

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

THIRD AFFIRMATIVE DEFENSE

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

Respectfully submitted,

THE U.S. HOUSE OF REPRESENTATIVES

By

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.

ENDNOTES

¹ Judge Harry E. Claiborne was acquitted of Article III, charging that he "was found guilty by a twelve-person jury" of criminal violations of the tax code, and that "a judgment of conviction was entered against [him]." See "Impeachment of Harry E. Claiborne," H. Res. 471, 99th Cong., 2d Sess. (1986) (Articles of Impeachment); 132 Cong. Rec. S 15761 (daily ed. Oct. 9, 1986) (acquitting him on Article III).

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

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

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

⁴ The respective Articles of Impeachment against Judges Halsted L. Ritter, Harold Louderback, and Robert W. Archbald each set forth lengthy descriptions of judicial misconduct arising from improper financial relationships between those judges and the private parties. These consist of detailed narration specifying numerous discrete acts. See "Impeachment of Judge Halsted L. Ritter," H. Res. 422, 74th Cong., 2d Sess. (March 2, 1936) and "Amendments to Articles of Impeachment Against Halsted L. Ritter," H. Res. 471, 74th Cong., 2d Sess. (March 30, 1936), reprinted in "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) [hereinafter "1973 Committee Print"] at 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.

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

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

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

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

ORDERS FOR MONDAY, APRIL 26, 2010

Mr. CASEY. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 2 p.m., Monday, April 26; that following the prayer and the pledge, the Journal of proceedings be approved to date, the morning hour be deemed expired, the time for the two leaders be reserved for their use later in the day, and there be a period of morning business until 3 p.m., with Senators permitted to speak for up to 10 minutes each; that following morning business, the Senate resume the motion to proceed to S. 3217, Wall Street reform.

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

PROGRAM

Mr. CASEY. Mr. President, at 5 p.m., Monday, the Senate will proceed to a rollcall vote on the motion to invoke cloture on the motion to proceed to the Wall Street reform legislation.

ADJOURNMENT UNTIL MONDAY, APRIL 26, 2010, AT 2 P.M.

Mr. CASEY. If there is no further business to come before the Senate, I ask unanimous consent that it adjourn under the previous order.

There being no objection, the Senate, at 6:45 p.m., adjourned until Monday, April 26, 2010, at 2 p.m.

NOMINATIONS

Executive nominations received by the Senate:

DEPARTMENT OF DEFENSE

JONATHAN WOODSON, OF MASSACHUSETTS, TO BE AN ASSISTANT SECRETARY OF DEFENSE, VICE S. WARD CASSCELLS.

DEPARTMENT OF STATE

ROSE M. LIKINS, OF VIRGINIA, A CAREER MEMBER OF THE SENIOR FOREIGN SERVICE, CLASS OF MINISTER-COUNSELOR, TO BE AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF THE UNITED STATES OF AMERICA TO THE REPUBLIC OF PERU.

LUIS E. ARREAGA-RODAS, OF VIRGINIA, A CAREER MEMBER OF THE SENIOR FOREIGN SERVICE, CLASS OF MINISTER-COUNSELOR, TO BE AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF THE UNITED STATES OF AMERICA TO THE REPUBLIC OF ICELAND.

CONFIRMATIONS

Executive nominations confirmed by the Senate, Thursday, April 22, 2010:

THE JUDICIARY

DENNY CHIN, OF NEW YORK, TO BE UNITED STATES CIRCUIT JUDGE FOR THE SECOND CIRCUIT.

DEPARTMENT OF JUSTICE

WILLIAM N. NETTLES, OF SOUTH CAROLINA, TO BE UNITED STATES ATTORNEY FOR THE DISTRICT OF SOUTH CAROLINA FOR THE TERM OF FOUR YEARS.

WIFREDO A. FERRER, OF FLORIDA, TO BE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF FLORIDA FOR THE TERM OF FOUR YEARS.

DAVID A. CAPP, OF INDIANA, TO BE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF INDIANA FOR THE TERM OF FOUR YEARS.

ANNE M. TOMPKINS, OF NORTH CAROLINA, TO BE UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF NORTH CAROLINA FOR THE TERM OF FOUR YEARS.

KELLY MCDADE NESBIT, OF NORTH CAROLINA, TO BE UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF NORTH CAROLINA FOR THE TERM OF FOUR YEARS.

PETER CHRISTOPHER MUNOZ, OF MICHIGAN, TO BE UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF MICHIGAN FOR THE TERM OF FOUR YEARS.

LORETTA E. LYNCH, OF NEW YORK, TO BE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK FOR THE TERM OF FOUR YEARS.

NOEL CULVER MARCH, OF MAINE, TO BE UNITED STATES MARSHAL FOR THE DISTRICT OF MAINE FOR THE TERM OF FOUR YEARS.

GEORGE WHITE, OF MISSISSIPPI, TO BE UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF MISSISSIPPI FOR THE TERM OF FOUR YEARS.

BRIAN TODD UNDERWOOD, OF IDAHO, TO BE UNITED STATES MARSHAL FOR THE DISTRICT OF IDAHO FOR THE TERM OF FOUR YEARS.

IN THE COAST GUARD

COAST GUARD NOMINATIONS BEGINNING WITH JOANN F. BURDIAN AND ENDING WITH DAWN N. PREBULA, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON FEBRUARY 24, 2010.

COAST GUARD NOMINATIONS BEGINNING WITH KAREN R. ANDERSON AND ENDING WITH STEVEN M. LONG,

WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON MARCH 10, 2010.

FOREIGN SERVICE

FOREIGN SERVICE NOMINATIONS BEGINNING WITH KAREN L. ZENS AND ENDING WITH RICHARD STEFFENS, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON JANUARY 26, 2010.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NOMINATIONS BEGINNING WITH SCOTT J. PRICE AND ENDING WITH SARAH K. MROZEK, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON FEBRUARY 22, 2010.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NOMINATIONS BEGINNING WITH HEATHER L. MOE

AND ENDING WITH KURT S. KARPOV, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON FEBRUARY 22, 2010.

WITHDRAWAL

Executive Message transmitted by the President to the Senate on April 22, 2010 withdrawing from further Senate consideration the following nomination:

TIMOTHY MCGEE, OF LOUISIANA, TO BE AN ASSISTANT SECRETARY OF COMMERCE, VICE PHILLIP A. SINGERMAN, WHICH WAS SENT TO THE SENATE ON DECEMBER 21, 2009.