westling from any part of the case.

[4] Letter of Jonathan Turley to the Honorable Claire McCaskill and the Honorable Orrin G. Hatch (June 13, 2010) ("June 13 Turley Letter").

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STANDARD

Impeachment has a unique role in our constitutional order.[5] The Supreme Court has recognized that "the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge," and that the impeachment proceeding is independent of, and not akin to, a civil or criminal proceeding.[6] The Founders' deliberate act of endowing the House and Senate with the impeachment power leads to a distinctive process that is neither subject to judicial review nor constrained by the procedures of the judicial branch.

Under Rule XI, the Committee is called on "to receive evidence and take testimony . . . . [and to] report to the Senate in writing a certified copy of the transcript of the proceedings and the testimony had and given before such committee."[7] The Senate has also authorized the Committee "to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact."[8] With these guidelines and subject to review by the full Senate, the Committee has broad discretion to manage the evidentiary proceedings and prepare a record for deliberation by the full Senate.[9] The Senate's delegation of responsibility to this Committee comes with the inherent power to supervise—and, if necessary, disqualify—counsel appearing before it.

DISCUSSION

The Committee must first confront a conflict-of-interest issue that Judge Porteous and his counsel have either willfully ignored or unreasonably excused since Mr. Westling was first retained. Even viewing the facts in the light most favorable to Judge Porteous and Mr. Westling, the October 29 letter from the House alerted them of this serious issue. Indeed, Mr. Westling sought informed consent waivers from the Marcottes in an attempt to salvage his representation of Judge Porteous. Yet even after being denied such waivers, Mr. Westling did not withdraw but instead opted only to bring in other counsel to cross-examine the Marcottes.[10] This failure to withdraw is professionally and ethically inexcusable. As explained below, neither Mr. Westling's partial withdrawal nor Mr. Turley's proposal to screen Mr. Westling from Article II and IV resolve the conflict of interest under the applicable rules of professional responsibility.

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[5] *See* U.S. Const. art. I, §§ 2, 3.

[6] *Nixon v. United States*, 506 U.S. 224, 236 (1993) (rejecting judicial review of the Senate's impeachment procedures based on the Constitution's commitment of "the sole Power to try all Impeachments" to the Senate); *id.* at 234 (citing U.S. Const., art. I, § 3, cl. 7).

[7] Rule XI, Procedure and Guidelines for Impeachment Trials in the United States Senate (August 15, 1986).

[8] S. Res. 111-458 § 5 (March 17, 2010).

[9] Under Rule XI, the full Senate retains oversight over all actions taken by the Committee; therefore, Judge Porteous will have the opportunity to seek relief from the full Senate.

[10] Even after Mr. Westling's co-counsel did not appear at a December 2009 hearing where the Marcottes testified before the House Impeachment Task Force, he waited to address the conflict until May 2010.

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I. Conflict of Interest

Prompted by new information disclosed in the June 9 letter from Mr. Turley, the Committee staff sought more information at the June 10 meeting regarding the conflict of interest in Mr. Westling's representation of Judge Porteous, the conflicts review conducted by Mr. Turley, and how the proposed bifurcated representation addressed the actual conflict identified. Although the parties were aware of this issue in October 2009, the material facts underlying the conflict were not fully disclosed to the Committee until the June 10 meeting. Since mid-May, Judge Porteous and his attorneys have put forth three different arrangements to address Mr. Westling's conflict.[11] None of the proposals offered by Mr. Westling and Mr. Turley adequately address the glaring conflict of interest.[12]

A. Mr. Westling has a conflict of interest in representing Judge Porteous.

There is no doubt that Mr. Westling has a conflict of interest under both the District of Columbia Rules of Professional Conduct and the American Bar Association Model Rules of Professional Conduct.[13] Unless informed consent of each affected client is secured, D.C. Rule 1.7(b) states that "a lawyer shall not represent a client with respect to a matter if: (1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer."[14] Mr. Westling has a Rule 1.7(b)(1) conflict here as Judge Porteous's position is adverse to a position to be taken by the Marcottes, another current client of Mr. Westling, in this proceeding.

Mr. Westling argues that Rule 1.7(d) allows him to continue representing Judge Porteous despite his Rule 1.7(b)(1) conflict. Subpart (d), often referred to as the "thrust-upon" exception, states: "If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4)."[15] At the June 10 meeting, Mr. Westling suggested that this

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[11] At the May 18 meeting, Mr. Westling reiterated his longstanding position that his conflict was sufficiently addressed if he did not cross-examine the Marcottes. In the face of Senate Legal Counsel's skepticism regarding this arrangement, Mr. Westling apparently requested a separate conflicts analysis by Mr. Turley. In his June 8 letter, Mr. Turley represented that Mr. Westling's conflict could be mitigated if he was screened from Article II, which alleges corrupt conduct involving the Marcottes. When asked by Senate Legal Counsel at the June 10 meeting why Mr. Westling should not also be screened from Article IV, which incorporates Marcotte-related allegations, Mr. Turley conceded that Mr. Westling should be screened from both Article II and IV.

[12] Indeed, Mr. Turley's June 13 letter raises concerns about some of the earlier proposals for addressing the conflict. *See* June 13 Turley Letter at 11.

[13] The applicable provisions under the D.C. Rules and the Model Rules are substantially similar; therefore, the analysis under both yields the same conclusion. *See* D.C. Rules of Prof'l Conduct R. 1.7 (2006); Model Rules of Prof'l Conduct R. 1.7 (2009). As Mr. Westling is a member of the D.C. Bar and Mr. Turley's analysis relied on the D.C. Rules, the Committee opts to examine this issue under the D.C. Rules.

[14] D.C. Rules of Prof'l Conduct R. 1.7(b)(1); *see also id.*, R. 1.7(c).

[15] *Id.*, R. 1.7(d).

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exception applied here because he had a reasonable basis for concluding at the time Judge Porteous retained him that the Marcotte-related allegations would not be part of the impeachment inquiry since those allegations were not part of the Judicial Council's investigation and report.

Mr. Westling's reliance on subpart (d) is not credible and undermined by his long involvement in representing Mr. Marcotte in a related criminal matter. According to Mr. Turley's June 13 letter, Mr. Westling represented Mr. Marcotte from at least 2004 through 2006 in the Justice Department investigation that led to a guilty plea for Mr. Marcotte and, later, the referral of Judge Porteous to the Judicial Council of the Fifth Circuit: "As part of the plea agreement, Louis Marcotte agreed to cooperate with the government, which continued until 2006. As part of this cooperation, Mr. Westling participated in various meetings with the government, including but not limited to a meeting with the Justice Department's Public Integrity Section which was investigating Judge Porteous."[16] Thus, he was well aware that the relationship between Judge Porteous and the Marcottes was being investigated years before he was retained by Judge Porteous in 2008. The accusations of corrupt conduct by Judge Porteous and the Marcottes were also included in the Justice Department referral letter to the Judicial Council dated May 18, 2007. While Judge Porteous (and Mr. Westling) may have been hopeful that those allegations would not be included in the Articles of Impeachment, the inclusion of those allegations was reasonably foreseeable.

In addition, as Mr. Turley noted in the June 13 letter, there are strong arguments that Mr. Westling also has a conflict under Rule 1.7(b)(2) and (b)(3).[17] These provisions bar representation where: "(2) Such representation will be or is likely to be adversely affected by representation of another client; [or] (3) Representation of another client will be or is likely to be adversely affected by such representation."[18] As Article II centers on Marcotte-related conduct and Article IV also references the Marcottes, the ongoing duties of loyalty and confidentiality to the Marcottes will unavoidably impair Mr. Westling's representation and defense of Judge Porteous. Similarly, his representation of Judge Porteous here will complicate his defense of the Marcottes in the civil matter now pending in federal court and potentially interfere with their role as witnesses in this proceeding.

The Committee therefore finds that Mr. Westling has a conflict of interest under Rule 1.7(b)(1), (b)(2), and (b)(3).

B. The proposed solution of screening Mr. Westling from Articles II and IV does not cure the conflict.

As outlined by Mr. Turley in his June 9 letter, at the June 10 meeting, and in the June 13 conflicts letter, Judge Porteous proposes to address the conflict by creating a firewall screening

[16] June 13 Turley Letter at 1.
[17] *Id.* at 8.
[18] The "thrust upon" exception under subpart (d) expressly excludes (b)(2) and (b)(3) conflicts. *See id.*, R. 1.7(d).

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Mr. Westling and his firm from the defense against Articles II and IV.[19] Despite settling on and recommending this arrangement, Mr. Turley raised for the first time in his June 13 letter that he "believe[s] a compelling argument can be made, with sufficient time to prepare for new counsel, that there is no alternative to complete withdrawal."[20]

The Committee is deeply troubled that this obvious conflict, which Judge Porteous and Mr. Westling have known about since October 2009, was not promptly and squarely resolved. When viewed in light of the abrupt changes in representation and delays in the proceedings before the Judicial Council, there is considerable doubt whether Judge Porteous has made a good faith effort to resolve this conflict. The wavering and evolving analysis and proposed remedies offered by counsel has complicated and frustrated the prompt resolution of this issue.

Even the final solution recommended by Judge Porteous to limit Mr. Westling to his defense against Articles I and III is problematic. Mr. Turley assumes but does not cite any supporting authority resolving this type of conflict with a screen or firewall.[21] Just as a civil or criminal case with multiple claims or counts is still one "matter" under the rules of professional conduct, the Senate's trial of the four Articles of Impeachment is also a single matter. While a "firewall" to exclude an attorney from discussing matters that present a conflict may be a permissible solution for conflicts imputed to other attorneys in a law firm, a screen cannot resolve the conflict caused by one attorney's representation of two adverse clients.

C. Absent informed consent of the Marcottes and Judge Porteous, Mr. Westling must be disqualified as counsel in this matter.

Although no party moves for the disqualification of Mr. Westling, the Committee cannot ignore a conflict of interest that threatens the integrity of the proceedings on Articles II and IV. The sole remedy for resolving this conflict without the disqualification of Mr. Westling is for Judge Porteous and the Marcottes to "provide[] informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[22] The Marcottes—key witnesses on Articles II and IV—have refused to give informed consent to Mr. Westling.[23] Therefore, the Committee has no choice but to disqualify Mr. Westling as counsel in this matter.

II. The Committee's Schedule

More than six weeks remain until the evidentiary hearings under the current Scheduling Order. Because of Mr. Westling's failure to address this conflict, the Committee is forced to modify the current schedule to allow Judge Porteous's remaining counsel more time to prepare

[19] *See* June 13 Turley Letter at 9-13.
[20] *Id.* at 11.
[21] *See id.*
[22] D.C. Rules of Prof'l Conduct R. 1.7(c).
[23] June 13 Turley Letter at 2.

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for the evidentiary hearings. The Judicial Council for the Fifth Circuit addressed these underlying matters in 2007. The House impeachment proceeding in this matter began in September 2008 and resulted in Articles of Impeachment adopted on March 17, 2010.[24] Based on Judge Porteous's participation in these earlier proceedings, a continuance of the evidentiary hearings of two months (or longer) is not warranted.[25]

The evidentiary hearings before the Committee are hereby continued to September 13, 2010. This resolution is appropriate given that Judge Porteous has been fully aware of this issue for almost eight months. The House's discovery production is now complete.[26] This provides remaining counsel twelve full weeks to prepare for the evidentiary hearings. Counsel for Judge Porteous and the House are advised that no further continuances based on this issue shall be granted. The Committee's May 26 Scheduling Order is modified as follows:

All Pre-Trial Motions Due	July 21, 2010
Response to Pre-Trial Motions Due	July 28, 2010
Witness Immunity Requests Due	August 2, 2010
Witness Subpoena Requests Due	August 2, 2010
Committee to Hold Hearing on Motions	August 4, 2010
Witness Lists and Proposed Stipulations Due	August 5, 2010
Responses/Objections to Proposed Stipulations Due	August 12, 2010
Reply to Objections to Proposed Stipulations Due	August 19, 2010
Meeting of All Counsel Re: Stipulations & Objections, Exhibits, Witnesses	August 26, 2010
Pre-Trial Statements Due	September 1, 2010
Committee to Hold Evidentiary Hearings	September 13-17, 2010
All Post-Trial Briefs Due	September 24, 2010

[24] H. Res. 111-1031 (March 17, 2010). Judge Porteous and his counsel have had the benefit of the House Judiciary Committee's report (published in March 2010) summarizing the evidence in support of the Articles.

[25] Judge Porteous cites the length of the impeachment trial proceedings against Judge Alcee Hastings as a reference for the reasonableness of his request for continuance. Judge Hastings's impeachment is the far outlier in terms of length duration for Senate impeachment proceedings. Of the eleven federal judges impeached and tried in the Senate, the duration of Senate impeachment proceedings has varied from 34 to 437 days. Congressional Research Service, *The Role of the Senate in Judicial Impeachment Proceedings* (April 9, 2010) (calculating for each impeachment proceeding the duration between the day the Senate first formed itself as a Court of Impeachment and the Senate's final vote on the articles). All but two impeachments trials were *resolved* within six months. *Id.*

[26] Letter of Alan Baron to Richard Westling and Jonathan Turley (June 15, 2010).

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Unless otherwise ordered, all filing deadlines shall be submitted in MS Word and PDF formats via electronic mail to filings@sitc.senate.gov no later than 5:00 p.m. on the due date. Two (2) copies should also be submitted in paper form with the Clerk of the Committee (or her designee) in B-34A of the Russell Senate Office Building soon thereafter. Unless expressly modified, all other requirements of the Committee's May 26 Scheduling Order remain in effect.

CONCLUSION

For these foregoing reasons, the Committee disqualifies Mr. Westling as counsel of record and grants in part and denies in part Judge Porteous's Motion for a Continuance. Judge Porteous's Motion for Hearing is denied.

Dated: June 21, 2010

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

AMY KLOBUCHAR

JIM DeMINT

SHELDON WHITEHOUSE

JOHN BARRASSO

TOM UDALL

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JAMES E. RISCH

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THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

June 14, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire C. McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous, Jr.

Dear Senator McCaskill and Senator Hatch:

Over the weekend, I supplied a full analysis of the conflict of interest raised in this case vis-à-vis Mr. Richard Westling and his firm Ober Kaler. As part of that analysis, I noted that a possible conflict of interest of Louisiana lawyers Sam Dalton and Rémy Voisin Starns had been raised at the last meeting by Mr. Westling. We stated that both lawyers had been advising Judge Porteous in Louisiana and would not have a role in the trial. Following the recent meeting, the matter was raised with both lawyers. This afternoon I received confirmation that both lawyers are formally withdrawing from any role in these proceedings.

Respectfully,

Jonathan Turley
Co-Lead Counsel to Judge G. Thomas Porteous, Jr.

cc: Thomas Jipping, Esq.
Derron Parks, Esq.
Morgan Frankel, Esq.
Alan I. Baron, Esq.
Mark Dubester, Esq.
Harold Damelin, Esq.

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June 24, 2010

The Honorable Claire McCaskill, Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of the Honorable G. Thomas Porteous, an Article III Judge.
Motion To Withdraw From the Representation Of Honorable G. Thomas Porteous, an Article III Judge.

GREETINGS SENATOR McCASKILL AND SENATOR HATCH:

Please notice the Joint Motion To Withdraw by Attorney Samuel S. Dalton (LSBA# 4473) and Attorney Rémy Voisin Starns from the Representation of G. Thomas Porteous, an Article III Judge.

The Motion, with the exhibits, is self- explanatory in that it exhibits a conflict of interest that requires withdrawal by the undersigned attorneys.

Thank you for your attention and patience in this matter.

Sincerely,

Samuel S. Dalton

Samuel S. Dalton (LSBA# 4473)
Attorney At Law

Rémy Voisin

Rémy Voisin Starns (LSBA# 26522)
Attorney At Law

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

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

JOINT MOTION TO WITHDRAW FROM REPRESENTING THE HON. G. THOMAS PORTEOUS, AN ARTICLE III JUDGE BY ATTORNEY SAMUEL S. DALTON (LSBA# 4473) AND ATTORNEY RÉMY VOISIN STARNS (LSBA 26522)

NOW BEFORE THE SENATE OF THE UNITED STATES, SITTING AS A COURT OF IMPEACHMENT, comes Samuel S. Dalton, attorney at law (LSBA# 4473) and Rémy Voisin Starns, members, in good standing of the Louisiana State Bar Association, the 5th Circuit Bar Association, and admitted to practice law and appear in the Supreme Court of the United States of America, hereinafter referred to as Movers, appearing herein for the sole purpose of informing the Senate of the United States, Sitting as a Court of Impeachment, that:

1. It has become mandatory, as a matter of Ethics and Professionalism, that withdrawal, by Movers, from any representation of the Honorable G. Thomas Porteous, Jr., an Article III Judge of the United States District Court for the Eastern District of Louisiana, in the above Entitled Matter for the following reasons:

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A) The Honorable G. Thomas Porteous has been Impeached by the United States House of Representatives and faces trial, in the United States Senate, upon Four Articles of Impeachment approved by the House of Representatives; and,[1]

B) The Louisiana Rules of Professional Conduct for Attorneys, Rule 1.7 thereof provides, to-wit:

Louisiana Rules of Professional Conduct

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if therepresentation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

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[1] See Exhibit A, Articles of Impeachment, attached hereto and made a part hereof.

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AND,

C) The District of Columbia Rules of Professional Conduct for Attorneys, Rule 1.7 thereof provides, to-wit:

Rule 1.7—Conflict of Interest: General Rule

(a) A lawyer shall not advance two or more adverse positions in the same matter.

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation;

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if

(1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and

(2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

(d) If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

Each of the foregoing Rules mandate the withdrawal of any representation of the said G. Thomas Porteous, an Article III Judge, in the above entitled Impeachment Proceedings, by Movers, because:

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1) Rhona Danos is listed as an witness, in the prosecution of this matter, in the letter dated April 13, 2010, addressed to Honorable Claire McCaskill, Chairman, and Honorable Orrin Hatch, Vice Chairman, Senate Rule IX Impeachment Committee by House Managers, Adam Schiff and Bob Goodlatte[2]; and,

2) Movers are presently, at all relevant times herein, represented Rhona Danos in the matter entitled Rhonda Danos v. Edith Jones, Chief Judge, et al, No. 09-6299 on the Docket of the United States District Court for the Eastern District of Louisiana[3]; and,

3) Movers, at all times relevant, were under the belief that a waiver could cure the current and actual conflict of interest, however, after learning of the attitude and interpretation placed upon the Louisiana and the District of Columbia Rules of Professional Conduct (1.7) relative to conflict of interest, by Adam Schiff, Chairman, Impeachment Task Force and Bob Goodlatte, Ranking Member, Impeachment Task Force.[4] Movers consulted with other Attorneys and realized that such conflict cannot be cured by a waiver from a fully informed client; it being impossible to fully inform Rhonda Danos of the consequences of this dual representation, without disclosing privileged information.

> **This court has consistently held that a defense attorney *required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict.* See, e.g., State v. Carmouche, 508 So.2d at 804; Franklin, 400 So.2d at 620 ("[W]e must agree with the defendant's attorney, and with the trial judge, that an actual conflict arose when the state called**

---

[2]See Exhibit B, April 13, 2010 letter by Adam Schiff and Bob Goodlatte, attached hereto and made a part hereof.

[3]See Exhibit C, Excerpts from Federal Complaint wherein Rhonda Danos appears as Plaintiff, represented by Movers, attached hereto and made a part hereof.

[4]See Exhibit D, letter of October 29, 2009, addressed to Attorney Richard Westling, attached hereto and made a part hereof.

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> **[counsel's former client] to the stand. [Counsel] was put in the unenviable position of trying zealously to represent the defendant at trial while simultaneously trying to protect the confidences of a former client who was testifying for the state against the defendant."); see also Dane S. Ciolino, ed., Louisiana Rules of Professional Conduct, Rule 1.7 comment 3 (L.S.B.A. 2001) ("As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent."). *State of Louisiana v. Cisco,* No. 2001-KA-2732 (La. S.Ct. December 3,2003, Rehearing Denied January 16, 2004, 861 So.2d 118 (La. S.Ct. 12/03/2003) at pg. 130 (Italics and underlined added);**

In view of the foregoing premises and the Rules of Professional Conduct for Attorneys, Movers are obligated to recognize the "actual and current conflict of interest" outstanding herein, thereby mandating the withdrawal and the removal of themselves from rendering any legal representation on behalf of the said G. Thomas Porteous in the above entitled Impeachment Proceedings; and,

IT IS SO MOVED.

Samuel S. Dalton (LSBA# 4473)
2001 Jefferson Highway
P.O. Box 10501
Jefferson, LA 70181-0501
(504) 835-4289 / FAX 835-4302

Rémy Voisin Starns
2001 Jefferson Highway
P.O. Box 10501
Jefferson, LA 70181-0501
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CERTIFICATE

I HEREBY CERTIFY THAT ON THE 24th DAY OF JUNE, 2010, I SERVED COPIES OF THE FOREGOING BY 1st Class Mail and/or ELECTRONIC MEANS ON THE HOUSE MANAGERS, THROUGH COUNSEL, AT THE FOLLOWING EMAIL AND/OR ADDRESSES, TO-WIT:

Alan Baron - abaron@sevfarth.com
Mark Dubester - mark.dbester@mail.house.gov
Harold Damelin - Harold.damelin@mail.house.gov
Morgan Frankel - Morgan J. Frankel
Attorney at Law
Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250
Kirsten Konar - kkonar@sevfarth.com

Jessica Klein - jessica.klein@mail.house.gov
Richard Westling - rwwestling@ober.com
P. J. Meitl - pjmeitl@bryancave.com
Jonathan Turley - jturley@law.gwu.edu
Rebecca Seidel - United States Senate
Impeachment Committee
Russell Senate Office Building
Room B-34A
Washington, DC 20002

I FURTHER CERTIFY THAT THE EXHIBITS, ATTACHED HERETO AND MADE A PART HEREOF, ARE TRUE AND CORRECT COPIES OF WHAT THEY PURPORT TO BE.

Samuel S. Dalton

Samuel S. Dalton, (LSBA#4473)
Attorney

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H. Res. 1031
In the House of Representatives, U.S.,
March 11, 2010.

Impeaching G. Thomas Porteous, 3r., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors.

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

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

Article I

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

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

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

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

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

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

Article II

G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court Judge. That conduct included the following: Beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, and continuing while he was a Federal judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail 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.,

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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.

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(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.

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Congress of the United States
Washington, DC 20515

April 13, 2010

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr. — Preliminary Matters

Dear Senator McCaskill and Senator Hatch:

The purpose of this letter is to address the questions set forth in the March 31, 2010 email from Senate Legal Counsel Frankel relating to certain preliminary procedural issues in connection with the impeachment trial of Judge Porteous.

Pretrial Motions. The House may raise pre-trial motions regarding the following matters:

- Motion to admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing [the Fifth Circuit Hearing] and at the House Impeachment Task Force Hearings where Judge Porteous or his counsel has either cross-examined the witness or has been provided the opportunity to do so;

- Motion to admit as substantive evidence the sworn testimony and other statements of Judge Porteous at the Fifth Circuit Hearing;

- Motion to admit certain documents into evidence, the authenticity and relevance of which are not in dispute. These would include, for example, court records (the curatorships, the Liljeberg proceedings, and the bankruptcy proceedings) or other similar documents. It is possible that this motion will be unnecessary, or will be limited in scope, depending on whether a stipulation can be reached with Judge Porteous's counsel on this topic;

- Motion to permit or admit expert testimony; and

- Motion relating to stipulations, if appropriate.

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Stipulations as to the authenticity of documents. The House believes that the authenticity of the documents that are relevant to the impeachment trial is beyond real dispute. These documents generally consist of court records, transcripts, financial records, public records and certain business records. The House has already identified those documents which are likely to be used in the Senate trial (using the same exhibit numbers from the Report that accompanied the Impeachment Resolution), and has provided counsel for Judge Porteous a disc containing the documents and an exhibit list. By separate letter dated April 9, 2010, the House has requested
that Judge Porteous stipulate to the authenticity of the documents on the exhibit list.

Stipulations as to facts. The House believes that a significant portion of the facts that are alleged in the Articles are uncontested or have been established beyond legitimate dispute. As an example, Judge Porteous has admitted to pertinent facts surrounding his relationship with attorneys Jacob Amato and Robert Creely — including his financial relationship with them prior
to becoming a Federal judge, his handling of the Liljeberg gr case, his solicitation and acceptance of cash from Amato when the case was pending, and his acceptance of other things of value from Amato and Creely while the case was pending. Similarly, the essential facts surrounding Judge Porteous's handling of his personal bankruptcy are not in dispute. The House is in the process of preparing a number of proposed factual stipulations, and will soon be providing them to Judge Porteous's counsel for review.

Nonetheless, to expedite the stipulation process, the House suggests that at the time the Committee sets a motions schedule in this case, it direct each party to consider stipulations proposed by the other party. The House further suggests that "any proposed stipulation of fact [or as to authenticity] . . . be accepted as true unless the opposing party file[s] an objection which include[s] a proffer as to why the proposed stipulation of fact [or authenticity] should not be accepted as true.'" The House urges that the Committee direct that this process be completed as of the date that responses to motions are due to be filed.

Evidence from prior proceedings. It is the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial. (As noted, the House may file a motion seeking to admit particular evidence in advance of the Senate trial.) At this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination. The House cannot rule out the possibility that circumstances may arise where it would seek to have the Committee consider sworn prior recorded testimony or other statements of witnesses whose credibility had not been questioned or whose statements relate to facts not in

1. "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101' Cong., 1st Sess. 169 (1989).

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substantial dispute.2

Witnesses. The House may call the following witnesses. The nature of the testimony of the respective witnesses is generally described in the Report that accompanied the Articles of Impeachment. Depending on the nature of the cross-examination or the defense case generally, it is likely that it will not be necessary to call all of them, and, of course, it may be necessary to call other witnesses to address factual contentions that may be raised by the defendant. Those who sought immunity in connection with the House investigation are indicated.

Article I

1. Robert Creely [Immunity]
2. Jacob Amato [Immunity]
3. Leonard Levenson [Immunity]
4. Donald Gardner
5. Joseph Mole
6. Rhonda Danos [Immunity]

Article 2

7. Louis Marcotte
8. Lori Marcotte
9. Ronald Bodenheimer
10. Bruce Netterville [Immunity]
11. Mike Reynolds
12. Jeffrey Duhon
13. Aubrey Wallace

Article 3

14. Claude Lightfoot
15. FBI Special Agent DeWayne Horner
16. FBI Financial Analyst Gerald Fink
17. Richard Greendyke

Article 4

18. Former FBI Agent Cheyanne Tackett
19. Former FBI Agent Robert Hamill

2See, e.g.., "Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings," S. Rept. No. 101-156, 101' Cong., 1st Sess. 170 (1989).

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Length of the case-in-chief. The House believes it can put on its case-in-chief in 30 hours of direct testimony.

Other. On March 23, 2010, the House provided to Judge Porteous all the exhibits cited in the House Report, as well as other materials marked as exhibits and an accompanying Exhibit List. (In that the Report refers to matters such as procedural and litigation background that are not going to be part of the trial in this case, the Exhibit List contains numerous documents which will not constitute evidence at trial.) The House also made available other documents and records for inspection. Judge Porteuos's attorneys have already made an initial review of these other documents. (A copy of the letter and Exhibit List is attached.)

A review of the Exhibit List provided to Mr. Westling reveals that there are virtually no materials with which Judge Porteous is unfamiliar. A significant portion of the documents on the Exhibit List were provided to Judge Porteous in connection with the Fifth Circuit Hearing or consist of testimony taken at that Healing.' Other significant sets of records include: 1) various documents describing the procedural background in this case; 2) court documents with which Judge Porteous is personally familiar, such as the records from the Liljeberg case, over which Judge Porteous presided; and 3) documents consisting of the grand jury-related litigation in this case.4

Though the Committee on the Judiciary's Impeachment Task Force developed additional corroboration for certain of the allegations — such as by obtaining the curatorship orders issued by Judge Porteous to Robert Creely, obtaining records of bails set by Judge Porteous that benefitted the Marcottes, obtaining the orders by which Judge Porteous set aside convictions, or engaging in further analysis of Judge Porteous's financial records related to his bankruptcy — a review of the Articles demonstrates they set forth virtually no substantive allegation of which Judge Porteous and his attorney were not personally aware:

3'These include a substantial portion of Exhibits 11-49, relating to Amato, Creely, Gardner, Levenson and Danos; Exhibits 100-114, consisting of Judge Portoues's financial disclosure reports; Exhibits 120-124, consisting of the Lightfoot grand jury testimony; exhibits 124-149, consisting of various bankruptcy records; and Exhibits 301-343, consisting of casino records and a few other miscellaneous bankruptcy-related records.

4Exhibits 1-10 are background documents related to the procedural history of this case; Exhibits 50-68 are Liljeberg court records; Exhibits 400-436 are the litigation documents related to Judge Porteous's efforts to keep relevant materials from the House and Senate. In addition, Exhibits 150 through 200 generally consist of records related to Judge Porteous's seeking and acceptance of trips and gifts from various parties that are not charged in the Articles but are contained in the Report. Exhibits 200 through 300 are Depositions exhibits. Some of these are photographs (and some of the photographs include Judge Porteous), but many are duplicates of documents that were marked and listed in other places on the Exhibits List and include numerous exhibits related to matters not charged in the Articles.

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Article I. Judge Porteous has been aware of the details and substance of the Liljeberg allegations since in or about late 2003. Judge Porteous was provided with the documents, including grand jury testimony, related to his relationships with the Robert Creely and Jacob Amato and his handling of the 1Liljeberg case in connection with the October 2007 Fifth Circuit Hearing. At that Hearing, he cross-examined Creely, Amato, and Joseph Mole — the critical fact witnesses. Judge Porteous was also present at the Task Force Hearing at which those three men testified and were cross-examined by his counsel.

Article II. Judge Porteous has been familiar with the Marcotte allegations since at least 2003. Indeed, in early 2004, Judge Porteous's criminal defense attorney at the time engaged in affirmative defensive efforts on Judge Porteous's behalf to keep him from being charged in the Marcotte corruption scheme. These efforts included obtaining from Louis Marcotte an affidavit that attempted to exculpate Judge Porteous from allegations that he (Judge Porteous) received
cash in exchange for his taking official acts in lowering bonds. In addition, Judge Porteous's present counsel, Mr. Westling, is personally and intimately familiar with the Marcotte allegations — having represented Louis Marcotte in connection with his guilty plea in March 2004 and, in fact, having been present representing Louis Marcotte during Louis Marcotte's debriefing interviews with the FBI in 2004.3 The allegations in Article II track the substance and detail of those interviews and Louis Marcotte's and Lori Marcotte's Task Force testimony, at which Judge Porteous was in attendance.

Article III. Judge Porteous has been aware of the details and substance of the bankruptcy allegations since at least 2004, when his bankruptcy attorney, Claude Lightfoot, was subpoenaed to the grand jury in connection with the Department of Justice criminal investigation. Judge Porteous was provided complete discovery on this topic at the Fifth Circuit Hearing, including Lightfoot's prior grand jury testimony and his files. He examined Lightfoot and other witnesses at the Fifth Circuit Hearing, and Mr. Westling was provided the opportunity to examine Lightfoot at the Task Force Hearing.

Article IV. As noted above, Judge Porteous is well aware of the allegations and evidence related to his relationships both with attorneys Robert Creely and Jacob Amato and with Louis Marcotte — information that Judge Porteous is alleged to have concealed in connection with his 1994 background check. Furthermore, the evidentiary materials memorializing his statements consist of but a handful of documents, some of which were disclosed at the House Task Force hearings in November of 2009.

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5 In a letter dated October 29, 2009, Mr. Schiff and Mr. Goodlatte alerted Mr. Westling to the potential conflict of interest in his taking a role in these proceedings on behalf of Judge Porteous that would require him to take a position or actions adverse to the Marcottes. It would be appropriate that Judge Porteous affirmatively waive any objection to Mr. Westling representing him arising from Mr. Westling's potential conflict so that no issue emerges at trial that would cause Mr. Westling to seek to withdraw and thus delay the proceedings.

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We look forward to working with the Committee to expedite the proceedings in this case.

Sincerely,

Adam Schiff
House Impeachment Manager

Bob Goodlatte
House Impeachment Manager

cc: Morgan Frankel
Senate Legal Counsel

Attachments

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
2009 SEP 15 AM 11:53
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

09-6299

RHONDA DANOS
Plaintiff

VERSUS

EDITH JONES, Chief Judge, United States Court of Appeals for the Fifth Circuit individually and in her official capacity as presiding officer of the Judicial Council of the Fifth Circuit, THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT, an entity created by Congress pursuant to 28 U.S.C. §332 composed entirely of Article III Judges; AND,
CAROLYN DINEEN KING, Judge, United States Court of Appeals for the Fifth Circuit., JERRY E. SMITH, Judge, United States Court of Appeals for the Fifth Circuit, W. EUGENE DAVIS Judge, United States Court of Appeals for the Fifth Circuit Council of the Fifth Circuit, RHESA H. BARKSDALE Judge, United States Court of Appeals for the Fifth Circuit,EDITH BROWN CLEMENT, A.K.A "JOY" CLEMENT, Judge, United States Court of Appeals for the Fifth Circuit, PRISCILLA R. OWEN Judge, United States Court of Appeals for the Fifth Circuit, JENNIFER WALKER ELROD Judge, United States Court of Appeals for the Fifth Circuit, LESLIE H. SOUTHWICK Judge, United States Court of Appeals for the Fifth Circuit, SARAH S. VANCE, United States District Judge for the Eastern District of Louisiana., NEAL B. BIGGERS JR., United States District Judge for the Northern District of Mississippi, LOUIS G. GUIROLA, JR., United States District Judge for the Southern District of Mississippi, SAM R. CUMMINGS, United States District Judge for the Northern District of Texas, HAYDEN HEAD, United States District Judge for the Southern District of Texas, FRED BIERY, United States District Judge for the Western District of Texas, each of the foregoing named Judges are named as Defendants herein, in their official capacity as a member of the Judicial Council of the Fifth Circuit and individually.

Defendants

NO: SECT. A MAG. 3
CIVIL ACTION

SECTION: _____

MAG: _____

Suit for Declaratory Judgment pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202 and Such Equitable Relief as the Court deems proper.

COMPLAINT FOR DECLARATORY JUDGMENT

Fee $350
Process
X Dktd
CtRmDep
Doc. No.

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PURSUANT TO 28 U.S.C. § 2201 AND
FOR FURTHER RELIEF PURSUANT TO 28 U.S.C. § 2202.

(Seeking a Declaratory Judgment under 28 U.S.C. §2201, declaring the nullity of an ULTRA VIRES[1] ACT, described herein, by Government Actors, under color of their Authority as Members of The Judicial Council of the Fifth Circuit and thereby imposing termination of employment, suffering, and punishment, upon Plaintiff, a Statutory Employee under Title 28 U.S.C. § 752 of an Article III Judge, in violation of all known promises of Inherent Fairness, Constitutional Rights under the 1st and the 5th, Amendments, violation of The Separation of Powers Doctrine and a violation of U.S. Const. Article II, Section 4 (the removal clause), and a violation of the the Authority of the Judicial Council of the Fifth Circuit and thereby making such act and order an ultra vires act, unconstitutional on its face and as applied; and, for further relief pursuant to 28 U.S.C. § 2202.)

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The JUDICIAL COUNCIL OF THE FIFTH CIRCUIT, through its Presiding Officer Chief Judge of the 5th Circuit, Hon. Edith H. Jones	**9 of 39**
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Judge RHESA H. BARKSDALE, in his official capacity as a member of the Judicial Council of the Fifth Circuit and Individually	**10 of 39**
Judge EDITH BROWN CLEMENT, in her official capacity as a member of the Judicial Council of the Fifth Circuit and Individually	**10 of 39**
[redacted]	[redacted]

[1] ***Ultra Vires:*** **An act performed without any authority to act on subject. Ultra Vires act of municipality is one which is beyond powers conferred upon it by law. See Black's Law Dictionary, Sixth Edition.**

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28 U.S.C. §354(a)(2)(A)(i): Authority of Judicial Councils to order "on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint".	30 of 39	U.S. Const. Art. II §4: Impeachment removal clause giving Congress the sole power to remove an Article III Judge.	33 of 39

Page 19 of 24 -EXHIBIT C -Danos Complaint.

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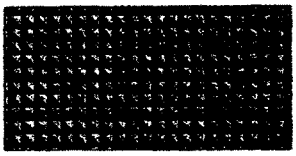
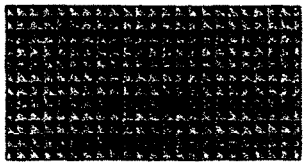
STATUTES	Pg#	CONSTITUTIONAL PROVISIONS	Pg#
28 U.S.C. §354(a)(2)(A)(ii): Authority of Judicial Councils for "censuring or reprimanding such judge by means of private communication".	30 of 39	US. Const. Art. III §1: The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.	33 of 39
28 U.S.C. §354(a)(2)(A)(iii): Authority of Judicial Councils for "censuring or reprimanding such judge by means of public announcement".	30 of 39		
28 U.S.C. §332(d)(1): Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment.	29 of 39	U.S. Const. Amend. 1: To petition Government for a redress of grievances. ..... 	35 of 39
28 U.S.C. §331: 28 U.S.C. § 331: Congressional creation of the Judicial Conference of the United States for the purpose of implementing the Judicial Conduct and Disability Act of 1980 (28 U.S.C. § 354 et seq.) ..... 	29 of 29	U.S. Const. Amend. 5: The Due Process and Equal Protection Clause thereof: Fifth Amendment equal protection claims are cognizable under the Amendment's Due Process Clause. Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964); Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976).	34 of 39

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3. The Judicial Council of the Fifth Circuit committed an " *ULTRA VIRES*" act by issuing an "Order that Judge Porteous' authority to employ staff, i.e. his secretary and law clerk(s) be suspended for the period of time encompassed by paragraph 2 above. *See* 28. U.S.C. §§ 332(d)(1)." The Judicial Council of the Fifth Circuit had no legal authority nor any jurisdiction to issue such an Order; and,

4. The Judicial Council of the Fifth Circuit's "Order that Judge Porteous' authority to employ staff, i.e. his secretary and law clerk(s) be suspended for the period of time encompassed by paragraph 2 above is null, void, and without any legal effect whatsoever; and,

5. Further Relief, to-wit:

1. Plaintiff Rhonda Danos be reinstated to her position as secretary to Judge Porteous, forthwith.

2. Plaintiff Rhonda Danos be immediately remunerated in all amounts, benefits and emoluments including but not limited to all back pay and retirement credits due her from September 19, 2008 until such time as She is reinstated.

3. And for Attorney's fees and Costs to be assessed against the Defendants, each and all, and for any and all other equitable relief this Honorable Court deems just.

Respectfully Submitted,

Samuel S. Dalton (LSBA# 4473)
Attorney for Plaintiff Rhonda Danos
2001 Jefferson Hwy
P.O. Box 10501
Jefferson, Louisiana 70181-0501
PH; 504.835.4289 /FAX: 504.835.4302

Rémy Vaïsin Starns (LSBA# 26522
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ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

http://www.house.gov/judiciary

October 29, 2009

Richard Westling, Esq.
Ober Kaler Grimes & Shriver
1401 H Street, N.W., Suite 500
Washington, D.C. 20005

Re: Impeachment Inquiry of Judge G. Thomas Porteous, Jr.

Dear Mr. Westling:

It has come to the attention of the Impeachment Task Force that you may currently represent Louis M. Marcotte, III, and Lori M. Marcotte in connection with civil litigation arising out of their operation of Bail Bonds Unlimited, Inc. (Bartholomew v. Bail Bonds Unlimited, Inc. et al, Case No. 2:05-cv-04165-ILRL-JCW (E.D. La.), and that you previously represented Louis M. Marcotte, III, in his criminal case (U.S. v. Marcotte, Crim. No. 04-061 (E.D. La.)).

As you know, Judge Porteous's relationship with Louis Marcotte and Lori Marcotte may be at issue in the pending impeachment inquiry being conducted by the Task Force for the House of Representatives, Committee on the Judiciary, and either or both may be called as witnesses at a hearing adverse to Judge Porteous.

As we are also sure you are aware, because of your duties of loyalty to current and prior clients and duties to protect confidential information, if there were to be a hearing where the relationship between the Marcottes and Judge Porteous is at issue, there would be significant conflict of interest issues arising from your participation. Further, those conflict issues may be implicated by your participation in the formulation of a factual defense of Judge Porteous where you are constrained from providing advice due to your ongoing ethical obligations.

As you know, the ethical bar rules in the District of Columbia, Maryland and Louisiana require informed consent by all clients in order to permit waivers of conflicts, and two of these jurisdictions require that such informed consent be in a signed writing. See, e.g., District of Columbia Rules of Professional Conduct, Rule 1.7(c); Louisiana Rules of Professional Conduct, Rule 1.7(b)(4) (requires writing); Maryland Lawyer's Rules of Professional Conduct, Rule 1.7(b)(4) (requires writing). We request that you promptly provide the Task Force with signed consent forms from all three of these clients. Until the Task Force and Committee are fully apprised, we will not be in a position to make a determination of the appropriate treatment of this situation in the event that the Marcottes are called as witnesses adverse to Judge Porteous.

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Mr. Westling
October 29, 2009
Page 2

We write now to put you and Judge Porteous on notice of the House's concern and so that you and he can take appropriate steps promptly to deal with this situation. We are aware that, in the past, Judge Porteous sought delays in Fifth Circuit proceedings in order for him to obtain new counsel. No delays in our schedule will be permitted to accommodate any search for additional or replacement counsel for Judge Porteous. If a hearing is scheduled at which the Marcottes are to testify, the Task Force will not postpone it in order for Judge Porteous to obtain new or different counsel.

We look forward to your providing the Task Force with the information we seek and your response to our concerns at your earliest opportunity so that the Task Force and the Committee can determine how we will proceed in light of this situation.

Please respond to Alan I. Baron, Esq., Seyfarth Shaw, 975 F. Street, N.W., Washington, D.C., 20004 (202-828-3589).

Sincerely,

Adam Schiff
Chairman
Impeachment Task Force

Bob Goodlatte
Ranking Member
Impeachment Task Force

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

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

PROPOSED ORDER

THE FOREGOING MOTION TO WITHDRAW FROM THE REPRESENTATION OF THE HON. G. THOMAS PORTEOUS, AN ARTICLE III JUDGE, THE PREMISES RECITED THEREIN AND TAKING NOTICE OF THE PROCEEDINGS ENTITLED *RHONDA DANOS V. EDITH JONES, CHIEF JUDGE, ET AL,* NO. 09-6299 ON THE DOCKET OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA WHEREIN THE MOVERS REPRESENTS RHONDA DANOS, AS PLAINTIFF AND LISTED AS A WITNESS ON BEHALF OF THE SENATE TRIAL COMMITTEE IN THE IMPEACHMENT PROCEEDINGS OF G. THOMAS PORTEOUSE, AN ARTICLE III JUDGE, AND THE CONFLICT OF INTEREST THEREBY ARISING, CONSIDERED:

SAMUEL S. DALTON (LSBA# 4473) AND RÉMY VOISIN STARNS (LSBA# 26522) ATTORNEYS ARE HEREWITH DISMISSED AS ATTORNEYS FOR HON. G. THOMAS PORTEOUS, AN ARTICLE III JUDGE. IN THESE IMPEACHMENT PROCEEDINGS.

WASHINGTON, D.C. THIS ____ DAY OF _____, 2010.

CLAIRE McCASKILL, CHAIR	**ORRIN G. HATCH, VICE CHAIR**
SENATE IMPEACHMENT TRIAL COMMITTEE	**SENATE IMPEACHMENT TRIAL COMMITTEE**

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Offices in
Maryland
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Virginia

June 24, 2010

By Electronic Mail and Hand Delivery

The Honorable Claire McCaskill, Chairman
The Honorable Orrin G. Hatch, Vice Chairman
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, DC. 20510

Re: In re: Impeachment of G. Thomas Porteous, Jr.

Dear Chairman McCaskill and Vice Chairman Hatch:

I am writing to acknowledge receipt of the Senate Impeachment Trial Committee's June 21, 2010 Disposition of Judge Porteous' Motion for a Continuance. While I respect the Committee's decision to disqualify me from further participation in the Senate Impeachment Trial, I have no doubt that the Committee's decision in that regard was unnecessary, and that it will not advance the interest of a fair impeachment process. I remain confident that the steps that had been taken to address the conflict issue were adequate under the governing Rules of Professional Conduct and under any other applicable professional standards.

In light of the Committee's ruling, however, I am withdrawing from any further participation in the defense of Judge Porteous before the Senate. I will do everything I can to quickly and efficiently transfer the entirety of the matter to Jonathan Turley and to Daniel Schwartz at Bryan, Cave.

Sincerely,

Richard W. Westling

RWW/nr
cc: Alan I. Baron, Esq.
Mark Dubester, Esq.
Harold Damelin, Esq.
Morgan Frankel, Esq

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