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Senate

The Senate met at 10:01 a.m. and was called to order by the Honorable TOM UDALL, a Senator from the State of New Mexico.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal Lord God, You are our refuge and strength, a very present help in trouble. Because of You, we need not fear, though the Earth be removed and though the mountains be carried into the midst of the sea.

On this day when we remember Pearl Harbor, we thank You for the protection of Your loving providence. You protect us from dangers seen and unseen. You sustain this Nation through seasons of distress and grief. You raise up leaders who possess the strength, wisdom, and courage we need to meet challenges. You are a generous and awesome God. May the memories of Your watch care infuse us with optimism about what the future holds. Keep us from fearing impending storms by reminding us about the way You have led us in the past.

Today, use our lawmakers, the members of their staff, and the thousands who work on Capitol Hill for Your glory. Especially guide our Senators during this impeachment process.

We pray in Your great Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable TOM UDALL led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. INOUYE).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, December 7, 2010.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable TOM UDALL, a Senator from the State of New Mexico, to perform the duties of the Chair.

DANIEL K. INOUYE,
President pro tempore.

Mr. UDALL of New Mexico thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. REID. Mr. President, Senators should be prepared to be in the Chamber throughout the day on the impeachment trial of Judge G. Thomas Porteous, Jr. At 12:30 p.m., the Senate will proceed to legislative session for a period of morning business, with Senator LEMIEUX permitted to speak for up to 15 minutes. Following his remarks, the Senate will recess until 2:30 p.m. to allow for the weekly caucus meetings. When the Senate reconvenes, there will be a mandatory live quorum to resume the court of impeachment. There may be another live quorum at 5:30 this evening to begin the closed session deliberations.

IMPEACHMENT OF JUDGE G. THOMAS PORTEOUS, JR.

CALL OF THE ROLL

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

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 6]

Akaka	Dorgan	McConnell
Alexander	Durbin	Menendez
Barrasso	Enzi	Merkley
Begich	Feingold	Mikulski
Bennet	Feinstein	Murkowski
Bennett	Franken	Murray
Bingaman	Gillibrand	Nelson (NE)
Bond	Grassley	Nelson (FL)
Boxer	Gregg	Pryor
Brown (MA)	Hagan	Reed
Brown (OH)	Hatch	Reid
Bunning	Inouye	Risch
Burr	Isakson	Roberts
Cantwell	Johanns	Rockefeller
Cardin	Johnson	Schumer
Carper	Kerry	Sessions
Casey	Kirk	Snowe
Chambliss	Klobuchar	Stabenow
Coburn	Kyl	Tester
Collins	Leahy	Thune
Conrad	LeMieux	Udall (NM)
Coons	Levin	Vitter
Corker	Lugar	Voinovich
Cornyn	Manchin	Warner
Crapo	McCain	Webb
DeMint	McCaskill	Wyden

Mr. REID addressed the Chair.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. REID. Is a quorum present?

The PRESIDENT pro tempore. A quorum is present.

COURT OF IMPEACHMENT

The PRESIDENT pro tempore. Under the previous order, the hour of 10:12 a.m. having arrived and a quorum having been established, the Senate will resume its consideration of the Articles of Impeachment against Judge G. Thomas Porteous, Jr.

The House managers and Judge Porteous and counsel will please make their entry before the proclamation is made.

(The House managers, Judge Porteous, and counsel proceeded to the seats assigned to them in the well of the Chamber.)

THE JUDGE AND HIS COUNSEL

1. Judge Gabriel Thomas Porteous, Jr.
2. Jonathan Turley
3. Daniel Schwartz

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

4. P.J. Meitl
5. Daniel O'Connor

THE HOUSE OF REPRESENTATIVES MANAGERS

6. Adam Schiff (D–CA)
7. Bob Goodlatte (R–VA)
8. Henry C. ''Hank'' Johnson, Jr. (D–GA)
9. Jim Sensenbrenner (R–WI)
10. Zoe Lofgren (D–CA)

SPECIAL IMPEACHMENT COUNSEL TO THE HOUSE MANAGERS

11. Alan Baron
12. Harold Damelin
13. Mark Dubester
14. Kirsten Konar

STAFF TO THE HOUSE MANAGERS

15. Jeffrey Lowenstein (Schiff)
16. Branden Ritchie (Goodlatte)
17. Elisabeth Stein (Johnson)
18. Michael Lenn (Sensenbrenner)
19. Ryan Clough (Lofgren)

SENATE LEGAL COUNSEL

20. Morgan Frankel
21. Pat Bryan
22. Grant R. Vinik
23. Thomas E. Caballero

SENATE STAFF

24. Derron R. Parks
25. Thomas L. Lipping
26. Justin Kim
27. Rebecca Seidel
28. Erin P. Johnson
29. Paul Lake Dishman IV
30. Susan Smelcer
31. Stephen Hedger
32. Chris Campbell
33. Paige Herwig
34. Stephen C.N. Lilley
35. Justin G. Florence
36. Matthew T. Nelson
37. Thomas J. Maloney
38. Nhan Nguyen
39. Erica Suares
40. Bryn Stewart
41. Emily Ferris
42. Michelle Weber
43. Jason Bohrer
44. Lori Hamamoto
45. Van Luong
46. Marie Blanco

The PRESIDENT pro tempore. The Sergeant at Arms will make the proclamation.

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

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

The PRESIDENT pro tempore. The Chair recognizes the majority leader.

Mr. REID. Mr. President, on March 17, 2010, the House of Representatives exhibited to the Senate four Articles of Impeachment against U.S. District Judge G. Thomas Porteous, Jr., of the Eastern District of Louisiana. Judge Porteous was summoned to answer, which he did on April 7, 2010, and the House of Representatives filed a reply to the answer on April 17, 2010, and amended the reply on April 22, 2010.

On the same day that the Articles of Impeachment were exhibited to the Senate, Members present in the Chamber were administered the oath, as required by the Constitution for impeachment trials. Those Senators who were not present to take the oath and those who had been elected to this body since the oath was administered, should be sworn today.

However, before the oath is administered to these Senators not yet sworn, there is one preliminary matter to be addressed. The Senator from Illinois, Mr. KIRK, was a Member of the House of Representatives during this Congress when the House voted on the Articles of Impeachment. If the Senator wishes to make a statement about his participation in the Senate phase of this impeachment, this would be an appropriate time to do so.

The PRESIDENT pro tempore. The Chair recognizes the junior Senator from Illinois.

Mr. KIRK. Mr. President, I was a Member of the House of Representatives at the time the Articles of Impeachment were proffered against Judge G. Thomas Porteous, Jr. On March 11, 2010, I voted in favor of all four Articles of Impeachment in the House, as recorded in rollcall votes 102, 103, 104, and 105. I have given careful consideration to this matter and consulted with other Members of the Senate about the Senate's historical practice. Because I believe the judge is entitled to a full and fair hearing in the Senate and to avoid any possible conflict of interest, I have concluded that under the circumstances, it would be inappropriate for me to participate in the Senate trial and vote again on matters related to the impeachment, having already done so as a Member of the House of Representatives.

Therefore, I request that I be recused from sitting as a Member of the Senate while it hears the matter of impeachment proceedings against Judge Porteous.

The PRESIDENT pro tempore. Mr. KIRK is excused from further participation in this impeachment for the reasons stated.

The majority leader is recognized.

Mr. REID. Mr. President, I would first ask that the House managers and Judge Porteous and counsel will take their seats. There is no reason, at this time, to remain standing.

OATH ADMINISTERED TO NEWLY ELECTED MEMBERS

Mr. President, the remaining preliminary matter is to administer the impeachment oath to the other newly elected Members of the Senate and any Member of the Senate who did not take the oath when the Articles of Impeachment were first exhibited.

Article I, section 3, clause 6 of the Constitution provides, in part:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.

The impeachment oath that was taken by Members of the Senate earlier in this session remains in effect. The four current Members who did not take the oath at that time have been so advised by the Secretary of the Senate. The two newly elected Senate Members also should be sworn now.

The PRESIDENT pro tempore. Those Senators who have not taken the oath will now rise, raise their right hands, and be sworn.

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

SENATORS. I do.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. REID. Thank you, Mr. President.

The Secretary will note the names of the Senators who have just taken the oath, and if these Senators will now present themselves to the desk, the Secretary will present to them for signature the book, which is the Senate's permanent record of the taking of the impeachment oath by Members of this body.

Mr. President, on March 17, 2010, the President pro tempore appointed, pursuant to S. Res. 458, Senators MCCASKILL, HATCH, KLOBUCHAR, WHITEHOUSE, UDALL of New Mexico, SHAHEEN, Kaufman, BARRASSO, DEMINT, JOHANNS, RISCH, and WICKER to perform the duties provided for by rule XI, the Senate's impeachment rules.

Under the leadership of its chairman, the Senator from Missouri, Mrs. MCCASKILL, and its vice chairman, Mr. HATCH, the committee heard 5 days of testimony between September 13 and September 21. During that time, the committee heard from 26 witnesses, 14 who were called by the House of Representatives and 12 witnesses who were called by Judge Porteous. The committee also conducted pretrial depositions of four witnesses and admitted into evidence the testimony of a number of witnesses, including Judge Porteous, who had testified in prior proceedings, more than 300 factual stipulations and hundreds of exhibits.

The Senate is indebted to all of the members of this committee who so conscientiously discharged their responsibility in this important constitutional matter. In addition to the committee's leadership, I would like to take particular note of the contribution of Senator Kaufman, who actively participated in the committee's proceedings, although his tenure in the Senate concluded before the committee filed the report of its proceedings in the Senate.

The committee filed its report on November 15, and the report was received as Senate report 111–347. In accordance with impeachment rule XI, the committee certified the Senate hearing report 111–691, which reprints the committee's proceedings, is a transcript of the proceedings and testimony had and given before the committee.

Before proceeding further, I would like to verify with the Presiding Officer that the evidence and the testimony received by the Senate from the

committee shall, as prescribed in rule XI:

be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy and materiality, as having been received and taken before the Senate . . .

Will the Presiding Officer advise the Senate whether this is correct?

The PRESIDENT pro tempore. The majority leader is correct. The testimony and other evidence reported by the committee will be considered, in accordance with impeachment rule XI, as having been received and taken before the Senate.

The majority leader is recognized.

Mr. REID. Thank you again, Mr. President. Rule XI provides that the Senate's receipt of evidence reported by the committee is subject to the Senate's right to determine competency, relevancy, and materiality. Further, the same rule explicitly provides that nothing in it prevents the Senate from sending for any witness and hearing that witness's testimony in open Senate or, by order of the Senate, having the entire trial before the full Senate.

I would ask the Presiding Officer to advise the Senator whether, following the report of the committee, any motions have been filed asking that any witnesses be heard in open Senate.

The PRESIDENT pro tempore. In response to the majority leader, neither party, following the report of the committee, has moved that any witness be called in open Senate, and the Senate may now proceed to hear final arguments on the basis of the record reported by its committee.

The majority leader is recognized again.

Mr. REID. Mr. President, the parties have filed their final written briefs and the Senate is now ready to hear arguments.

Prior to consideration of the Articles of Impeachment, Judge Porteous has requested time to present argument on three motions that take issue with the sufficiency under the Constitution of several aspects of the Impeachment Articles framed by the House. First, Judge Porteous has moved to dismiss Article II, or for alternative relief, based on the House's inclusion of allegations of misconduct occurring prior to the commencement of the Judge's Federal service as a U.S. district judge. Second, Judge Porteous has moved to dismiss article I, or for alternative relief, based on the House's inclusion of unconstitutionally vague allegations that Judge Porteous's conduct deprived the public of its right to the honest services of his office. Third, Judge Porteous objects to the manner in which each Article of Impeachment was framed to aggregate discrete allegations of misconduct. He accordingly moves to dismiss the Articles of Impeachment or seeks alternative curative relief. The parties' written arguments on those legal issues are addressed in their post-trial briefs, as well as the motion papers submitted by the parties to the committee, which are on the desks of all Members. In accordance with the unanimous consent agreement, each side will be permitted no more than 1 hour to present its argument on the motions.

Upon the conclusion of argument on the motions, the Senate will then turn to hearing final arguments by the parties on the Impeachment Articles. Under impeachment rule XXII, final argument will be open and closed by the House. By unanimous consent, each party shall have up to 1½ hours to present final argument on the merits.

As the Senate has done in the past, we have provided that counsel may face the full Senate during these presentations. They should remain mindful, nevertheless, that the proceedings are under the direction of the Presiding Officer. On their part, Senators should recall that any questions they have of counsel should, pursuant to impeachment rule XIX, ''be reduced to writing, and put by the Presiding Officer.'' There is assistance available in the respective cloakrooms to aid Members in putting the questions in writing. Questions may be sent to the Chair during the argument, for reading by the Chair at the appropriate times.

The managers, on behalf of the House of Representatives—Representative SCHIFF, Representative GOODLATTE, and Representative JOHNSON, Representative SENSENBRENNER, and special impeachment counsel to the House Alan Baron are present at the managers' table. Jonathan Turley, Daniel C. Schwartz, P.J. Meitl, Daniel T. O'Connor, and Ian Barlow are counsel to Judge Porteous and are present with him.

Mr. President, motions will be argued first by Jonathan Turley, counsel to the judge, who is the moving party. By the unanimous consent order, argument on the motions on behalf of the House will be divided between Representative SCHIFF and Representative GOODLATTE. Mr. Turley may, under the unanimous consent agreement, reserve a portion of Judge Porteous's time for rebuttal.

For the argument on the articles, the managers will likewise divide their time between the two managers, and Mr. Turley will present argument on behalf of Judge Porteous. Under impeachment rule XXII, the House will open and close final argument in the impeachment articles.

The PRESIDENT pro tempore. We are now ready to hear motions. Mr. Turley will open the arguments in support of the motions to dismiss.

Mr. Turley, how much time do you wish to reserve for rebuttal?

Mr. TURLEY. We would like to reserve 10 minutes for rebuttal.

The PRESIDENT pro tempore. Ten minutes. It is so ordered. You may proceed.

Mr. TURLEY. Thank you. Mr. President and Members of the Senate, my name is Jonathan Turley, and I am the Shapiro Professor of Public Interest Law at George Washington University and counsel to the Honorable G. Thomas Porteous, Jr., a judge of the U.S. District Court for the Eastern District of Louisiana. Joining me at counsel's table with Judge Porteous are my colleagues from the law firm of Bryan Cave: Daniel Schwartz, P.J. Meitl, and Daniel O'Connor.

As the majority leader has told you and as many of you know, the Porteous impeachment has raised a number of constitutional issues that are rather unique and of considerable concern among law professors and legislators alike. The three motions before you today are designed to put these issues squarely before you.

We understand that the Members can choose not to vote on these motions and you can, in fact, reject an article or an allegation in light of these constitutional concerns. However, these are issues that do not turn on the facts of this case. Rather, they present threshold questions for each Senator in deciding whether to establish new precedent in the scope and the meaning of impeachable offenses.

The first motion before you today is a motion to exclude, as a basis for the removal of a Federal judge, any so-called pre-Federal allegations; that is, conduct that allegedly occurred before Judge Porteous became a Federal judge. This motion primarily deals with article II, which is widely recognized as a pre-Federal claim and the focus of much discussion nationally.

Second is a motion to exclude, as a basis for removal, that Judge Porteous deprived litigants and the public of the right to his so-called honest services. The Supreme Court recently rejected that very theory as unconstitutionally vague. We believe the Senate should do likewise.

Third, and finally, there is a motion for preliminary votes on each of the multiple allegations contained in the House's Articles of Impeachment. As we will discuss, those articles are grossly aggregated, meaning that each article contains numerous separate allegations. This long-simmering dispute between the House and the Senate came to a boiling point in these articles with the unprecedented use of what we refer to as the ''aggregation tactic.''

Equally important to the relief that Judge Porteous is requesting is what he is not requesting. We have tailored these motions so we are not requesting the dismissal of any articles in their entirety. Instead, Judge Porteous requests that Senate deliberation be confined only to those allegations that constitute valid bases for removal under the U.S. Constitution.

Throughout history, Senators have expressed their primary concern over the precedent set by impeachment cases and the implications of their decisions that are reached in this Chamber for future cases. This care is shown in the fact that in 19 impeachments to reach this body in history, only 7 ended

in convictions. Your predecessors accepted that the impeachment clauses contain an implied Hippocratic Oath under the Constitution. Your duty, first and foremost, is to do no harm—to do no harm—to the courts and to do no harm to the Constitution. Indeed, in all of the impeachment cases resulting in acquittal, the Senators found much to condemn in the conduct of the accused. They simply didn't find impeachable offenses.

With that brief introduction, I would like to turn to the first motion before the Senate in which Judge Porteous asks for the exclusion of pre-Federal allegations.

The first motion deals with the most dangerous aspect of the Articles of Impeachment. The House, through article II, and to some degree through article I, is seeking to have Judge Porteous removed on the basis of conduct that allegedly occurred before he became a Federal judge.

The House's pre-Federal charges in this case are in direct contradiction with decades of precedent from this body and would, in fact, violate the text of the U.S. Constitution.

In the history of this Republic, no one has ever been removed from office on the basis of pre-Federal conduct—no one.

The pre-Federal claims are an attempt by the House to secure impeachment at any cost, at the cost of the constitutional standard itself to remove a previously disciplined judge just months before his retirement.

The logic of this article is much like the story my father used to tell me about a man who comes across a stranger on his hands and knees one night looking for his wedding ring under a lamppost. He joins the man, searches for an hour, and then turns to him and says: ''You know, Mister, I don't see it anywhere. Are you sure you dropped it here?''

And the stranger responds, ''Oh, no, no, no, I lost it down the street, but the light is better here.''

Unable to find a crime during Federal service, the House managers just decided to look elsewhere down the road, before he became a Federal judge.

It does not appear to matter that experts and the Congressional Research Service warned that no individual—not a President, not a Vice President, not a Federal judge, not a Cabinet member—has ever been removed on this basis.

In order to open the Federal bench to removals for pre-Federal conduct, you must ignore the express language of the Constitution itself, which refers to conduct during Federal service, during service in office. A judge is guaranteed life tenure under the Constitution ''during the behavior'' in office. It is not a standard of good behavior in life. It is a standard of good behavior in office. It requires misconduct during Federal service that justifies removal from that Federal office.

The standard fashioned by James Madison and others has stood for centuries, largely because of the work of your predecessors, who have rejected articles that allege pre-Federal conduct.

In 1912, in the impeachment of Judge Robert Archbald, the Senate explicitly rejected the theory of removing an individual for conduct occurring before he took Federal office for which the House was seeking removal.

In the Archbald case, there were 13 Articles of Impeachment. The first six dealt with alleged misconduct in the office for which he was being sought to be removed. The next six dealt with conduct that allegedly occurred before he entered that office. And the last article was something that is called a ''catch-all'' provision. That combined all of the 12 earlier provisions into one.

Archbald was acquitted on all six articles that focused on conduct prior to his assuming a seat on the circuit court. All six were defeated in this Chamber.

These were not close votes, with the House receiving no more than 29 votes for conviction on those pre-Federal articles and averaged a rather high 64-percent rate for acquittal. Many Senators rose to amplify the reasons they rejected those articles.

Senator Bryan of Florida stated:

I am convinced that articles of impeachment lie only for conduct during the term of office being filled.

Senator Brandegee of Connecticut stated:

I vote not guilty because it alleges offenses, some of which are alleged to have been committed by the respondent while he was in an office he does not hold at the present and did not hold at the time the articles were adopted.

Senator DuPont of Delaware said:

My vote of not guilty upon the article of impeachment was based upon the fact that the offenses were alleged to have been committed when he was not holding his present office.

Senator Works of California said:

I am of the opinion that the respondent can not be impeached for offenses committed before his appointment to the present office.

Senator Catron of New Mexico said:

I do not believe the House of Representatives had the right to go back of the present office held by Judge Archbald to hunt up any of his acts to charge against him so as to remove him from the office he now holds.

Senator Crawford of South Dakota stated:

I find the respondent guilty of misconduct, but it occurred before he became the incumbent in his present office. I do not believe impeachment can be sustained for the reason stated.

Finally, Senator M'Cumber, North Dakota, stated:

Impeachment proceedings cannot lie against a person for an act committed while holding an official position for which he is separated.

I could read more, but I think the point is clear. The Senate specifically dealt with this issue of pre-Federal conduct before and rejected it by a large margin. A large percentage of Senators at the time felt strongly enough about the issue to publicly speak about the impropriety of seeking pre-Federal causes for removal.

Thirty-two Senators sat out the vote on that catch-all article 13 in the Archbald case, and many publicly stated the reason they were sitting out that vote was because it contained in that whole list some of the pre-Federal conduct. However, the judge had already been convicted of six articles that contained Federal conduct. So by a vote of just two, with these Senators sitting out the vote, that article was approved.

Article II would eradicate over two centuries of precedent, and for what purpose? The House alleges Federal rather than pre-Federal conduct in article III and article IV. Even article I has some Federal claims. We are eager to reach those issues, and they offer an ample basis for the review and, yes, possible removal of a judge without opening the Federal bench—and all other Federal offices—to pre-Federal attacks.

One statement in the Archbald case stands out particularly prophetic and relevant. When confronted with the pre-Federal conduct, Senator Stone of Missouri rose to give the following warning to his colleagues, and by extension to you, his successors:

It would not be difficult to conceive a case where under great pressure, when the country was in the state of high political excitement and when some supposed political exigency was influencing a partisan public opinion, a hostile partisan majority might hark back to some alleged misbehavior of a judge.

Now, one can certainly imagine a period of ''high political excitement'' if you tried hard enough. The point is that despite the rhetoric and passions of periods of great political upheaval, Senators have stepped forward to protect our core constitutional values and standards. This is why the Framers gave Senators long terms and large constituencies—to allow them to resist the passions and distemper of contemporary politics.

Once the Senate allows the House to cross this constitutional Rubicon for the first time, Congress would be able to dredge up any pre-Federal conduct to strip the bench of unpopular judges or to remove other Federal officials at the whim of the House. It would raise the very real possibility that an unpopular opinion issued by a Federal judge or a Supreme Court Justice could trigger an impeachment based on alleged acts from decades of practice before taking office. Moreover, other Federal officials, such as the Vice President, or a Cabinet member, could be similarly confronted with pre-Federal conduct as a basis for removal.

I expect my esteemed colleagues from the House to raise again a rather old saw that if you accept the defense's argument, the Senate would be precluded from removing someone who committed murder before taking office. Of course, an extreme hypothetical

like this points out the absurdity of the case against Judge Porteous. In this case, the Justice Department did not even find evidence to bring a single charge of criminal wrongdoing. Once again, the House simply wants to go where the light is better. In this case, it wanted to go to a hypothetical place.

But to be blunt, in deference to my colleagues, I must say this is an nonsensical argument from a constitutional standpoint. The reason is that in a case of a pre-Federal murder, the judge would likely be subject to trial during his or her Federal term. If convicted, a judge would likely be sentenced to life in prison. While the crime may have predated his confirmation, he became a convicted felon during his Federal service. That is the basis for the removal. Further, the judge could not possibly serve in a time of good behavior given his conviction and presumed incarceration.

The House, I believe, will also argue the reasons for the lack of any precedent of removals for pre-Federal conduct. The record is rather telling. There hasn't been such a case. Why? The House will argue that the reason is that people who are charged with pre-Federal misconduct simply resign if it is serious. History repudiates that argument. It is simply not true. A number of individuals have had information about misconduct in their pre-Federal lives revealed after they took office and yet never faced impeachment. For example, Supreme Court Justice Hugo Black admitted after his confirmation that he was in fact at one time a member of the Ku Klux Klan. There was outrage with that disclosure; that controversy had not been raised before confirmation.

As our filings document, numerous other Supreme Court Justices, as well as a bevy of other Federal officers, have had damaging information of this kind revealed. Hugo Black did not face impeachment.

This body has removed only seven judges in 206 years through the impeachment process and has never removed anyone for pre-Federal conduct.

If you believe Judge Porteous committed removable offenses as a Federal judge, so be it—and he is here to be judged himself—but do so on that basis of the remaining articles, not on article II.

It is a great burden and responsibility to stand before you not just as counsel for Judge Porteous, but as a constitutional law scholar. The importance of article II transcends this case and, frankly, transcends this judge. It is a direct attack on a constitutional standard that has guaranteed an independent judiciary for two centuries. Whatever you do today, please do no harm. Judge Porteous stands ready to be judged for his conduct on the Federal bench. However, like so many scholars and commentators, I ask you to hold the constitutional line, as did your predecessors, and reject pre-Federal claims as the basis for his removal.

I would like now to turn to perhaps the most novel problem raised in this impeachment: the reliance in article I on a theory that was rejected by the Supreme Court after the impeachment vote in the House.

At issue is the honest services claim that is at the heart of article I. Even before this impeachment, honest services claims were controversial in Federal court. Various judges, in fact, rejected this claim.

While experts were predicting a rejection in whole or in part of the theory, the Supreme Court accepted three cases dealing with honest services. The House was fully aware those cases had been accepted by the Supreme Court. The House was fully aware that lower court judges had rejected this theory. They simply took a gamble and decided to take a risk and structured article I as an honest services claim. They lost that gamble. When the court ruled in Skilling v. United States and two related cases, rejecting the use of this theory in cases without express allegations of bribery and kickbacks, neither bribery nor kickbacks are alleged in article I.

In fact, they are not mentioned in any of the articles.

Indeed, the House's own witnesses testified that there was no such bribery or kickback scheme to influence Judge Porteous on the Federal—or, for that matter, on the State—bench. House managers are now going to ask the Senate to cover their bad bet on Skilling and ignore that the stated theory of article I was rejected by the Supreme Court as a viable criminal claim. The dangerous implications of such a vote are difficult to overstate.

The Senate has never removed a Federal judge on the basis of a legal theory specifically rejected by the Supreme Court. If allowed, Congress could remove Presidents, judges, Cabinet members on theories that they are barred as invalid in Federal court. Ironically, if Judge Porteous were presiding in that case, he would be bound by the rule of law to reject an indictment of a public official on this identical claim that is now being offered as the basis for his removal.

House managers crafted article I around the same theory of honest services as was advanced by the Federal Government in the Skilling case. Article I alleges that Judge Porteous is ''guilty of high crimes and misdemeanors and should be removed from office'' because, in connection with a recusal motion—a recusal motion in a single case—before him, he ''deprived the parties and the public of the right to the honest services of his office.''

The House asserts that Judge Porteous caused this deprivation of honest services in three ways: First, that he failed to disclose certain information during the recusal hearing held in the so-called Lifemark case about his relationship with one of the attorneys in the case—Jake Amato—and Amato's partner Bob Creely. Second, he made misleading statements at the recusal hearing about his relationship with these two attorneys; third, that he ultimately denied a motion to recuse.

Now, the reason the House did not allege either bribery or kickbacks became obvious when the defense was allowed to cross-examine the House witnesses before the Senate committee concerning article I, all of whom denied any bribe or kickback scheme by Judge Porteous. Faced with various House witnesses who insisted, universally, that Judge Porteous was not and could not be bribed, the House turned to a claim of ''a scheme or artifice to deprive another of the intangible right of honest services.''

In basing its allegations on this provision of the Criminal Code—which is title 18, section 1346—the House followed a longstanding precedent of crafting articles to reflect actual crimes. That, however, happened to be the provision that was rejected in Skilling. The House finalized and approved article I in March 2010. That means for months the House knew an honest services claim could be rejected by the court and decided to rely on it because it could not expressly claim a Federal bribe or kickback.

The reason for the House's 'honest services' gamble was obvious: Beginning in the early 1990s—actually more in the late 1990s—the Justice Department began what was called the Wrinkled Robe investigation. In the course of that investigation, they conducted a long-running grand jury investigation, with plea bargains, countless subpoenas and searches of judges in Louisiana. In the end, some judges were indicted. However, the government, which looked specifically at Judge Porteous, as well as some of the other judges, found the evidence did not support bringing an indictment against Judge Porteous for any crime.

Permit me to repeat: Judge Porteous had agreed to waive the statute of limitations to allow the government to bring a criminal charge against him. He decided that it would not be appropriate for a Federal judge to rely on the statute of limitations to protect himself from criminal charge. He signed three waivers to permit those charges, even though they could have been blocked under the statute of limitations.

The Department of Justice then investigated and found insufficient evidence to bring a charge of any kind—big or small—against Judge Porteous. In declining to prosecute, the DOJ specifically cited a host of rather fundamental problems in bringing such a case. It said that it did not believe it could carry the burden of proof, it did not believe it could secure a verdict of conviction from a jury, and that there was a general lack of evidence to show ''mens rea and intent to deceive.'' That only left the soon-to-be-rejected theory of honest services, without a specific charge of bribery or kickback.

The House's gamble failed in June when the Supreme Court issued its trio of decisions, led by the Skilling v. United States decision, where the court directly—and by the way, unanimously—rejected the theory of the underlying article I. The court expressly held that absent specific allegations of a bribe or kickback, ''no other misconduct falls within the statute's province.'' In direct relevance to this case, the court expressly rejected the notion that ''nondisclosure of a conflicting financial interest can constitute criminal deprivation of 'honest services.' '' Nondisclosure of a conflicting financial interest: That should sound familiar because that is article I.

As noted earlier, article I does not include any allegation of a bribe or kickback. Instead, it refers to a ''corrupt scheme'' that existed when Judge Porteous was a State—not a Federal—judge. It alleges a ''corrupt scheme'' that he had with attorneys Amato and Creely. As we will address in greater detail in our closing argument, there was, in fact, no corrupt scheme. Our proof is the testimony of the House's witnesses, not our witnesses—the attorneys themselves who denied a scheme of bribery or kickback.

The greatest irony of the House's use of the honest services claim is that the very concern stated by the Supreme Court was that it was so ambiguous that it would not give citizens notice of what it is they could be charged with criminally. Yet that is the same concern James Madison raised when crafting an impeachment standard. Madison said Congress should not be able to use a standard that was so vague as to make removal easy or to rob people of knowledge of what they could be removed for.

So after the Supreme Court in Skilling rejects this very theory as so ambiguous, so vague it cannot be used in a Federal court, the House picked up that very theory and said: But we think you should use it as the basis to remove Federal officers—from Presidents to judges to Cabinet members.

Simply put: Deprivation of honest services is the modern equivalent of ''maladministration.'' Many of you know that James Madison and the Framers rejected maladministration as a standard for impeachment. By the way, they also rejected corruption. The term ''corruption'' was viewed as far too vague to allow the Members of the Senate to remove a judge on that basis. So what the House is doing is taking a standard of honest services, which was rejected for the same reason, and effectively making it a standard of the United States for the basis of removal of a Federal judge.

Since article I does not allege a bribe or kickback, it is constitutionally invalid under Skilling, and this body should not import that standard into the U.S. Constitution. While an Article of Impeachment does not have to be coextensive with a crime to be valid, an article must give fair notice of what conduct can result in removal. An impeachment speaks not just to one judge, it speaks to all judges. They need to know because they need to know that they can perform their duties without having a Damocles sword dangling over their head, not knowing if an unpopular decision will trigger removal. They deserve fair notice.

It is worth noting that after the court's decision, Senator LEAHY introduced a bill that was committee sponsored by Senator WHITEHOUSE and former Senator Kaufman to amend the Federal honest services statute in response to Skilling. That bill—known as the Honest Services Restoration Act—would revise the honest services statute to prescribe what is defined as ''undisclosed self-dealing'' by a public official.

Notably, even under the new statutory definition of honest services, the allegations in article I would not meet that standard any more than it would meet the standard under Skilling. Senator LEAHY's bill defines ''undisclosed self-dealing'' as a public official performing an official act ''for the purpose'' of benefiting either himself or others and their financial interests.

Article I doesn't allege that Judge Porteous denied the recusal motion for the purpose of benefiting himself. Indeed, the House doesn't allege that he was at that time receiving gifts from Mr. Creely or Mr. Amato. Those gifts—which we will talk about later—occurred years before. But, of course, that is not the prior and it is not the current standard. The Senate must decide if a Federal judge can be removed on the alleged claim of a corrupt scheme despite the Supreme Court ruling.

To allow such a removal would be to sever any connection between the viability of a criminal claim and the basis for the removal of a Federal judge. Indeed, it would establish a Federal judge can be removed for conduct that is demonstrably not criminal and a theory so vague it can't actually be used in a Federal court. The House made a bad gamble in Skilling. The Senate should not now make a bad gamble and a bad law.

I would like now to turn to the final motion before the Senate, which is a defense request that the Senate take preliminary votes on the numerous and separate allegations in the four Articles of Impeachment. The House managers, in drafting these articles, used a tactic called ''aggregation.'' It is not new. It has often been the subject of criticism by both Senators and scholars.

Aggregation is a method by which House Members, when drafting Articles of Impeachment, can circumvent the high vote required in the Constitution. They can essentially remove a Federal judge even though less than two-thirds of you agree on any specific allegation. This is accomplished by combining different claims in one article so that no single act is subject to a stand-alone vote. By lumping together or aggregating issues, you can secure total votes even if only 5 or 10 Senators might agree that any given act is sufficient to remove a Federal judge. That negates article I, section 3, which says ''no person shall be convicted without Concurrence of two-thirds of the members present.''

The aggregation tactic converts this exacting process into an undefined and fluid process where neither history nor the public will know what was the grounds by which you removed a Federal judge.

Let me try to explain this with an example. Let's say you go back into your deliberations and 20 of you might agree that one allegation in a particular article was worthy of removal, while another 30 might reject that allegation but agree on a different allegation as sufficient for removal. Two other groups of Senators of 10 might focus on a third and fourth allegation. When it came to the final vote, you would have 70 Senators voting for removal even though no more than 30 actually agree on what should be the basis for removal—what actually satisfied the constitutional standard.

One does not have to be a strict constructionist to see the violence that approach does to the express language of the Constitution. Honestly, do Members of this body believe the Framers would establish a two-thirds majority vote to remove a Federal judge but allow a House to simply aggregate and achieve that with just 20 or 30? The Framers of the United States might have been many things, but they were not stupid and they were not frivolous. They created a two-thirds vote for a purpose. They wanted two-thirds of you to agree together that at least one act committed by a Federal judge is sufficient to satisfy this extraordinary measure of removal. Such aggregation of claims wouldn't even be allowed in a criminal or a civil trial. A judge wouldn't permit it. This judge wouldn't permit it.

Senators have repeatedly objected to the aggregation of claims in past cases. However, the House knows Senators are reluctant to dismiss an article that has been duly submitted by the House. It is a game of constitutional chicken. They aggregate knowing that it would be difficult institutionally to simply dismiss an article, and for that reason we are not asking you to do that. All we are asking for you to do is to take preliminary votes on the separate allegations that have been combined in these articles to assure for yourself and for history that the constitutional standard has been met.

The House itself has conceded that the Senate can, in fact, do this—and conceded it may be necessary to do this—when we last had this discussion before the committee and Chairman MCCASKILL. Congressman SCHIFF stated at that time:

The Senate can, when it deliberates, say we want to have a separate vote internally

on each of the facts that are alleged in article I, on each of the facts that are alleged in article II. You can make that decision and, if the vote internally is that you don't agree, and you have a further discussion and say, well, unless we agree on these pieces we don't think the conduct rises, you can make that decision.

You will find that quote on page 1861 in the green books before you. Congressman SCHIFF further noted that:

You will have every opportunity when the evidence is provided to you to vote on it in any way, shape or form you decide. Nothing we do here will prejudice that.

Later in the hearing, when Senator KLOBUCHAR asked Congressman SCHIFF whether ''we could decide on our own to individually vote on each one or both of them as a group, and would we be allowed to do that,'' Congressman SCHIFF said ''That's exactly right, Senator.''

I commended Congressman SCHIFF because I believe that is an honorable and correct position. We would encourage, however, that those votes be made public. I say this not as much for the interest of my client as in the interest of history. What you say this week will speak to the remaining judges on the bench, and you should speak clearly as to what you think is sufficient to remove a Federal judge.

I also want to mention that the need for clear records is particularly important in this case because there was no criminal trial in this case. This is the first modern impeachment to come to you as a body without a prior trial and, more important, a prior trial record so the evidence, the witnesses in this case were not subject to the procedures and review of a criminal case. It was raw evidence that came in. For that reason, you will be the first to evaluate this evidence in terms of an impeachment that did not occur in a criminal case, and we believe that in light of that, you should take particularly strong steps to isolate what it is that will be the basis for removal or acquittal.

I have to point out that the problems of the House were unnecessarily created by itself, not by this body and not by the defense. The House decided to abandon good practices in the drafting of articles, good practices that were applied in prior cases. For example, in the Hastings impeachment case, where some of you, in fact, were involved, if you recall, there were 17 Articles of Impeachment. Each of those articles isolated one false statement that Hastings allegedly made. Articles II through XIV were all short and they were largely identical. The first and third paragraphs of those articles were, in fact, identical. The only difference was the specific false statement. The House did that so you would have the opportunity to say—to vote whether you believed this was a false statement and whether that specific statement justified removal. That has been the approach of the House in prior cases.

It is correct, and I believe the House is likely to mention, there are some prior cases that have multiple claims, but those are different from an aggregation case. As I mentioned before, on some occasions, the House has submitted to you what is called a catchall provision, so what they would do is they would have, for example, six articles of impeachment, with specific acts that they believed should be subject to removal, and then the seventh article was a catchall article that combined all the previous alleged acts. The difference between this and a catchall provision is that you or, in this case, your predecessors had the ability to vote on those first six claims so you knew as a body if in fact two-thirds of you agree that any of those prior six actually did occur and actually did constitute removable conduct. That is not the case with aggregation.

What we are suggesting today is a simple process that we believe would protect the constitutional standard in this body, not just in this case but in the future. We have suggested that you simply vote preliminarily, as was discussed with Congressman SCHIFF, on each of these insular allegations. If you look at our motion, we have laid them out. There is not a great number in each of the articles. But you could vote simply on those specific allegations and determine if two-thirds of you agree that, first, they occurred and that you believe they would be the basis for removal.

You would then vote on the article as a whole, in compliance with rule XXIII. Rule XXIII requires you to take a final vote on an article that has not been divided. But by the time you took that vote, you would know whether the standard of the Constitution had been satisfied.

As we note in our filing—and I will not take your time by quoting them again—many Senators have objected to the aggregation of claims in history. In the Archbald indictment, for example, George Sutherland of Utah objected to his colleagues and stated, in exasperation: ''I cannot consistently vote upon this article one way or the other,'' because of aggregation.

The PRESIDENT pro tempore. The Chair would like to advise you that you have consumed 40 minutes.

Mr. TURLEY. Thank you very much, Mr. President. As a law professor, I am trained to speak in 50-minute increments. I will try to wrap-up.

In conclusion, I ask that the Senate adopt this simple approach to deal with aggregated claims. We have suggested this way to deaggregate the claims. We believe it is useful, not in just this case but in future cases.

We would like to reserve the remainder of our time for rebuttal.

Thank you very much.

The PRESIDENT pro tempore. I thank you very much. The Chair has not received any written questions. Accordingly, the Senate will now hear from Representative SCHIFF in opposition to the motions.

Representative SCHIFF.

Mr. Manager SCHIFF. Mr. President, Members of the Senate, I am Representative ADAM SCHIFF of California. I am joined by fellow House managers BOB GOODLATTE of Virginia, JIM SENSENBRENNER of Wisconsin, and HANK JOHNSON of Georgia, as well as our counsel, Alan Baron, who has been assisted by Mark Dubester, Harry Damelin, and Kirsten Konar.

When the impeachment trial began in this case some weeks ago, we acknowledged the historic significance of an impeachment proceeding and how rarely they are undertaken. This is for good reason. The overwhelming majority of men and women appointed to the bench have great integrity and uphold the enormous trust the public places in them. Very seldom does someone corrupt get nominated for the bench and, in those cases where a significant problem is discovered during the confirmation process, most withdraw from further consideration or their confirmation is denied. It is very rare that a corrupt official is nominated and his corruption escape discovery until after he is appointed, but it does happen. It happened here with the appointment of G. Thomas Porteous, who is not only a corrupt State judge but would become a corrupt Federal judge as well.

By means of the impeachment and removal process, the Framers of the Constitution sought to protect the institutions of government by allowing Congress to remove persons who are unfit to hold positions of trust. As Alexander Hamilton noted when referring to jurisdiction to impeach an official in Federalist 65: ''There are those offenses which proceed from the misconduct of public men or, in other words, from the abuse or violation of some public trust.''

The charges against Judge Porteous here, in the view of the House of Representatives, are precisely that, abusive and violative of the public trust, and he must be removed.

As a Federal district judge in New Orleans, the first proceedings against Judge Porteous began before a disciplinary panel of the Fifth Circuit Court of Appeals. After taking evidence and conducting 2 days' worth of hearings in which Judge Porteous testified under a grant of immunity, the Fifth Circuit concluded that Judge Porteous's misconduct ''might constitute one or more grounds for impeachment'' and referred the matter to the judicial conference of the United States headed by Chief Justice Roberts. The Chief Justice, in conference, also concluded that impeachment may be warranted and referred the case against Judge Porteous to the House of Representatives. The case was also recommended for potential impeachment by the Department of Justice which, in part, because the statute of limitations had run on many of Judge Porteous's offenses, felt that impeachment might be the more appropriate remedy.

Although Judge Porteous signed an agreement when in discussions with the Justice Department, it did not reset the clock on the vast majority of

potential charges, from the kickbacks from the lawyers or the bail bondsmen, corrupt activity, which were already time-barred from prosecution. In the House Judiciary Committee, we undertook a thorough investigation, interviewing a great many witnesses, taking depositions, acquiring documents never found by the Justice Department, including the very revealing transcript of the recusal hearing in the hospital case mentioned by my opposing counsel, where Judge Porteous so grievously misled and deceived the parties. At the conclusion of our investigation, the Committee considered carefully whether Judge Porteous's conduct was so morally repugnant, so violative of public trust, and whether he had so demeaned himself in office that he was guilty of high crimes and misdemeanors and should be removed from the bench.

Unanimously, the committee concluded he was guilty of high crimes and misdemeanors and must be impeached.

Our committee then studied the very issues implicated in this morning's three motions to dismiss. We considered carefully how many articles should be crafted, whether his conduct naturally divided itself into coherent schemes and, if so, how many, so as to give the public clear knowledge of what he was charged with and to give Judge Porteous a fair opportunity to defend himself and to give the Senate clear articles to vote upon. We concluded that the judge's conduct could be divided quite logically into four parts: One article based on his corrupt scheme with the lawyers, one article based on his corrupt scheme with the bondsmen, one based on his false bankruptcy petition, and one based on his deception of this very body, the Senate. We did not wish to pile on charges against Judge Porteous by dividing any of these articles into unnatural pieces, something a prosecutor might refer to as ''loading up'' an indictment.

There were other charges we considered as well, the evidence of which was introduced at trial, such as his many serious false statements on mandatory judicial disclosure forms, but opted instead to introduce that as evidence of his willingness to perjure himself when it suited his interests, something very relevant to both his statements to the Senate and in the bankruptcy proceeding.

The House has great discretion in how it drafts an Article of Impeachment, which is why the Senate Impeachment Trial Committee in this case ruled against precisely this same motion counsel makes only 2 months ago, finding that the schemes charged were very straightforward.

We also considered whether a charge of a violation of a specific criminal statute, that the judge violated 18 U.S. C, section X,Y or Z, but rejected that approach. Most impeachments do not charge specific crimes, some charge no crimes at all, and impeachment precedent is very clear—no particular statute need be referenced, only the conduct that constitutes a high crime or misdemeanor, which is why, as I will explain later, Judge Porteous's motion to dismiss article I, claiming that it charges a violation of 18 U.S.C. section 1346, is so fatally flawed. The article charges no such violation of that statute and, indeed, makes no reference to that code section whatsoever.

The House Judiciary Committee considered how to view the illicit conduct of Judge Porteous, not only while he was on the Federal bench but prior to his appointment, and, indeed, during the very confirmation procession itself. We concluded we could not ignore the judge's corrupt prior conduct or his conduct during the confirmation because it was so interwoven with his corruption on the Federal bench. His deplorable handling of the hospital case while a Federal judge, his lies during the recusal hearing, his hitting up the lawyers for cash—the very reason the lawyer was brought into that hospital case to begin with. Although all that conduct occurred while Judge Porteous was on the Federal bench, none of it can be fully understood without considering the judge's prior conduct in relationship with those same attorneys.

It was also the unanimous view of the Judiciary Committee that, whether a high crime or misdemeanor occurs before or after someone is appointed to the bench, if it is such a violation of the public trust that the institution of the judiciary will be harmed, that the public will lose confidence in the decisions of the court and of that judge, then he must be impeached. To reach the opposite conclusion would be to countenance a continuing injury to the judiciary, which would be forced to retain judges proved to be corrupt. Even where a judge is indicted and convicted on conduct that occurred before his appointment, the Senate would be powerless to remove him from office or from lifetime salary though he sits in prison. Nothing in the language of the Constitution or 200 years of precedent supports such an absurd result.

This was the unanimous view not only of the House Judiciary Committee, but when the matter was brought before the full House, it was the unanimous view of that body as well.

The Senate can decide to convict Judge Porteous on articles I, II, and III on the basis of corrupt conduct on the Federal bench alone, if it chooses—and count 4 addresses the concealment and false statements to the Senate during the confirmation itself—or the Senate may, as I will discuss later, convict Judge Porteous on the basis of his prior conduct as well consistent with the Constitution, with precedent, with a considered opinion of experts, and with sound public policy reasons as well.

But first, let me turn to each of the judge's three motions. In considering Judge Porteous's motions to dismiss, let me begin with a discussion of his arguments that the charges against him are improperly aggravated. In order to do so, it may be useful to provide a brief summary of the evidence charged in each article so that the full Senate can see, just as the Senate Impeachment Trial Committee concluded, that the House was well within its discretion in how it drafted the articles. Each contains a coherent scheme of conduct giving the judge, the Senate, and the public a clear understanding of the charges against him, and the motion must be denied. It is also worth pointing out, as the Senate Impeachment Trial Committee report demonstrates so clearly, none of the really salient facts in this case are in dispute.

Article I. Article I alleges and the evidence at the trial has now established that Judge Porteous, while a State judge, initiated and implemented a corrupt kickback scheme with attorney Robert Creeley and his partner, Jacob Amato. The essence of the scheme was that Judge Porteous, in his judicial capacity, assigned curatorship cases to Creeley, and thereafter the firm of Amato & Creeley gave Judge Porteous approximately half of the legal fees generated by those cases. A curatorship is a small case where the appointed lawyer represents a missing party and has to do some minor administrative work. The payments to the judge were always made in cash, as Amato testified at trial, to avoid a paper trail. Contrary to what counsel has just represented, Amato testified that it was a classic kickback scheme.

Prior to Judge Porteous's initiation of this curator kickback scheme, he had asked Creeley for small sums of money from time to time. Creeley gave him the money until Judge Porteous asked for larger amounts—$500 or $1,000 at a time. At this point, Creeley balked. It was then that Judge Porteous began assigning Creeley the curatorships and seeking the cash back from Creeley and his partner, Amato.

The evidence is undisputed that Judge Porteous assigned Creeley over 190 of these cases from 1988 to 1994, resulting in fees to the firm of about $40,000. Both Creeley and Amato independently estimated they gave Judge Porteous a total of about $20,000 in cash. They both testified that they understood that the cash they gave Judge Porteous was funded by these curatorships.

By initiating and implementing this curatorship kickback scheme, Judge Porteus abused his position of trust as a judge by corruptly taking actions in his official capacity designed and intended to enrich himself. This is judicial misconduct and abuse of power, and it is most venal. But this was only the beginning of Judge Porteous's egregious misconduct. It gets worse.

Thereafter, when Judge Porteous became a Federal judge, he presided over a complex, high-stakes, nonjury case. You will hear it referred to as the Liljeberg case, the hospital case.

Amato enters his appearance in this case as an attorney for the Liljebergs. Even though this case has been around for years—tens of millions are at stake—he enters the case 6 weeks before trial.

When opposing counsel filed a motion to recuse Judge Porteous, because he was concerned about the late introduction of this attorney, seeking that Judge Porteous reassign the case to another judge based on what counsel understood to be the judge's close relationship to Amato, Judge Porteous deliberately misled counsel and the parties, concealing his previous corrupt financial relationship that had existed between himself, Amato, and Creeley.

In fact, Judge Porteous did something much worse. The transcript of that hearing was truly revealing and sets forth a series of misleading statements, half-truths, and outright lies by Judge Porteous. As but one example, Judge Porteous steered the colloquy of a discussion of whether Amato had ever given Judge Porteous campaign contributions. In that discussion, Judge Porteous stated:

> The first time I ran, 1984, I think is the only time when they gave me money.

That statement was clearly false and deceptive and concealed many thousands—indeed, tens of thousands of dollars—in cash that Amato and his partner had given Judge Porteous.

Judge Porteous denied the recusal motion, and the order was appealed. The court of appeals, based on the false record Judge Porteous had created, affirmed the denial. So counsel for the other party, Lifemark, was unwillingly forced to represent his client against an opposing counsel who had given Judge Porteous thousands of dollars as part of a corrupt scheme.

In one of the most appallingly corrupt acts among many by Judge Porteous, after the case is tried but has not been decided—and again, a nonjury case; the judge is the trier of fact as law—the judge solicits and receives a secret cash payment of $2,000 from Amato.

Amato would testify during the Senate trial that it was the worst decision of his life and would acknowledge that he worked on this case for 2 years, stood to make $500,000 to $1 million in fees if he prevailed, and if he lost, he would make nothing, and that this was one of the reasons he gave the judge the cash—because the judge was presiding over this very important case.

Judge Porteous decides the Liljeberg case very favorable to Amato's client. This decision is later reversed in scathing terms by the U.S. Court of Appeals for the Fifth Circuit in an opinion by the appellate court which characterized Judge Porteous's central rulings as ''inexplicable,'' ''apparently constructed out of whole cloth,'' and ''close to being nonsensical.''

Not until the case was long over and the parties had moved on would they learn that the lawyer for the prevailing side at trial had given the judge thousands in secret cash.

That is article I.

Article II alleges and the evidence has shown that Judge Porteous, while a State judge and extending into his tenure as a Federal judge, had a corrupt relationship with local bail bondsman Louis Marcotte and his sister Lori Marcotte. The essence of the relationship was that Judge Porteous would take official acts to financially benefit the Marcottes by setting bail in amounts that they requested to maximize their profit—not in the best interest of the public, not what was necessary to secure the defendant's appearance in court but would maximize their profit. In addition, he would set aside the criminal convictions of the Marcottes' employees.

The way the bond arrangement worked was this: Louis Marcotte would interview the defendant and their family to figure out the most expensive bond they could possibly afford and would ask Judge Porteous to set the bond at precisely this amount, and the judge would do so. If the bond was set too low, below what the family could afford, Marcotte would lose money. If the bond was set too high, then the defendant could not use Marcotte at all, and Marcotte would lose money. It had to be set just right to maximize their profit. And Judge Porteous was their go-to bond-setter.

Although other judges would later go to jail for precisely this same relationship with the Marcottes, Louis Marcotte testified at the Senate trial that no one—no one did more for them than Judge Porteous. And Marcotte said further that the more they did for Porteous, the more he did for them.

The Marcottes supported Judge Porteous's lifestyle in numerous ways. In response to Judge Porteous's request, they frequently took Judge Porteous out to expensive restaurants, paying for his food and copious amounts of liquor. They sent their employees to pick up his cars at the courthouse, repair them, fill them up with gas, detail them, and leave buckets of shrimp or bottles of liquor in them when they were done. They sent their employees to his house to do home repairs, where they spent 3 days repairing 85 feet of damaged fence—digging the holes, laying the concrete, picking up the fence boards, doing the construction. And they paid for one or more trips to Las Vegas for the judge and his secretary.

As we proved during the trial, Judge Porteous was also asked by Louis Marcotte to expunge or set aside the felony convictions of two Marcotte employees so they could be licensed as bail bondsmen. Judge Porteous obliged but, significantly, told Marcotte that he would not set aside one of the convictions until after Senate confirmation of his position as a U.S. district judge because Judge Porteous did not want to jeopardize what was, in the judge's words, his lifetime appointment. In essence, Judge Porteous told Marcotte that he would set aside the conviction but that he needed to hide the corrupt relationship from the Senate. In fact, this is exactly what he did. Shortly after Senate confirmation but before he was sworn in as a Federal judge, Judge Porteous did, in fact, set aside the conviction of Marcotte's employee. It had to be done precisely then, after confirmation, so you would not learn about it, but before he was sworn in because once he was sworn in, it was too late, he could no longer expunge the conviction.

What the articles allege and the evidence establishes is that this was a classic quid pro quo relationship between a judge with his hand out and a corrupt bondsman who was willing to pay for what the judge could do for him.

Judge Porteous's corrupt relationship with the Marcottes did not come to an end after Judge Porteous became a Federal judge, although he no longer had the power to set bonds or expunge convictions for the Marcottes. The Marcottes continued wining and dining Judge Porteous because they needed his help to recruit a successor—other State judges—to assume Judge Porteous's former role in setting bonds at the amounts necessary to maximize their profits. Once again, Judge Porteous agreed, meeting with State judges and vouching for the Marcottes and using the prestige and power of his office to foster these new, corrupt relationships.

One of the judges Porteous helped the Marcottes recruit while he was a Federal Judge was a State judge named Ronald Bodenheimer. Bodenheimer testified that he did not hold Louis Marcotte in high regard and would not deal with him because he had a low regard for Marcotte's character and believed he was a drug user. Bodenheimer testified that when Judge Porteous vouched for Marcotte's integrity, it was critical to his decision to form a relationship with Louis Marcotte.

Judge Bodenheimer would later be convicted and incarcerated on Federal corruption charges, in part because of his corrupt relationship with the Marcottes, setting bonds in the amounts they requested in return for financial favors. Both the Marcottes also would plead guilty to corruption charges premised on these same relationships.

Now let me turn to article III.

By 2001, Judge Porteous had close to $200,000 in credit card debt, a substantial portion of which resulted from his gambling problem. For years, Judge Porteous had dishonestly concealed his debts and the extent of his gambling by filing false annual disclosure forms.

Ultimately, in March of 2001, Judge Porteous filed for bankruptcy. His filings were replete with dishonest representations. First, to conceal his identify, Judge Porteous filed and signed the petition under penalty of perjury using a fake name: G.T. Ortous. Further, just a few days prior to filing, as part of his plan to conceal his identity,

he obtained a post office box which he listed as his residence on the bankruptcy petition. He concealed assets so he could gamble, such as a $4,100 tax refund, even through the bankruptcy form asked him specifically whether he was expecting a tax refund. He concealed a money market account that he used the day before filing bankruptcy and that he used while in bankruptcy to pay for his gambling. He lied under oath about preferential payments to creditors, particularly casinos. He falsely denied under oath having gambling losses in response to a question on the form that asked just that. He had his secretary pay off a credit card account shortly before filing and then failed to report the transaction.

After the bankruptcy judge issued an order confirming Judge Porteous's chapter 13 plan, which prohibited him from incurring new debt without permission, Judge Porteous violated the order by secretly incurring additional debt at several casinos and by obtaining and using a new credit card, all without the permission of the bankruptcy trustee.

In sum, his bankruptcy was replete with deliberately false statements made under penalty of perjury in an effort to avoid public disclosure of his bankruptcy and his gambling problem.

Now, let me turn to article IV.

I previously mentioned that while he was a State judge, Judge Porteous had corrupt schemes going on with attorneys Amato and Creeley and with the Marcottes. How, then, did he ever get confirmed in the first place?

Article IV alleges and the evidence establishes at Judge Porteous repeatedly lied to the Federal Bureau of Investigation and to the U.S. Senate in responding to questions posed to him as part of the confirmation process on no less than four occasions—particularly in response to the very questions that would have required that he disclose his corrupt relationships with Creely, Amato, and the Marcottes. He was interviewed twice by FBI agents, and filled out two separate questionnaires, one of which was sent directly to the Senate Committee on the Judiciary.

There is perhaps no question more important of an applicant for a Senate-confirmed position than that which seeks information concerning the candidate's integrity. Judge Porteous's responses to these questions were false given his corrupt relationship with attorneys Amato and Creely and his corrupt relationship with the Marcottes and their bail bond business.

There is a wealth of evidence that makes clear that Judge Porteous understood the questions as calling for his disclosure of his corrupt relationship with the Marcottes. Most critically, as I mentioned, in the summer of 1994, Louis Marcotte asked Judge Porteous to set aside the felony conviction of one of his employees named Aubry Wallace—a Marcotte employee who had taken care of Judge Porteous's cars and had performed house repairs for Judge Porteous. Marcotte testified that Judge Porteous responded to Marcotte's request by telling Marcotte:

> Louis, I am not going to let Wallace get in the way of me becoming a Federal judge and getting appointed for the rest of [my] life. . . . Wait until it happens, and then I'll do it.

In short, Judge Porteous would set aside the conviction as Marcotte requested, but he would hide that act from the Senate so as to not jeopardize his confirmation. Judge Porteous knew that he had to conceal his corrupt relationship with Marcotte if he had any hope of being confirmed as a U.S. District Judge—and that is exactly what he did.

Almost all of the salient facts in this case I have just mentioned are not seriously contested. In connection with article I and his relationship with Creely and Amato, Judge Porteous admitted the critical facts during his sworn testimony before the Fifth Circuit—where he was given immunity from the use of his testimony in any criminal proceeding He admitted Creely gave him money and then balked at continuing to do so. He was asked about the curator moneys, and he admitted sending the curatorships to Creely and getting cash from Amato and Creely after he assigned them the curatorships. Though he will not call it a kickback, Judge Porteous does not deny getting the cash back from the attorneys after sending them the curatorships.

When he was asked how much money he got back from Creely and Amato during the Fifth Circuit proceedings, his answer was: ''I have no earthly idea.'' I have no idea. Not ''I didn't get the money''; not ''I don't know what you're talking about.'' but in terms of how much: ''I have no idea.'' The payments of cash to Judge Porteous occurred so often and for such a prolonged period of time, he could not, or would not, estimate how many thousands of dollars he received from them.

Does he admit getting the $2,000 in cash in an envelope after soliciting it from Amato during the pendency of the Liljeberg case? Yes, he admits to that in the Fifth Circuit. He takes issue, strangely enough, with the envelope itself. He can't remember whether the money was delivered in bank envelope or a regular envelope, but he doesn't deny getting an envelope with cash during the pendency of this multi-million-dollar litigation. He doesn't renember whether he got it personally or whether he sent his secretary to pick it up, but he doesn't deny getting the cash.

The record is absolutely clear that Judge Porteous did not disclose his receipt of curatorship money when he was asked to recuse himself from the Liljeberg case. He admits filing bankruptcy under a false name, saying only it was his lawyer's idea. He admits not disclosing his pending income tax refund on the forms as required. He admits not disclosing his gambling losses on the forms as required. He admits not disclosing a bank account he used for gambling. And as to the Judge's false statements to the FBI and Senate, the defense's own expert testified that if the judge had received kickbacks while on the State bench, and if he had a corrupt relationship with bail bondsmen, he would have understood that this must be disclosed in answer to the questions he was asked by the FBI and the Senate.

These were the facts the House considered in unanimously approving four articles of impeachment. The House determined that the corrupt conduct by Judge Porteous fell into four discrete schemes, one involving his corrupt relationship with Amato and Creely, another pertaining to the Marcottes, a third reflecting his false filings in bankruptcy, and the final concerning his deception of the Senate and the FBI.

Notwithstanding the historic precedent of giving the House broad discretion in the drafting of articles of impeachment and the plain logic of this division, Judge Porteous complains that the articles contain allegations that, in counsel's words, are improperly ''aggregated.'' The Senate has never ordered an article passed by the House to be divided up according to the accused's desires, or required multiple votes on an article, a proposal prohibited by the Senate's own rules.

Unlike his motions to dismiss articles I and II, this motion was heard and decided by the Senate Impeachment Trial Committee on the merits, which rejected it completely.

Judge Porteous claims that the structure of the Articles of Impeachment aggregates a series of a disparate allegations. He argues further that the Senate should dismiss all of the articles in its pleadings or, in so many words, vote on each separate factual predicate claim within each article. Judge Porteous mischaracterizes the articles in this case, and misstates the impeachment precedent on this issue. There is no basis for granting the relief he seeks, and the motion should be denied.

First, as a factual matter, the articles simply do not contain a series of unrelated, discrete acts as Judge Porteous contends. Each article describes a course of conduct in pursuit of a unitary end, pursued through a combination of means. Article I describes Judge Porteous's improper conduct while presiding over the Liljeberg case, arising from his concealed corrupt financial relationships with attorneys Creely and Amato; article II describes Judge Porteous's corrupt relationship with Louis and Lori Marcotte and provides the details of what he received from them and what he did for them; article III describes the numerous dishonest acts and false statements under oath by Judge Porteous to deprive his creditors and the bankruptcy court of the truth surrounding his financial circumstances; and article IV

describes Judge Porteous's false statements during the confirmation process when he concealed his corrupt relationships with attorneys Creely and Amato and the Marcottes. Even though each of these separate schemes comprised discrete acts, each article describes a single coherent scheme.

Second, as such, each of the articles easily withstand scrutiny under long-settled Senate precedent. The Nixon Impeachment Committee ruled that Articles of Impeachment are properly framed if they give ''fair notice of the contours of the charges against the judge and (2) contained an intelligible, essential accusation, thus providing a fair basis for conducting the evidentiary proceedings.''

There is no reason for the Full Senate to set aside the analysis and decision of the Senate Impeachment Trial Committee in this case, which found the Nixon standard persuasive and consistent with the Constitution and ruled that ''Each of the four Articles against Judge Porteous meets the Nixon standard.'' In reaching this conclusion, the committee summarized the articles, and stated: ''Each Article provides Judge Porteous with fair notice of the contours of the charges against him and makes clear, intelligible allegations.''

Each article contains a series of factual allegations comprising the charged ''course of conduct'' that constitutes that article. Although the requirements for how a count is charged in a criminal indictment do not apply in an impeachment, we think that Senator WHITEHOUSE—a former U.S. Attorney—got it right when he said during the proceedings:

> Let's say you were looking at a case say involving a scheme and artifice to defraud, and a whole bunch of conduct is alleged in that particular scheme and artifice to defraud. The jury doesn't have to agree on every single piece of that having been done; they have to look at the evidence and conclude ['']yep, based on what we see, we do see a scheme and artifice to defraud in this particular case.['']
>
> Isn't that the case here, as well? Because the course of conduct [is] integrated enough [it] can fall within the general impeachment standard of high crime and misdemeanor?

That analysis hits the nail right on the head—each of the four articles describes integrated schemes, integrated courses of conduct. Looking at article I, for example, defense counsel argues in his brief that the recusal hearing alone should be three separate counts—one stating the recusal motion was improperly denied, another charging that during the recusal hearing he should have disclosed the kickbacks from Creely and Amato, and a third, that he made false and misleading statements during the same recusal hearing. One hearing—three articles. Had we charged it the way counsel suggests, is there any question in your mind that counsel wouldn't be here before you today arguing that the House improperly disaggregated one corrupt scheme to pile on three separate charges?

In fact, none of these articles constitutes what in the past has been occasionally referred to as an ''omnibus'' article—where articles involving discrete spheres of misconduct are joined in a single article. Had we drafted a fifth article, that set out his relationship with Amato and Creely, and the Marcottes, and the bankruptcy and the deception of the Senate and said that because of all these acts together he should be removed, that would be considered an omnibus article. The House chose not to do so, although we note that the House has frequently returned omnibus articles summarizing the prior counts, and the Senate has not only deemed them proper but repeatedly voted to convict on such omnibus articles.

Judge Porteous has suggested that the consideration of the articles as drafted is unfair or would lead to confusion. According to Judge Porteous, Senators would not really understand what they were voting on in voting to convict. This, however, is hardly a serious contention. In article I, there is no credible reason to believe that a Senator would not convict unless he or she were satisfied with the core factual theory set forth in that count, and the same as with articles II, III, or IV.

Counsel for Judge Porteous has argued that the cases of Judges Hastings and Archbald support his claim, pointing to the comments of some individual Senators. But as the Senate Impeachment Trial Committee in this case so correctly pointed out: ''This, however, was not the adopted view in either instance as both judges were convicted on the aggregated articles.'' So in both the cases cited by counsel, the Senate voted to convict on the omnibus or aggregated articles.

Judge Porteous's arguments are no different, in substance, to those raised in the Hastings impeachment. In that case, there was a parliamentary inquiry as to whether, in order to find Judge Hastings guilty, a Senator had to find that he committed each of the four allegations in a given article. The President pro tempore of the Senate responded:

> This is for each Senator to determine in his own mind and in his own conscience and in accordance with his oath that he will do impartial justice under the Constitution and law. It is the Chair's opinion, if the Senator in his own conscience and based on the facts as he understands them determines that, in any one of the paragraphs, Judge Alcee L. Hastings has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States, he should vote accordingly.

And so it is here. It certainly is not necessary for the Senate to proceed sentence by sentence or paragraph by paragraph, so long as you are able to find, based on the facts as you understand them, that Judge Porteous, by his conduct in the given article, has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States.

The alternate request of counsel, to require multiple votes on each article, was also rejected by the Senate Impeachment Trial Committee and should be rejected here. As the committee ruled: ''The impeachment Rules do not permit Judge Porteous's suggestion that the Senate vote separately on the individual impeachable allegations within each Article. Impeachment Rule XXIII states that an article of impeachment 'shall not be divisible for the purpose of voting thereon at any time during the trial.' ''

Now, let me turn to Judge Porteous's motion to dismiss article I. Judge Porteous acknowledges in his written pleadings, that for the purpose of this motion all the facts alleged in article I should be accepted as true. Judge Porteous urges the Senate to dismiss article I on three grounds—first, that it charges a violation of title 18, U.S.C. section 1346, the mail and wire fraud statute, claiming that under the Supreme Court's decision in Skilling, an honest services claim cannot be made under that code section. Second, he argues that Judge Porteous could not have known that taking kickbacks, lying during a recusal hearing, or soliciting thousands in cash from an attorney with a case before him could constitute grounds for his impeachment. Most remarkably, he claims that he did nothing wrong and that taking secret cash from an attorney whose case is under submission in your courtroom is, at most, only an appearance problem. It is just such an argument which demonstrates his unfitness for the bench.

First, as to his ''honest services'' argument it is helpful to provide some background on what an honest services charge is in a criminal case. 18 U.S.C. Section 1346 and 7 are the wire and mail fraud statutes. Under those laws, a defendant in a criminal case can be charged with defrauding someone of money, property or honest services. Judge Porteous argues here that he has been charged with a violation of the mail and wire fraud statutes, and if this were a criminal case, he would seek to dismiss the charge on the basis that it did not adequately set out a crime under that statute. The problem with the Judge's argument is that he is not charged with mail or wire fraud under section 1346 or 7, this is not a criminal case, and even if it were, he would still lose under the very case he cites—for in Skilling, the Court found that you could be charged with honest services fraud in any case involving a kickback scheme.

It is plain from a reading of article I that the House has not charged, nor is it required to charge, that Porteous is guilty of mail or wire fraud in violation of title 18. The article I described by Judge Porteous's counsel bears little resemblance to the article that was actually charged in this case, which consists of six paragraphs that describe how Judge Porteous received kickbacks from attorneys Amato and Creely, how he dishonestly presided

over the Liljeberg case by concealing these kickbacks and making intentionally misleading statements at the recusal hearing, and by secretly soliciting and accepting cash from Amato while the case was pending.

Article I, despite defense counsel's claim, is not patterned after the mail fraud or wire fraud statutes—or any other criminal statute—and it does not otherwise allege a ''scheme or artifice to defraud,'' or any other language that would be necessary to charge a criminal ''honest services'' fraud offense. Article I is written in non-technical language and focuses on Judge Porteous's receipt of kickbacks and his acts of concealment of corrupt financial relationships in the course of presiding over a case. Article I concludes that Judge Porteous ''brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.'' Whether the conduct alleged in article I also violated criminal laws, or could have resulted in an indictable offense for ''honest services fraud,'' simply has no bearing on any issue before the Senate, and no plausible reading of article I as actually drafted suggests that it intended to import Supreme Court interpretations of a Federal statute.

It is for the Senate to determine whether charged conduct demonstrates that the individual is not fit to be a judge. That determination does not turn on whether the conduct at issue constitutes a Federal criminal offense. Indeed, one of the first impeachments was of a judge for drunkenness, and, for most of this Nation's history, Federal judges have been impeached, and convicted, and removed pursuant to articles that have not alleged the commission of Federal criminal offenses. As the Senate committee in this case repeatedly pointed out, this is not a criminal case. Impeachments in this country, as opposed to the British example, are not punitive in nature and threaten the judge with no loss of liberty or jail time. They are designed to protect the institution from the ill effects of having a corrupt officer destroy the public trust in that institution.

Finally, if this were a criminal case, and he were charged with mail or wire fraud, and you were judges rather than Senators, and the judge stood to go to jail rather than lose his office, he would still lose under the very precedent he cites, Skilling. Skilling, the former CEO of Enron, was charged with mail and wire fraud on the theory that he deprived shareholders of truthful information about the value of the company. The Supreme Court held, as to these counts, that if Congress wanted the statute to apply this broadly, it would need to do a better job saying so, because the charges against Skilling didn't involve bribery or kickbacks. If the scheme did involve kickbacks, as alleged in article I, the Court said the charges would be fine. As the Court stated: ''A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under section 1346 on vagueness grounds.''

Finally, Judge Porteous argues that article I should be dismissed because it charges only the appearance of impropriety, not actual wrongdoing, as if no judge can be expected to know that he cannot receive secret cash from an attorney with a pending case, or that he cannot receive kickbacks from attorneys after sending them cases. That is truly a remarkable assertion. Judges are on notice from the day they are sworn that they may be convicted and removed if they commit high crimes and misdemeanors—that is the constitutional standard to which judges must adhere, and Judge Porteous and every other judge ought to understand that it requires a very basic level of integrity.

When Judge Porteous—or any judge—is exposed as having accepted things of value from attorneys appearing before him and then ruling in favor of the client represented by those same attorneys, he damages the judicial system and brings the Federal courts into disrepute. This is especially so here, where Judge Porteous's ruling for his financial benefactors was reversed on the central issues in the litigation, in an opinion that excoriated the judge. Whether the House proved these facts is a matter you must decide when you deliberate on the case after closing arguments. The Senate report makes clear most of these facts are beyond dispute. But accepting the allegations in article I as true, as defense counsel concedes you must for the purpose of this motion, there is no question that they set out a chargeable high crime and misdemeanor. For these reasons, Judge Porteous's second motion must be denied. Let me now turn to his motion on article II.

Judge Porteous argues that article II must be dismissed on three grounds: First, because it alleges conduct both before and after his appointment to the Federal bench and dismissal is constitutionally required as shown by the Senate's precedent in Archbald. Second, because House experts testified that a judge could never be impeached on the basis of prior conduct. And finally, because the article only alleges Judge Porteous socialized with the wrong people.

Judge Porteous, in his moving papers, again concedes that the allegations in article II, for the purpose of this motion, must be accepted as true. Those allegations are, in summary, this: That Judge Porteous, while a State judge, began a corrupt relationship with the Marcottes in which the judge solicited and accepted numerous things of value, meals, trips, home repairs, car repairs for his personal use and benefit and in return, took official actions benefiting the Marcottes, setting bail in a way to maximize their profits, expunging the convictions of Marcotte employees both before and after his confirmation for the Federal bench, and using the power and prestige of his office as a Federal judge in helping recruit other State judges to form the same corrupt relationship with the Marcottes.

As you can see, article II by its own terms charges conduct which occurred before confirmation to his Federal judgeship, after his confirmation but before he was sworn in, and after he was sworn in and while serving on the Federal bench. The conduct charged in article II, while he was a Federal judge is egregious, using the power of his office to help recruit other State judges to form the same corrupt relationship with the Marcottes that he had—a relationship these other judges would later go to jail for. We proved this at trial, but more than that, this conduct, for the purpose of this motion, and much as defense counsel may forget, must be accepted as true. Just as in article I, the Senate may convict on article II if it chooses solely on the basis of what Judge Porteous did as a Federal judge.

The only article that charges pre-Federal bench conduct alone, is article IV, which charges Judge Porteous with making false statements to the Senate and FBI during the confirmation process. Interestingly, although Judge Porteous takes other issue with article IV, he does challenge the constitutionality of the fact that only prior conduct is alleged in article IV. And in fact, as I will discuss in a moment, even defense counsel recognize that it is not only constitutional to impeach a judge on prior conduct in certain cases, but that it is inevitable as well.

The Constitution itself is silent on when a high crime of misdemeanor warranting impeachment must take place. The Constitution describes certain types of conduct for which impeachment is warranted, such as bribery or treason, but does not say when the misconduct must have been committed. Plainly, had the Framers wished to confine the time the conduct must have taken place, it would have been easy to do so. They could have provided that an officer could be removed for a high crime or misdemeanor committed while in that office. But they chose not to so limit the scope of impeachment, and for good reason.

The deliberations of the Framers who were focused on the impeachment clause make it clear that it was the institution they sought to protect from the destructive influence of an officer who violates the public trust and brings the institution into disrepute. Whether the high crime or misdemeanor occurs before or after appointment to a particular office, if the conduct of that official has brought the institution into ill repute, it stands to reason that the Framer's intended that conduct to warrant impeachment. There is certainly no indication, that in a charge such as article II, which describes conduct before, during and after

appointment, that anything in the text of the Constitution presents a grounds for dismissal.

The one precedent in which a judge was charged in a single count with both pre and post office conduct is the 1913 impeachment of Judge Robert W. Archbald. There were 13 Articles of Impeachment brought against Archbald. Six articles accused him of misconduct on the Commerce Court where he was then assigned at the time of his impeachment and trial; six accused him of misconduct on the district court—his prior judicial appointment. Article 13 set forth allegations that involved his conduct on both courts and is therefore directly analogous to both articles II in the case against Judge Porteous. And on this article, the Senate convicted Judge Archbald.

Because debate was closed during the floor vote in the Archbald impeachment, there was no formal debate or discussion about the Senate's jurisdiction to impeach over prior conduct. The Senators were not required to state their reasons for their votes, although some did. Senator Owen, for example, stated:

> Whether these crimes be committed during the holding of a present office or a preceding office is immaterial if such crimes demonstrate the gross unfitness of such official to hold the great offices and dignities of the people.

Another Senator specifically noted that he was voting not guilty on all but one of the prior court counts because he felt the evidence did not support conviction on those counts, but that his vote should not be misinterpreted as suggesting that charging prior conduct was improper. In fact, five Senators did not feel the evidence was sufficient on any count, pre or post.

More than a quarter of the Senate was absent in the Archbald case, and it is impossible to determine what motivated the votes of every Senator in Archbald. We do know that of the 68 Senators who believed there was sufficient evidence to convict on at least one count, a full 34 of them expressed unequivocally that they believed a judge should be impeached on the basis on misconduct preceding their appointment to their current position. How do we know this? Because 32 of them said so, by voting to convict on purely prior conduct, and 2 others publicly stated that they would have done so, if the evidence of guilt were stronger. Only seven expressed the view advocated by Judge Porteous.

But one conclusion is beyond question: the Senate voted to convict Archbald on the one count that most closely resembles article II against Judge Porteous and alleged conduct both prior to and during his tenure in the current office.

Defense counsel argues that constitutional experts who testified before the House Impeachment Task Force took the position that prior conduct could not be considered by the Senate as a basis for impeachment. This is a rather incredible claim, since each of the experts testified precisely to the contrary, that the timing of the misconduct was not a constitutional impediment or the standard, but rather the effect of retaining a corrupt official on the institution.

Distinguished constitutional scholars who testified before the House Impeachment Task Force were unequivocal in their views that the Constitution permits impeachment, conviction and removal of a Federal judge for pre-Federal bench conduct. They noted that the Constitution provides no limitation, and that the principles underlying the reasons for the impeachment process—protecting the integrity of the Federal judiciary—compel this conclusion.

Professor Michael Gerhardt explained in his written statement:

> Say, for instance, that the offence was murder—it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a Federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process.

Professor Akhil Amar stated at the hearing:

> Let's take bribery. Imagine now a person who bribes his very way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can't immunize the bribery from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.

Moreover, defense counsel himself concedes in his written statement of the case to the full Senate that prior conduct can be an appropriate grounds for impeachment. In discussing a case where a judge might be indicted and convicted of a murder that he committed before appointment to the Federal bench—that was only discovered later—the defense conceded impeachment would be appropriate, writing: ''There would be little controversy about removing a judge from office who was convicted of murder during his term of office, and the precedential value of such an action would be limited.''

Nor has defense counsel taken the position that impeachment for prior conduct should be limited to cases of murder. The Senators from Illinois may recall the case of Judge Otto Kerner. He had been the Governor of Illinois before his appointment to the Seventh Circuit Court of Appeals. While on the court of appeals, he was indicted and convicted for accepting bribes while governor, long before he was put on the bench. In writing about the case of Otto Kerner, defense counsel not only asserted that Kerner could be impeached for the bribes he took as governor, but that his impeachment was inevitable. To quote Mr. Turley, ''Judge Otto Kerner, Jr., of the United States Court of Appeals for the Seventh Circuit, resigned before inevitable impeachment after he was convicted for conduct that preceded his service.

Let us assume that the statute of limitations had not barred prosecution of Judge Porteous on the kickbacks, or his corrupt scheme with the Marcottes, and like Judge Bodenheimer, he had been sent to jail based on that prior conduct. Would it be any less inevitable that he must also be impeached and removed from office?

Although Judge Porteous's counsel acknowledges the appropriateness of impeaching for prior conduct in murder, bribery, and other cases—indeed its inevitability—he evidently seeks to distinguish this case because Judge Porteous was not first convicted during a criminal trial. Of course, the Constitution does not require a criminal conviction prior to impeachment. The Framers didn't want to delegate to the Department of Justice the power to remove a judge, which would be the effect of saying it requires a conviction to remove someone on that basis. The language of the Constitution presumes, when it says that a prosecution may follow not precede impeachment, when it provides in article I, section 3 that a party convicted in an impeachment trial ''shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to our criminal law.''

In many prior impeachments, there has been no criminal trial and, in fact, in the Hastings case impeachment followed acquittal in a criminal case. So, plainly, the Constitution doesn't require a prior criminal trial or conviction to impeach, whether the conduct occurred or not.

Nonetheless, counsel argues it is unfair here, because a criminal trial would have more fully brought out the facts in the case, and provided a more detailed record. But this ignores the very full record in the fifth circuit proceeding, the depositions in this case, as well as the comprehensive trial before the Senate Committee. It is worth pointing out that during that trial, Judge Porteous has been represented not only by the very capable Mr. Turley, but at least 8 attorneys from the law firm of Bryan Cave. Moreover, this team of attorneys did not feel it was necessary to use the entire amount of time they were permitted to put on their case and simply rested. You would think, if counsel really felt that there was more to the case that needed to be illuminated, it would have used the full opportunity it was given to present witnesses.

Finally, there is a policy argument advanced by Judge Porteous, that if the Senate convicts him on the basis of conduct that occurred in part before he was on the federal bench, even though it is intertwined with his appointment and service on the bench, it will open the impeachment process to abuse by partisan interests. These partisan interests, upset with a judge's decision or

judicial philosophy, might conjure up some prior misconduct and use it to urge the impeachment of a judge.

It is true that the power to impeach a judge based on prior conduct could be abused, like any other power. If partisan interests wish to urge the impeachment of a judge whose decisions they don't like, they could just as well conjure up misconduct which occurred while the judge was on the bench, as before. The protection against that abuse rests in two places: it rests with the House to reject any impeachment charge which is a mere subterfuge for attacking a judge's decision of philosophy. And it rests here, in this chamber, where you must never remove a judge for partisan reason and erode independence of the judiciary.

Importantly, there is no allegation, no suggestion, not by defense counsel or anyone else, that this is the case with Judge Porteous. There is no claim that this impeachment is based on some illicit partisan interest.

There is a more serious consequence, however, of concluding that judges cannot be impeached for prior conduct, that confirmation is a safe harbor against all removal for all prior offenses be they undiscovered at the time. And that is the destruction to the public trust that would accompany a constitutional or policy determination that a judge who has so disgraced his office, by committing a high crime or misdemeanor, though they sit in jail, must continue to be called ''judge,'' must continue to be paid their full salary for life, and rest beyond the reach of this body.

Whether the Senate concludes that prior conduct alone should be the basis of an impeachment, article II alleges impeachable conduct that occurred not just before but while he was a Federal judge, and for the purpose of this motion to dismiss those allegations are accepted as true, this final motion must be denied.

For these reasons, Judge Porteous's motion to dismiss should be denied. I would be happy to respond to any questions.

The PRESIDENT pro tempore. Thank you very much. Mr. Turley.

Mr. TURLEY. Mr. President, I thank you for allowing me a chance to rebut some of what my esteemed colleague told you today.

I have to begin by making an observation, and perhaps you noticed what happened. We were told we were going to speak to you this morning about constitutional issues. The first thing the House did was start to go through these specific allegations against Judge Porteous, the merits of the case. Maybe I am a bit sensitive, but the way I heard it made it sound as if, if you don't like this guy, don't like what the merits say, it should influence how you read the Constitution.

As many of you know—and I believe all of you know—constitutional interpretations don't depend on how you feel about someone. It doesn't depend on how you feel about a case. It depends on how you read the Constitution. So my opposing counsel took you up 10,000 feet, had you look down at these articles, and said: Look at all the bad things we say this guy did. He is asking you to interpret the Constitution.

He is not asking you to interpret the Constitution. You are required to do that. That is your job. It doesn't matter if he was guilty of all these things. He is not guilty, and we will make that argument. That doesn't have any bearing on how you interpret these clauses.

I also have to object to the use by the House of testimony by law professors in the House proceedings. As some of you know, the House of Representatives submitted a post-trial brief that contained statements from law professors on the merits of impeachment basically telling you what you should do in this case. The committee and Chairman MCCASKILL, correctly in our view, ruled that is not appropriate. It would not be allowed in a court of law. So the House was told to redo their brief and resubmit it. The House then proceeded to introduce that very same information in today's presentation. I simply have to object.

I also have to object that, when they did so, the House didn't actually quote the law professors fully on the issue of pre-Federal conduct. Professor Omar actually dismissed it as just all that State stuff. Professor Gerhardt said nobody should be convicted of pre-Federal conduct, which completely contradicts what the House has said. The reason we objected to the inclusion of these professors—and if I could testify, I think my testimony should have been excluded—is that it is your decision. Judges don't hear experts on the merits of decisions.

I wish to actually address the constitutional issue. I will, however, take the liberty to deal with one factual assertion that the House has made because it was in direct response to something I had said. I told the Members of this body that Judge Porteous agreed to waive all the statutes of limitations that he was asked to waive. He did not think it was appropriate to stand behind the statutes of limitations. The House proceeded to suggest that he had not, that there were some statutes of limitations that he did not waive. The record will show, if you look at some of the material we have already submitted to you in our post-trial brief, that, in fact, Judge Porteous agreed to every waiver of the statutes of limitations put in front of him. He did not refuse any waiver of a statute of limitation.

When they said to him: We want the ability to charge you, even if you could block charges as to limitations, he said: So be it. I am a Federal judge. If you find crimes, charge me. Just make sure we understand this, DOJ began its investigation in the mid to late nineties. The statute of limitations on the Articles of Impeachment ran 5 to 10 years. So no statute of limitations had passed for anything he did as a Federal judge, which is what we are discussing today.

But putting that aside, the prosecutors had a problem with the statute of limitations with regard to Judge Bodenheimer, and it didn't stop them from charging. All they did was charge conspiracy and said there were ongoing acts, so the statute of limitations had to run. It wasn't even a speed bump on their way to charge Judge Bodenheimer.

Specifically, Judge Porteous waived, among others, the right to charge him with bankruptcy fraud, bribery, illegal gratuities, criminal conflict of interest, criminal contempt, false statements, honest services or wire fraud. Those were requested of him and that is what he signed. I think it would have been unfair to suggest somehow he hasn't done that.

The Senate has heard from the House that they were simply showing considerable restraint and deference to this body by aggregating counts. By aggregating counts, my esteemed colleague on the other side said that, after all, you wouldn't want us to break these up into what he calls unnatural pieces. I wish to talk about those unnatural pieces in a second. I cannot allow in the past when the House said: Do any of you doubt that if we had disaggregated, the defense would not be here today complaining that they were facing individual articles on individual claims? I will simply represent to you, if you look at the record, no one—no criminal defense attorney in history has objected to having specific defined charges. But more important, if you look at the history of this body, defense attorneys and Members of this body have objected to the aggregation that is being used in these articles.

Indeed, the House of Representatives, in Hastings, separated specific false statements so you could make a decision whether a judge gave a false statement, a specific one, before you reached your decision to remove them. Those weren't unnatural pieces. Those were stand-alone charges. Those would be in an indictment as separate counts.

My esteemed colleague also has objected that we are asking you to set up a situation where some judge is going to sit in a prison, and I believe the expression was ''force people to call him judge.'' Once again, just as the response was to go into the merits instead of constitutional issues, clearly, the light is better by directing your attention to a mythical judge sitting in a Federal prison making people call him judge. I will argue that case if you want me to. But I have to tell you, I lose. The judge cannot serve in office in good behavior in prison. I don't know of anyone who is credible who has said at any time that a judge could insist on being treated as a judge in that instance. I don't know about being called a judge, but to be a judge, that would not be possible, in our view.

I wish to address a couple points about aggregation. The House obviously walked back from Mr. SCHIFF's statement to the committee that you have the authority to do preliminary votes. That was very clear. At the time, I commended Mr. SCHIFF for that position. I have no idea what the authority is for saying that you cannot organize your deliberations any way you want. What you are required to do under rule XXIII is have a final vote on the article, and it cannot be divided. We suggest you do that. All we are proposing is that the Senate know what it is voting on, to look at the individual issues presented in these articles.

Furthermore, the House said this was already rejected by the committee. We were given a fair hearing by the committee in the pretrial motion, and I thank the chair and I thank the vice chair for that opportunity. If you look at the record, what occurred was that some Senators agreed that they had difficulties with the aggregation issue. And Mr. SCHIFF stood up and said: You don't have to decide it because you have the authority to do this. You can go ahead and make determinations on individual issues.

Some Senators raised this question, and it was ultimately not granted at that time. Instead, we have submitted it to you.

I will only submit to you that it makes no sense, honestly, for the Framers to go through the trouble of establishing a two-thirds vote requirement but allow the House to simply aggregate charges that virtually guarantees that, in many cases, two-thirds of you will not agree on the reason you are removing a Federal judge. That can't possibly be what the Framers intended because they weren't stupid men. They were very careful and deliberate men, and they set up a standard that was exacting.

The House also says: In addition to our being able to do this—to aggregate—because it would be so exhaustive to turn one article into three, even though they did that in Hastings and prior impeachment cases—that, by the way, these aren't individual claims; they are actually all related. So they do not have to be separate because the House says it wouldn't make any sense; you wouldn't understand it.

I direct your attention to article II.

In article II, Judge Porteous is accused of using his power and prestige of Federal office to assist bail bondsmen in making relationships and acting corruptly. All right, I understand that. I don't think it is an impeachable offense, seeing that ''corruption'' is the exact word Madison rejected. But still, that is a stand-alone issue. You can make a decision if that happened. I will simply say—because I will not argue the merits at this time; I was told to argue the motions—that we have very strong disagreements with the factual representations made by the House. But that is one of the claims in article II. In the same article, he is charged with knowing that Louis Marcotte, a bail bondsman from Gretna, LA, lied to the FBI in an interview.

Those are two very distinct charges. One is saying that he essentially procured someone to testify or make statements falsely, and one is that he used his office to assist in a corrupt relationship. As you can imagine, if you were standing here in my place, could you defend against both those points with the same argument? I don't think so. Those two points raise two different issues. They actually refer to two different issues in the Criminal Code.

What I am asking from you, with all due respect, is to give this judge the process you would want for yourself if, God forbid, you were accused of anything like what the Judge is accused of. Would it be fair, if you stood here accused, to have the House say: You know what, we don't have to separate allegations; we can just pile them all together because, after all, they have one thing in common: Judge Porteous.

That is not enough.

We have submitted a motion that showed no discernible connection between some of these aggregated claims, and we will leave it to that because we have limited time, and I know the Members of this body have somewhere to go, and I will try to wrap up as quickly as possible. I would simply note on the Skilling issue that if you listen carefully, the House, on Skilling, said that it is not a problem after Skilling because you can read in a kickback scheme into these articles. If you want to, you could read these facts and say: Well, that is a kickback, so Skilling applies.

Isn't the danger to that argument obvious? The Senate would be changing an Article of Impeachment. That is what they are being invited to do. The House of Representatives has the sole authority and obligation to define what it is that a judge should be removed for. It is not just their power, it is their obligation. Now the House says: Look, we are given great discretion to give you whatever we want. No one tells us what has to be in an article. We can do it because we have the authority to do it. That is true. And the Constitution gives you great authority to turn down an article from the House of Representatives. That is what you can do.

So this idea that the House would produce four articles that don't even mention bribery or kickbacks but that you can read it into those articles is unbelievably dangerous. It means you could get any article and transform it here on the floor of the Senate. You could remove someone for something the House Members did not agree should be submitted to you. Isn't that danger obvious?

The House had the opportunity to state that there was a bribe or a kickback. Bribery is in the standard. It was used by the Framers. They rejected corruption, but they put bribery in. So the question is, Are you allowed to do a do-over here on the floor of the Senate and simply ask the Members of the Senate to make the article fit like it is close enough for jazz? That is not the standard under the Constitution.

Now, the House says the Constitution is silent on when conduct has to occur in order for it to be the basis for the removal of a Federal judge. In fact, I thought I heard the House say that the Framers chose not to put in a statement in the Constitution when it occurred. Like many in this room, I have spent a lot of time with those debates—probably more than I should. I don't remember ever seeing that. My understanding is the Framers never addressed this issue, but they did address it in the Constitution. They just didn't put it in the impeachment clause. But when they defined life tenure, they said you have life tenure during good behavior. During good behavior in what? There wasn't good behavior in life. They said good behavior in office. It was a reference to the office that they held because they wanted to make sure people would not abuse their Federal office.

The life tenure guarantee under article III of the Constitution was to guarantee an independent judiciary by saying that you could not be denied life tenure as long as you served with good behavior in that office. What the House would have you believe is that the Framers would allow you—even though it refers to good behavior in office—to remove a judge for anything they did in life. Once again, does that track with what you know about article III? Does that make sense in terms of the only seven judges who were removed by this body; that all the time, it turns out that for 206 years Congress could have removed someone for anything they did in life?

Now, the House says you shouldn't be scared by the implications of all of this; that if you allow pre-Federal conduct, if you allow anything done in life to be the basis of removal of a Federal judge, don't be concerned about abuse. God knows Congress would never abuse any authority under the Constitution. And basically the argument was, trust us, we are the House. That is not what the Framers said in the Constitution. They didn't say to trust them because of the House.

And yes, you are here. The House said: Don't worry, you are here. So even if we abuse this, it has to go through you. Now, that is true. God knows this body has stopped a lot of impeachments. It has only agreed to seven removals. But is that the constitutional standard, that the House can go ahead and just impeach anyone for anything they did in life and seek the removal and hope you correct their actions?

The PRESIDENT pro tempore. The time has expired.

Mr. TURLEY. Thank you, Mr. President. And thank you, Members of Congress—Senate.

The PRESIDENT pro tempore. The Chair has received two questions for

both sides, one from Senator DURBIN and the other from Senator LEAHY.

The clerk will report.

The legislative clerk read as follows:

Senator Durbin's question to both sides: What is the standard of proof for the movant or petitioner in impeachment proceedings such as the extant case?

The PRESIDENT pro tempore. Do you wish to respond, Mr. Turley?

Mr. TURLEY. Senator DURBIN, the standard which we will be addressing when we get to the merits of the case has been subject to considerable historical debate. I will give what I believe is the weight of that historical record.

It is true that the Constitution does not enunciate a specific standard in terms of a burden of proof. We do not agree with the House that they refer to high crimes and misdemeanors as a standard. That is not a standard of proof; that is the definition of a removable offense. There is a difference.

So what we would suggest is that the Senate can look at a known standard, such as beyond a reasonable doubt. Beyond a reasonable doubt, of course, is the standard for a criminal case. The Constitution is written in criminal terms of high crimes and misdemeanors. That is one of the reasons why historically you have had these articles crafted closely to the Criminal Code. In fact, many impeachments actually took directly from a prior indictment and made the indictable counts the Articles of Impeachment.

The House has argued that standard is not necessary and too high. Well, we would submit to you—and we will certainly argue this when we get to the merits—that in the House recently, when they held a Member up for censure, they had a clear and convincing standard, that you must at least be satisfied with clear and convincing evidence. In my view, as an academic, it must be somewhere between clear and convincing and beyond a reasonable doubt.

What is more clear, Senator, is what it is not; that is, if you read the impeachment clauses, the clear message is that you can't just take facts that are in equipoise—allegations supported by one witness and denied by another—and just choose between them; that the facts have to, in your mind, go beyond a simple disagreement and be established, in our view, at a minimum by clear and convincing evidence.

The PRESIDENT pro tempore. Representative SCHIFF.

Mr. Manager SCHIFF. Mr. President, Senators, the Senate has considered and rejected the adoption of any particular standard, such as beyond a reasonable doubt. What the Senate has determined in the past in these cases is that, essentially, each Senator must decide for themselves, are they sufficiently satisfied that the House has met its burden of proof, are they convinced of the truthfulness of the allegations and that they rise to a level of high crimes and misdemeanors.

It is a decision where—and we can get into precise language the Senate has used in the past, but the Presiding Officer has instructed each Senator to look to their own conscience, to look to their own conviction, to be assured they believe that the judge in this case has committed the acts the House has alleged. So it is an individual determination, and the Senate has always rejected adopting a specific Criminal Code-based standard, such as beyond a reasonable doubt or a civil standard of convincing or clear and convincing proof because it is an individual Senator's decision.

It also reflects the fact that, as the Framers articulated, this is a political process—not political in the partisan sense but political in that it is not a criminal process. It is not going to deprive someone of their liberty. What it is designed to do is to protect the institution.

So I think the question for each Senator is, Has the House sufficiently proved the case that, in the view of each Senator, to protect the institution, there must be a removal from office? So it is an individual determination.

The PRESIDENT pro tempore. Thank you very much.

And now will the clerk read the question from Senator LEAHY.

The assistant legislative clerk read as follows:

Senator Leahy's question to both sides: The Senate Judiciary Committee requires a sworn statement as part of a detailed questionnaire by a nominee. Until this questionnaire is filed, neither the Judiciary Committee nor the Senate votes to advise and consent to the nomination. Would not perjury on that questionnaire during the confirmation process be an impeachable offense?

The PRESIDENT pro tempore. Professor Turley.

Mr. TURLEY. Thank you, Mr. President. Thank you, Senator LEAHY.

In my view, yes, that is if you commit perjury in the course of confirmation, that would be basis for removal. In fact, I believe Mr. SCHIFF made reference to perjurious statements by Judge Porteous. We will be addressing that because that is not charged.

What would have to be done is the House would have to accuse someone of perjury as in the Hastings case and have perjurious statements, and then I could stand here and tell you why there is no intent to commit perjury or why the statements were, in fact, true.

While Mr. SCHIFF referred to perjury, once again, perjury is not one of the Articles of Impeachment. And what I would caution—even though it can be, I would again caution this should not be an ad hoc process by which you can graft on actual criminal claims by implying them in language issued by the House.

The PRESIDENT pro tempore. Congressman SCHIFF.

Mr. Manager SCHIFF. Thank you, Mr. President, Senators. This essentially is what article IV is about which charges Judge Porteous with making false statements to the FBI and to the Senate during his confirmation process, and the answer is yes, absolutely. But I think what is very telling here is that counsel has conceded that, yes, if someone perjures themselves in the confirmation process they can and should be impeached but by definition that is conduct which has occurred prior to their assumption of Federal office. If someone can never be impeached on the basis of prior conduct, his answer should have been no, but plainly counsel recognizes there are circumstances where impeachment is not only appropriate but inevitable and essential. And where someone lies to get the very office that they are confirmed to, to deprive him of that office, to deprive him of the ill-gotten gain of that deception I think is not only constitutional but essential to uphold the office as well as to uphold the confirmation process itself.

The PRESIDENT pro tempore. Thank you very much. That concludes the argument on the motions.

MORNING BUSINESS

The PRESIDENT pro tempore. Under the previous order, the Senate will proceed to legislative session for a period of morning business with the Senator from Florida, Mr. LEMIEUX, recognized to speak therein for up to 15 minutes.

Senator LEMIEUX.

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Tennessee.

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

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

FAREWELL TO THE SENATE

Mr. LEMIEUX. Madam President, I rise to pay tribute to the body with which I have had the privilege of serving for the past 15 months. Being a U.S. Senator, representing 18½ million Floridians, has been the privilege of my lifetime, and now that privilege is coming to an end. As I stand on the floor of the Senate to address my colleagues this one last time, I am both humbled and grateful, humbled by this tremendous institution, by its work, and by the statesmen I have had the opportunity to serve with, who I knew only from afar but now am grateful that I can call those same men and women my colleagues.

No endeavor worth doing is done alone. And my time here is no exception. In the past 16 months, I have asked the folks who worked with me to try to get 6 years of service out of that time, and they have worked tirelessly to achieve that goal.