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

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

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


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## INTRODUCTION

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

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

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

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

## EXECUTIVE SUMMARY

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

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

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

## Pre-Federal Conduct

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

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

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

## Article I

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

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

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

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

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

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

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

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

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

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

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

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

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

## Article II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Article III

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

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

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

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

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

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

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

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

**Article IV**

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

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

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

(1) "could cause an embarrassment" to him or President Clinton if publicly known;

(2) could be used to "influence, pressure, coerce," "blackmail," or "compromise" him;

(3) would "impact negatively on his character, reputation, judgment, or discretion;" or

(4) would unfavorably "affect his nomination" as a federal judge.

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

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

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

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

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

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

## BACKGROUND – JUDGE G. THOMAS PORTEOUS, JR.

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

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

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

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[2] This brief utilizes the following citation system:

> Judge Porteous's proposed findings of fact are cited as "PF [no.]." The House's proposed findings of fact are cited as "HF [no.]."
>
> Testimony from the Senate Impeachment Trial Committee's (the "Committee") evidentiary hearings held on September 13 (Vol. I), 14 (Vol. II), 15 (Vol. III), 16 (Vol. IV), and 21 (Vol. V), 2010, is cited as "Senate Vol. [no.] at [page no.] (witness)."
>
> Exhibits offered by Judge Porteous and accepted into the Senate record are cited as "Porteous Ex. [no.]."
>
> Exhibits offered by the House Managers and accepted into the Senate record are cited as "House Ex. [no.]."
>
> Stipulations of fact agreed to between Judge Porteous and the House (and filed with the Committee on September 8, 2010) are cited as "Stipulation [no.]."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Id*. at 3.)

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

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

## CONSTITUTIONAL STANDARD

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

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

## BURDEN OF PROOF

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

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

## STANDARD OF PROOF

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

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

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

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

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

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

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

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

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

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

## ARGUMENT

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

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

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

Elizabeth B. Bazan & Anna C. Henning, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, Congressional Research Service, April 26, 2010.[4]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Judge John Pickering was impeached in 1803 and convicted by the Senate in 1804 for allegedly rendering judgment on the merits of a case while refusing to hear relevant testimony offered by the attorney general, disregarding and attempting to evade federal law, and refusing to permit an appeal; further, he appeared on the bench while intoxicated. *See generally* 13 Annals of Cong. 319-368 (1852).

2. Judge West H. Humphreys was impeached and convicted by the Senate in 1862 for actions most akin to treason, incitement to revolt, and rebellion while sitting as a federal judge. Humphreys joined the Tennessee secession and served as a District Court Judge

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

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

3. Judge Robert W. Archbald was impeached in 1912 and convicted by the Senate in 1913 for bribery and abuse of his position as a federal judge by inducing numerous litigants to allow him profitable financial deals, and hearing cases as a federal judge in which he had a financial interest. *See generally* 62 Cong. Rec. S1105-1678 (1913).

4. Judge Halsted L. Ritter was impeached and convicted by the Senate in 1936 for creating kickback schemes while a federal judge, continuing to work on a case as a lawyer while already a federal judge, evading federal income tax while a federal judge, bartering his federal judicial authority for a vote of confidence, and bringing his court into scandal and disrepute. *See generally* 74 Cong. Rec. S1-684 (1936).)

5. Judge Harry Claiborne was impeached and convicted by the Senate for tax evasion in 1986. Prior to his impeachment, Claiborne had been convicted in court of criminal tax evasion for substantially under-reporting his income in 1979 and 1980 while he was a federal judge. The income he failed to report was the profit gained from bribes that Judge Claiborne had received. *See generally* 99 Cong. Rec. S2-31 (1986).

6. Judge Alcee L. Hastings was impeached in 1988 and convicted by the Senate in 1989 for conspiracy to solicit a bribe and perjury while a federal judge. *See generally* 101 Cong. Rec. S1-77 (1989).

7. Judge Walter L. Nixon was impeached and convicted by the Senate in 1989 for perjury while a federal judge. Prior to his impeachment, Nixon had been convicted in court on federal criminal charges of perjury and was serving a five-year sentence. Nixon's perjury conviction arose out of statements he made to a grand jury, which was investigating bribery charges alleging that Nixon accepted a gratuity in exchange for attempting to influence a state's drug prosecution against a business partner's son. *See* 101 Cong. Rec. S10,673 (1989).

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

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

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

In 1912, the House of Representatives[9] filed thirteen Articles of Impeachment against Archbald, alleging misconduct in his then-current circuit judgeship (Articles 1 through 6) as well as in his prior district judgeship (Articles 7 through 12).[10] The Senate convicted Archbald on Articles 1, 3, 4, 5, and 13, but acquitted Judge Archbald on the articles relating solely to Archbald's former office (Articles 7 through 12).[11] In so doing, many Senators formally denounced impeachment based on pre-office misconduct. For example:

- Senator Bryan (D-FL) stated: [I am ] "convinced that articles of impeachment lie only for conduct during the term of office then being filled." (S. Doc. No. 1140, 62d Cong., at 1635 (1913).)

- Senator Brandegee (R-CT) stated: "I vote 'not guilty' on article 13 because it alleges offenses some of which are alleged to have been committed by the respondent while he was… [in an] office he does not hold at present and did not hold at the time the articles were adopted[.]" (*Id.* at 1647.)

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

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

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

- Senator du Pont (R-DE) stated: "My vote of 'not guilty' upon the articles of impeachment against Judge R.W. Archbald numbered 7, 8, 9, 10, 11, 12, and 13 was based, in the main, upon the fact that the offenses therein charged were alleged to have been committed…when he was not holding his present office." (*Id.* at 1647.)

- Senator Works (R-CA) stated: "I am of the opinion that the respondent can not be impeached for offenses committed before his appointment to his present office." (*Id.* at 1635.)

- Senator M'Cumber (R-ND) stated: "[Articles 7-12] charge offenses committed while Judge Archbald was holding another and distinct official position…I therefore voted 'not guilty' on each and all of said articles[.]" (*Id.* at 1659-60.)

- Senator Catron (D-NM) stated: "[t]he charges (Nos. 7, 8, 9, 10, 11, and 12) against Judge Archbald of acts committed during the time that he was a district judge and before he became a circuit judge, in my opinion, have no validity in them…I do not believe that the House of Representatives had the right to go back of the present office held by Judge Archbald to hunt up any of his acts to charge against him so as to remove him from the office he now holds." (*Id.* at 1661.)

- Senator Crawford (R-SD) stated: "I find respondent guilty of misconduct, but it occurred before he became the incumbent of his present office…I do not believe impeachment can be sustained…for the reason stated." (*Id.* at 1655.)

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

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

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

- Senator Catron (R-NM) stated: "Section 4 of Article II of the Constitution is restricted by the terms of that section to the actual President, Vice President, or any civil officer who is actually such at the time the charges are made, and, in my judgment, is limited to the acts done by him in that particular office." (*Id.* at 1661.)

- Senator Works (R-CA) stated: "[t]he Constitution provides, in express terms, that judges appointed 'shall hold their offices during good behavior.' Therefore if a judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. <u>Article I</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

owes a fiduciary duty," can constitute a criminal deprivation of "honest services." *Id.* at *28-29.[18]

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

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

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

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

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

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

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

**C. Pre-Federal v. Federal Conduct**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 4. No Link Between Curatorships and Gifts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

explained at his Senate deposition that he had no knowledge concerning how much money had been given to Judge Porteous[25] and that "something between ten and twenty thousand dollars has been batted around, but no, I never sat down and put a pencil to it." (PF 167.) In fact, Amato testified at trial that he believes that it was FBI Agent DeWayne Horner who came up with the $20,000 figure, which Agent Horner derived by looking at the number of alleged curatorship cases assigned to Creely, multiplying that figure by the average fees earned in connection with curatorships at the time, and then dividing that number in half (apparently assuming a 50/50 split of the fees). (PF 165.) This reverse-engineering the numbers and shoehorning the facts to fit the pre-conceived theories of the House bears no relationship to hard evidence and is highly questionable.

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

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

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

5. Lunches, Fishing Trips, Hunting Trips

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Timothy Porteous's 1994 Senate Internship

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

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

Second, and more fundamentally, Timothy Porteous testified at trial that any money that Creely[31] or Amato may have given him in connection with his 1994 internship was a gift to him, not his father, and was "done out of love for [him]." (PF 182.) Don Gardner similarly testified that he gave Timothy Porteous a "few dollars" to help pay for the expenses associated with his Senate internship because he was proud of Timothy Porteous, whom, as the son of his close friend, he had known since the day Timothy was born. (PF 183.)

**E. Federal Conduct (Post-October 1994)**

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

(1) "failed to disclose" that he "engaged in a corrupt scheme with attorneys Jacob Amato, Jr., and Robert Creely" relating to curatorships;

(2) "made intentionally misleading statement at the recusal hearing intended to minimize the extent of his personal relationship with [Amato and Creely]";

(3) "denied a motion to recuse himself from the case" despite having a "corrupt financial relationship with the law firm of Amato & Creely, P.C.";

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

(4) "solicited and accepted things of value from both Amato and his law partner Creely" following the *Lifemark* trial; and

(5) "ruled in favor of [Amato's] client, Liljeberg."

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

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

1. Background of the *Lifemark* Case

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

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

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

Lifemark v. Liljeberg

**13 TOTAL JUDGE REASSIGNMENTS**

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

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

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

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

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

2. Counsel in the *Lifemark* Case

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

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

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

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

The House has put much stock into Mole's allegation that Amato's and Levenson's formal appearance in the *Lifemark* case (in September 1996) raised concerns because it occurred less than two months prior to the scheduled start of trial (in November 1996). Such concerns, however, were uninformed[34] and unfounded. As Amato testified, prior to formally entering his appearance in the *Lifemark* case, he had spent two to three months thoroughly evaluating and carefully considering the merits of the case. (PF 190.) Amato did this to satisfy himself that the merits favored his potential clients, the Liljebergs, and that their claims deserved to be pursued,

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

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

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

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

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

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

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

3. Disclosures During the *Lifemark* Recusal Hearing

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

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

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

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

The House's second allegation likewise fails, but for a different reason. Contrary to the House's assertion, Judge Porteous did not make any misleading statements designed to minimize his relationship with Amato or Creely.[36] Instead, Judge Porteous specifically confirmed the widely known fact – which, indeed, was so widely known that it served as the primary basis for Mole's recusal motion[37] – that he, Amato, and Levenson were long-time friends who went to lunch together regularly and that Judge Porteous and Amato had practiced law together more than 20 years earlier. (PF 208, 210, 215; House Ex. 52 (Recusal Motion); House Ex. 56 (Recusal Hearing Tr., at 4, 6-7).) During the recusal hearing, Judge Porteous specifically stated:

> The Court: Let me make also one other statement for the record if anyone wants to decide whether I am a friend with Mr. Amato and Mr. Levenson, I will put that to rest for the answer is affirmative, yes. Mr. Amato and I practiced law together probably 20-plus years ago. ...
>
> * * *
>
> The Court: ... I have made the statement. Yes, Mr. Amato and Mr. Levenson are friends of mine. Have I ever been to either one of them's house? The answer is a definitive no. Have I gone along to lunch with them? The answer is a definitive yes. ...
>
> * * *

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

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

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

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

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

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

earlier. The Senate should not remove a federal judge from office on the basis of the House's selective misquoting of a transcript[38] and its unilateral declaration that that misquote is an "intentionally misleading statement[]."

4. Denial of the *Lifemark* Recusal Motion

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

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

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

5. Lifemark's Machiavellian Scheme to Remove Judge Porteous

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

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

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

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

ATTORNEYS AT LAW
3600 ENERGY CENTRE
1100 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70163-3600
TELEPHONE (504) 599-8000
FACSIMILE (504) 599-8100

WRITER'S DIRECT DIAL NUMBER

WRITER'S DIRECT DIAL FAX NUMBER

599-8006

February 18, 1997

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

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

Dear Don:

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

1. Retainer of $100,000 payable upon enrollment of counsel of record.

2. A fee of $200,000 if after trial there is a judgment allowing Lifemark to terminate the pharmacy agreement with no liability for future damages.

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

3. A fee $100,000 if the damages for past actions are less than $15 million in principal. (Total fee of $400,000)

4. A fee of $200,000 if the damages are less than $5 million in principal. (Total fee of $500,000)

5. A fee of $300,000 if the damages are zero. (Total fee of $600,000)

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

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

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

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

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

1. $200,000 if Judge Porteous withdraws, or if the case settles prior to trial ($100,000 retainer plus $100,000 severance).

2. $300,000. This would be the minimum payable for any result that allows Lifemark to terminate the pharmacy agreement with no liability for future damages.

3. $400,000 for a judgment or other result allowing Lifemark to terminate the contract with no liability for future damages, and with damages for past actions in an amount less than $15 million in principal.

4. $500,000. This sum would be payable if the damages are less than $5 million in principal, and Lifemark is able to terminate the contract as described above.

5. $600,000. This fee would be payable if the trial resulted in a judgment allowing Lifemark to terminate the contract and damages are zero.

I look forward to meeting with you later this week.

Very truly yours,

Joseph N. Mole

JNM:kcb

cc: Gary K. Ruff, Esq.

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

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

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

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

### 6. Conduct Following the *Lifemark* Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Ruling in the *Lifemark* Trial

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

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

**F. Conclusion**

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

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

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

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

## III. <u>Article II</u>

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

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

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

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

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

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

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

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

- Judge Porteous never asked for or received cash from the Marcottes or their company, Bail Bonds Unlimited. (PF 302.) The Marcottes conceded that they made improper cash payments (up to $10,000 in envelopes) to approximately three dozen other state court judges, several of whom are still on the bench today, but not to Judge Porteous. (PF 296, 580-86.)

- Judge Porteous never asked for nor received from the Marcottes a percentage of the money the Marcottes received for bonds signed by Judge Porteous. (PF 295-96.)

- Judge Porteous never asked for nor received a campaign contribution from the Marcottes or Bail Bonds Unlimited. (PF 303.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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44 The relevant text of Article II reads:

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

- When the Marcottes would approach Judge Porteous about setting bonds, they would ask Judge Porteous to set a bond that would maximize their profits . . . On occasion, the Marcottes would be very specific as to how much a prisoner could afford. (HF 114.)

- Judge Porteous would set bonds for the Marcottes that other judges did not want to handle. (HF 116.)

- Judge Porteous would spend extra effort to figure out ways to set or reduce bonds in order to help the Marcottes. He would be inventive and take risks in "splitting bonds. (HF 117.)[45]

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

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

a. How Bail Bonds Work

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

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

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

**Split Bonds**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f. The House's "Floodgates" Theory Has Been Completely Disproven

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

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

## "FLOODGATES THEORY"

| OCTOBER 1994 | | | | | | |
|---|---|---|---|---|---|---|
| How many bonds would you estimate were signed in a given day by judges in the 24th JDC, if you had to estimate?<br>***Louis Marcotte: "It seems like anywhere between 1 and 10, depending on what day."*** | | | How many bonds in an average day, from the '92 to '94 period, [would] you all generally move in the district?<br>***Lori Marcotte: "It's more than a dozen, less than two [dozen]."*** | | | 1 |
| 2 | 3 | 4<br>**2 Bonds**<br>1. $4,000 (split)<br>2. $10,000 | 5 | 6 | 7 | 8<br>**1 Bond**<br>1. $5,000 |
| 9 | 10<br>**4 Bonds**<br>1. $5,000 (split)<br>2. $5,000 (split)<br>3. $1,500<br>4. $2,000 (split) | 11<br>**5 Bonds**<br>1. $16,000 (split)<br>2. $4,000 (split)<br>3. $5,000<br>4. $10,000 (split)<br>5. $30,000 (split) | 12<br>**3 Bonds**<br>1. $20,000<br>2. $45,000<br>3. $55,100 | 13<br>**5 Bonds**<br>1. $5,000<br>2. $6,000<br>3. $17,500<br>4. $2,000<br>5. $2,500 | 14 | 15 |
| 16 | 17 | 18<br>**2 Bonds**<br>1. $5,000<br>2. $1,500 | 19<br>**4 Bonds**<br>$5,000 (split)<br>$5,000 (split)<br>$1,500<br>$2,000 (split) | 20 | 21 | 22 |
| 23<br>**1 Bond**<br>1. $1,300 (split) | 24 | 25 | 26<br>**1 Bond**<br>1. $4,000 (split) | 27<br>**1 Bond**<br>1. $5,000 | 28<br>**Judge Porteous sworn into Federal bench** | 29 |
| 30 | 31 | | | | | |

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

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

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

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

2. <u>Judge Porteous Acted Appropriately in Expunging Jeff Duhon's Record and in Setting Aside Aubrey Wallace's Conviction</u>

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

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

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

a. Jeffrey Duhon Expungement

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

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

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

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

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

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

convicted of any other criminal offense and had no criminal charges pending. (PF 466, House Ex. 77(c).) The Motion was filed in Division B and again assigned to Judge E.V. Richards. (PF 466, House Ex. 77(c).) On June 16, 1993, Judge Richards entered a show cause order in Case No. 76-770 and set a hearing for the next day, June 17, 1993. (PF 467, House Ex. 77(c).) At or after the hearing, Judge Richards set aside Duhon's burglary conviction in Case No. 76-770.[50] (PF 468, House Ex. 77(c).)[51]

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

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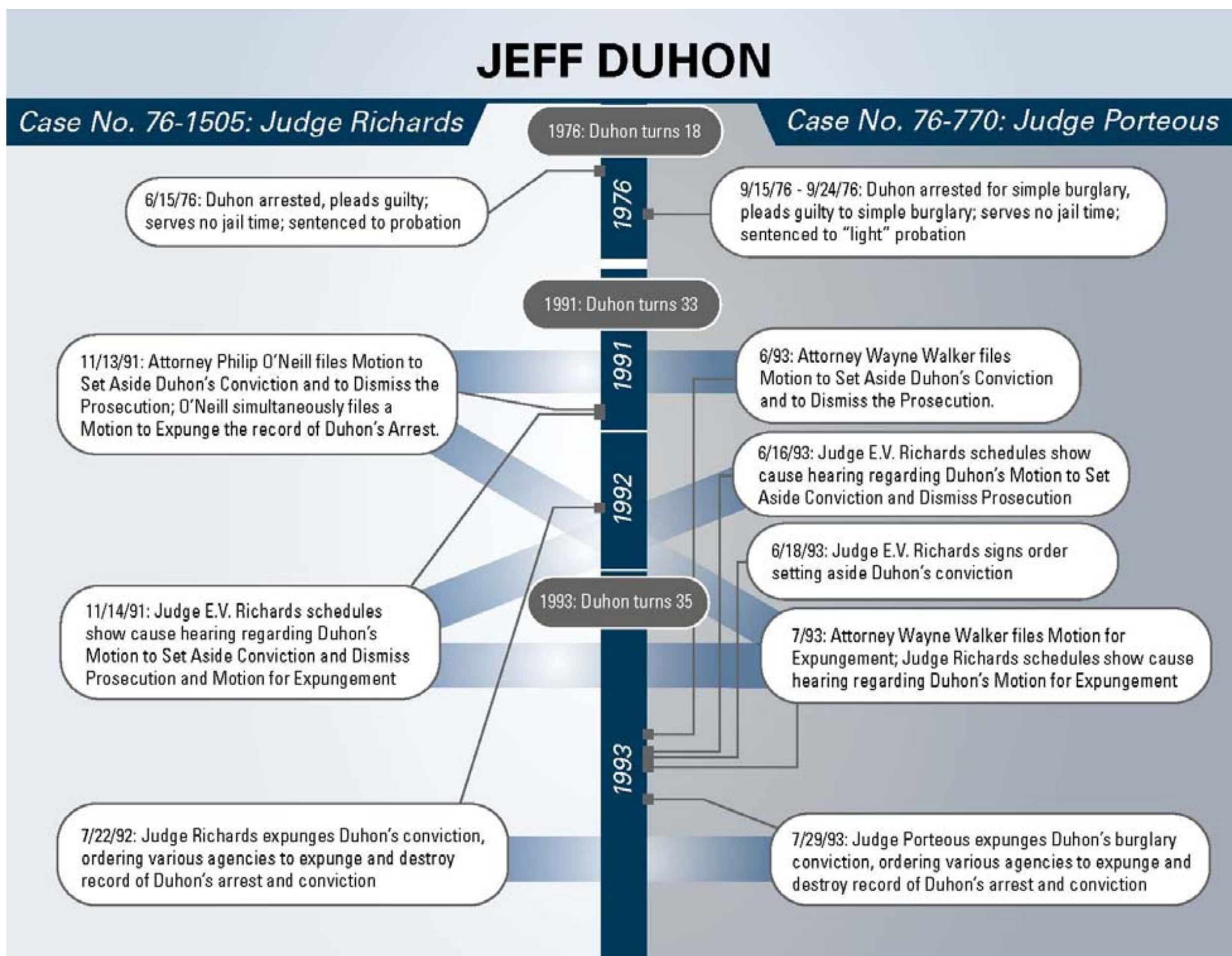
[50] House "expert" Charles Geyh admitted that he was unaware that Judge Richards had been the judge who set aside Duhon's conviction. (PF 558.) Geyh also admitted that in forming his "expert" opinion that Judge Porteous's actions in this matter were improper, he assumed all evidence as alleged by the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

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




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

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

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

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

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

| Judge Richards Order of Expungement in Case No. 76-1505 (Porteous Ex. 2006.) | Judge Porteous Order of Expungement in Case No. 76-770 (House Ex. 77(b).) |
| --- | --- |

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

No. 76-1505 Division "B"

STATE OF LOUISIANA

Vs.

JEFFERY J. DUHON

Filed: ____________ ____________ Deputy Clerk

ORDER

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

A. Hon. Harry Lee, Sheriff, Jefferson Parish, Louisiana;

B. Hon. John M. Mamoulides, District Attorney, Jefferson Parish, Louisiana;

C. Hon. Jon C. Gegenheimer, Clerk, 24th Judicial District Court, Jefferson Parish, Louisiana;

D. Louisiana State Police, Criminal Records Section, 265 South Foster Drive, Baton Rouge, Louisiana 70806;

E. Col. Marlin A. Flores, Administrator of the Louisiana Bureau of Criminal Identification, Investigation and Statistics, also known as Bureau of Identification, see R.S. 15:581.1 et seq.

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

Name: Jeffery J. Duhon
Sex and Race: White male
Date of Birth: January 7, 1959
Item No.: 6-14206-76
Date of Arrest: June 15, 1976
Arresting Agency: Jefferson Parish Sheriff's Office

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

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24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 76-770 DIVISION: "B"

**STATE OF LOUISIANA**

**VERSUS**

**JEFFERY J. DUHON**

FILED: ____________ DEPUTY CLERK: ____________

**JUDGEMENT OF EXPUNGEMENT**

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

A. **Harry Lee**, Sheriff of Jefferson Parish, State of Louisiana; and,

B. **John M. Mamoulides**, District Attorney, Parish of Jefferson, State of Louisiana; and,

C. **Jon A. Gegenheimer**, Clerk of the 24th Judicial District Court, Parish of Jefferson, State of Louisiana; and,

D. **Louisiana State Police Criminal Records Section**, 265 South Foster Drive, Baton Rouge, Louisiana; and,

E. **Col. Malcolm Millet**, Administrator of Louisiana Bureau of Criminal identification, State Police Headquarters, State Capitol, Baton Rouge, Louisiana.

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

NAME: **JEFFERY J. DUHON**
D.O.B.: **January 7, 1959**
COMPLAINT/ITEM NO.: **3-12486-76**
DATE OF ARREST:
ARRESTING AGENCY: **Jefferson Parish Sheriff's Office**

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

**HP Exhibit 77(b)**

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

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

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

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

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

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

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

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

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

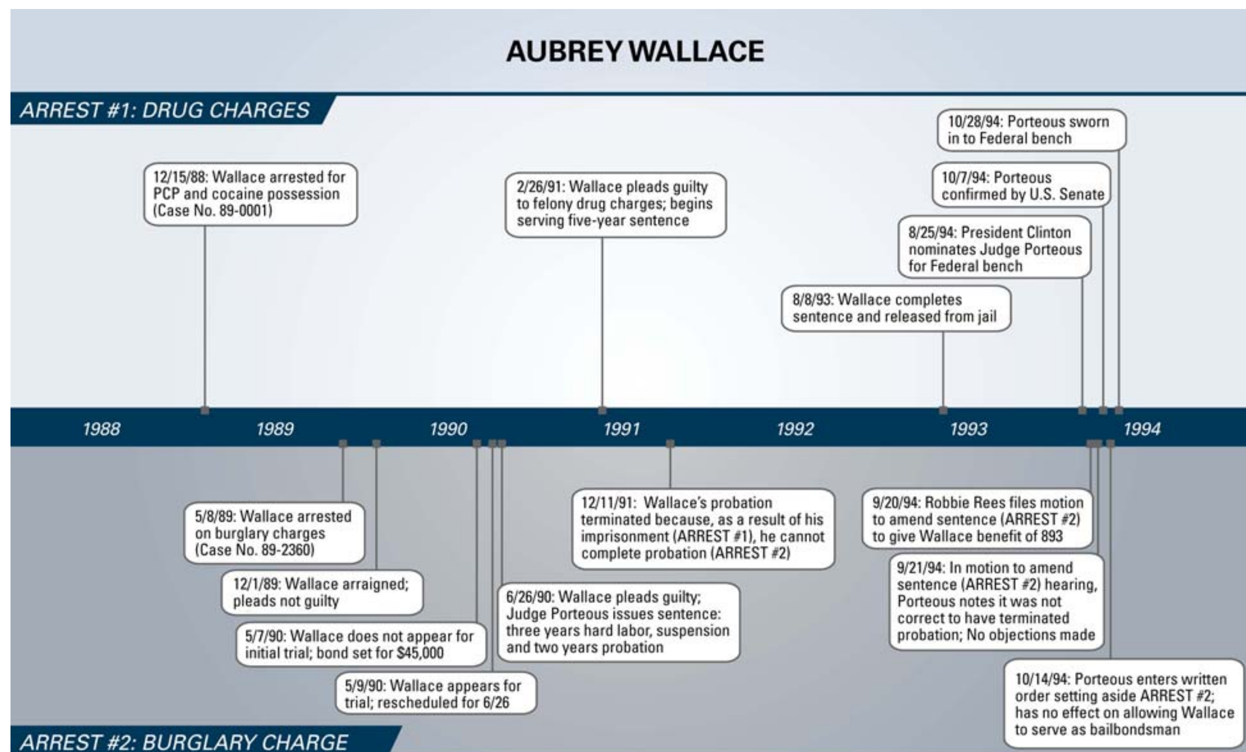
The details of Wallace's charges and sentencing are crucial to understanding the propriety of Judge Porteous's actions.

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

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

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

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




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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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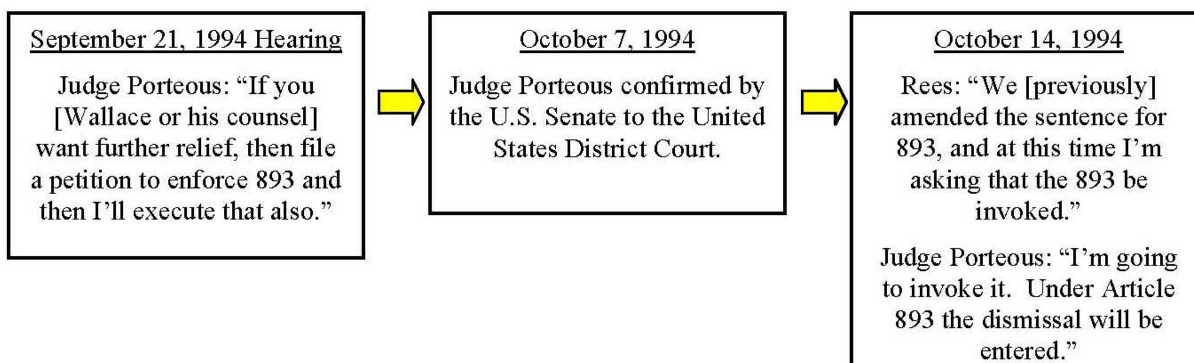
Porteous had illegally set aside the conviction of Aubrey Wallace." (HF 144.) Notably, although Reynolds was subpoenaed and present at the Senate, he was not called as a witness.

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

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

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




Despite the amendment of Wallace's sentence and then the subsequent invocation of Article 893 and the setting aside of the sentence, Wallace still could not serve as a bail bondsman, because the drug charges from 1988 (Arrest # 1) were still part of his record. (PF 530.) Judge Porteous took no action with regards to those charges.

The House's elementary approach to demonizing Judge Porteous's actions regarding Aubrey Wallace's conviction can only succeed when one chooses to ignore the details and the evidence. Judge Porteous was open and honest about his intentions, sought to correct a prior mistake, received no objection from the government, and acted entirely appropriate according to the only witness who testified and had experience in such matters.

### B. Although Judge Porteous Had Lunch with the Marcottes, There is Little to No Evidence Supporting the House's Allegations Regarding his Receipt of Other Things of Value

In Article II, the House alleges "Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit." (PF 290.) Although Judge Porteous readily admits that he had lunch with the Marcottes on occasion, at their expense, there is simply very little evidence (outside of the testimony of convicted felons) that Judge Porteous received the other things of value that the House insists were given to him. In securing the impeachment from the House, the House Managers never

revealed that these lunches are not just common in Gretna but allowed under ethical rules. Indeed, even under the more restrictive rules recently passed, all but one of those same lunches would have been allowed. (PF 417.)

Even if these items were received, there was no ethical rule or statute that forbade Judge Porteous's receipt of any such small gifts. The House presented no evidence linking the receipt of these items to judicial actions, or any form of *quid pro quo* arrangement. If they occurred, such gifts were nothing more than that -- a gift from the Marcottes – which was neither improper nor even had the appearance of impropriety. As the Marcottes themselves testified, they, and others who worked at the Court, provided numerous small gifts to various judges and court employees for years.[59] According to former District Attorney John Mamoulides, it was common for lawyers and others to bring gifts to judges and the fact that a judge received a gift "wouldn't bother" Mamoulides as the parish's chief prosecutor. (PF 590.) The Senate should decline the House's invitation to condemn the receipt of unsolicited and customary gifts as an impeachable offense, on par with treason.

1. Judge Porteous Admits That He Occasionally Ate Lunch with the Marcottes

The parties do not dispute that the Marcottes and Judge Porteous occasionally had lunch together, and that the Marcottes would pay for many, if not most of these lunches which Judge Porteous attended. This is not unlike what occurs, on a daily basis, in most state courthouses, offices, legislatures, and government offices throughout the country. Individuals become acquainted through work, often becoming friends, and invite each other to lunch with the inviter

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59 The Marcottes testified that they gave numerous gifts to judges and courtroom staff, including large quantities of shrimp, fake Rolex watches, hams, turkeys, cakes, and gingerbread houses. (PF 587.) Aubrey Wallace stated that it was a "regular practice of bail Bonds Unlimited to give gifts to "several judges." (PF 588.) Wallace testified that he would personally "bring little boxes of the little pastries to each division of the judges." (PF 589.)

tending to pay for the lunch.[60] This is not only the practice of the Marcottes, Judge Porteous, or even the legal community in Gretna, Louisiana. This is simply a practice of most working professionals in the United States.[61]

Yet, the House, through exaggeration and innuendo, makes unsubstantiated claims suggesting that the Marcottes bought "hundreds" of lunches for Judge Porteous at "high-end restaurants" over the course of decades, and thereby transformed normal hospitality into a longstanding corrupt practice. These allegations, when tested under cross-examination during the evidentiary hearings, have been debunked and deflated.

First, as to frequency, and as discussed above, the House concedes that the Marcottes' relationship and friendship with Judge Porteous did not begin until the early 1990s. Louis Marcotte testified that he began having lunch with Judge Porteous in 1994 or 1995.[62] (PF 404.) Lori Marcotte described the frequency of the lunches as "sometimes once a month." Darcy Griffin testified that, for those lunches she (and other members of the courthouse staff) attended

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[60] Louis Marcotte testified that he considered Judge Porteous to be a friend. (PF 305.)

[61] As a prime example, Lori Marcotte testified that Bail Bonds Unlimited paid for a lunch, at Ruth's Chris Steakhouse that then-Senator John Breaux attended. (PF 422.) Lori Marcotte testified that at the time of the Breaux lunch, there was "very important" federal legislation pending regarding bail bonds and that Senator Breaux was "important" to the Marcottes in relation to the legislation. (PF 423.) No one, including the House, has suggested that Senator Breaux committed ethical violations by accepting the paid lunch.

In fact, both the House and Senate rules currently provide a general *de minimis* exception for gifts from private sources and allow for the acceptance of a gift (including the gift of a meal) if the gift has a value of below $50. House Rule 25, cl. 5(a)(1)(B); Senate Rule 35, para. 1(a)(2). Prior to 1996, there were no limits on the acceptance of free meals by members of Congress. (*See* House Ethics Manual, Cmte. on Standards of Official Congress, (2008 ed.), at 27-28.)

[62] In its proposed findings of fact, the House concedes that, at the earliest, the Marcotte lunches with Judge Porteous started in or around October 1992. (HF 92.) Thus, even if the House's assertion is taken as true, as opposed to Louis Marcotte's testimony, the Marcottes and Judge Porteous only dined together while Judge Porteous was on the state bench for a period of less than two years – 24 times if Lori Marcotte's testimony ("sometimes once a month") – is correct.

with the Marcottes, she did not recall Judge Porteous coming often. (PF 409.) The House has presented no documentary evidence regarding the frequency of lunches between Judge Porteous and the Marcottes while Judge Porteous was on the state bench.

The House could only find a few lunches where Judge Porteous *might* have been a guest. Six of these meals allegedly occurred at an establishment known as the Beef Connection. The receipts produced by the House suggest that a filet mignon at the time cost $15.00, a tuna entrée cost $10.00, and a salmon entrée cost $11.50 – none of which supports the House's claim that these lunches were overly expensive. The receipts associated with these six lunches show that there were between five and fourteen attendees, and, assuming he attended, Judge Porteous's share of the bill at these lunches averaged just over $40 per meal, or less than $250 in the aggregate for all lunches over a seven year period.[63] (PF 411, 413, 414.)

Once confronted with the number of attendees, the House shifted gears and identified the total bill, often in the several hundreds of dollars range given the large number of attendees, and attributed the total amount as a benefit to Judge Porteous because "Judge Porteous liked to have people around him . . . [and] because it made Louis Marcotte look like a business man instead of a bondsman" (HF 96.) This result-oriented spin is unsupported by any evidence other than the Marcottes' forced testimony.[64]

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[63] Under applicable Louisiana ethical rules now in place, but which were non-existent in 1994, when determining how much of a specific meal should be attributable to a certain individual, the total costs are to be divided by the total number of attendees. (PF 412.)

[64] The House failed to call, or even identify, other attendees at these lunches. They failed to establish a link between those unknown attendees and Judge Porteous. However, both Aubrey Wallace and Jeffrey Duhon – Marcotte employees – testified that they attended several lunches with Judge Porteous and the Marcottes. (Senate Vol. II at 663 (Duhon); Senate Vol. II. At 706-07 (Wallace).) Under the House's theory, Wallace's and Duhon's attendance – and the costs associated with their meals – were somehow for the benefit of Judge Porteous. Under the House's tortured reasoning, the attendance of these two ex-felon bail bondsmen gave Marcotte

Between 1992 and 2001, when all of the lunches involving the Marcottes and Judge Porteous allegedly occurred, there was no ethical rule that prohibited a state or federal court judge from accepting such a meal. (Senate Vol. IV at 1633:21-1636:03; 1640:03-1641:10; *see also* Porteous Ex. 1001(h)-(r).) In 2008, well after these events occurred, the state of Louisiana changed the ethical rules to impose a $50.00 cap on any gift (including meals) received by a Judge. All but one of the lunches for which the House has provided receipts would comply with current Louisiana judicial ethics rules. (PF 417.)

Moreover, these lunches were in the open and in public restaurants. (PF 407.) As testified by the Marcottes, Judge Porteous, rarely if ever had lunch with just Louis Marcotte, and neither the Marcottes nor Judge Porteous attempted to conceal the fact that they were occasionally lunching together in a rather large and presumably conspicuous group. (PF 405, 407.) In fact, when the Metropolitan Crime Commission (MCC) interviewed Judge Porteous in 1994 regarding his relationship with the Marcottes, Judge Porteous "freely admitted that he has known Mr. Marcotte for a number of years and considers him to be a friend [and] admitted that he has had several lunches with Mr. Marcotte." (HF 149.)

The conversation at these lunches tended to focus on non-work-related matters and witnesses, such as Darcy Griffin, testified that she was unaware of the Marcottes ever raising bond issues at the lunches she attended with the Marcottes. (PF 408, 409.) In fact, Lori Marcotte testified that she thought it would have been rude to speak about bonds while at lunch, further suggesting that these lunches were seen as nothing more than social gatherings of friends and work colleagues. (PF 408.)

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stature as a "businessman" as opposed to a bail bondsman, while their companionship in some inexplicable way provided a benefit to Judge Porteous. The argument is absurd.

2. Single Trip to Las Vegas

The House alleges that, *while Judge Porteous was a state court judge*, the Marcottes paid for Judge Porteous's travel expenses to Las Vegas for a single trip in 1994.[65] (HF 108.) According to the House, other individuals, including Judge George Giacobbe (who remains a state court judge today) and attorney Bruce Netterville also went on the trip. (HF 108, PF 450.)

The only evidence about this trip is the testimony of Louis and Lori Marcotte, both of whom could not recall the date of the trip. (PF 449, 450, 452.) The House did not introduce any documentary evidence (i.e. receipts, credit card statements, plane tickets) regarding the costs associated with the trips and specifically chose not to call Netterville as a witness, despite his having been subpoenaed and having traveled to Washington, D.C. for the evidentiary hearings. (PF 450-51.) Giacobbe has apparently not been investigated or sanctioned for his alleged receipt of travel expenses related to this trip, further weakening the House's allegation.

The House alleges that the Marcottes and other attendees paid for the costs associated with Judge Porteous's air travel. (HP 109.) Yet, upon cross-examination, the Marcottes admitted that Judge Porteous may have been speaking at a national bail bonds convention during the trip, and that if that was the case, his travel expenses (air and hotel) would have been paid for by the national bail bonds association hosting the convention, not by the Marcottes. (PF 340, 453.)[66]

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[65] In the actual text of Article II, the House incorrectly asserts that Judge Porteous accepted "trips" from the Marcottes. The suggestion that Judge Porteous received multiple "trips" from the Marcottes is now refuted by the House's own proposed statements of fact, which discuss only one trip to Las Vegas. (*See generally* HF 85-185.)

[66] Of the limited records produced by the House regarding Judge Porteous's attendance at bail bonds conventions, it is clear that Judge Porteous often spoke at conventions held by the Professional Bail Agents of the United States, including two such conventions in 1996 and one in 1999. The defense sought out records relating to the 1993 and 1994 conventions but were

Louis Marcotte stated that he did not have a specific memory regarding this trip because he had gone to the national bail bonds convention for over 25 years and that Judge Porteous had, on occasion, spoken at these conventions. (Senate Vol. II at 571:13-572:08.)[67] Similarly, Lori Marcotte was unclear about specifics related to the Las Vegas trip that Judge Porteous allegedly attended and conceded that she had never personally traveled to Las Vegas with Judge Porteous. (PF 452, 456.) The Marcottes were definitive, however, in stating that they never gave any cash to Judge Porteous on any trip to Las Vegas and never saw anyone else give cash to Judge Porteous on any trip to Las Vegas. (PF 455.)

The House has alleged that Marcotte asked Netterville to accompany him on the trip because "he knew that bail bondsmen do not enjoy a great reputation and it would not look good

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informed that such records no longer exist. Nonetheless, it is the House's burden to prove that the Marcottes improperly paid Judge Porteous's expenses for the alleged 1994 trip.

[67] The following exchange, during his Senate testimony, highlights Marcotte's equivocal testimony regarding this issue:

> Q: Now, I want to talk about that Vegas trip. We had talked about that during the deposition. Isn't it true that Judge Porteous went to Las Vegas to speak at that conference?
>
> A: I don't know if it was that conference, but I think one time we went just for -- you know, when I went with Giacobbe and him. And I don't think it was a conference that he spoke at but –
>
> Q: It might have been a convention. I might be using the wrong term. But he spoke at a convention in Vegas. Isn't that what you testified to previously?
>
> A: I know I went to Vegas with him and Jacoby. I don't know if he spoke at the convention at that time. The bail bonds convention was in Vegas for 25 years, and I brought different people, insurance -- so, I mean, I know I was in Vegas with Porteous and Giacobbe, unequivocally, without a doubt.
>
> Q: Do you recall testifying under oath previously when asked did he go to Vegas to speak at this convention, and you answered, "he did"?
>
> A: Yes, I did.

(Senate Vol. II at 571:13-572:08.)

for Judge Porteous to be going to Las Vegas only with him." (HF 108.) This assertion was refuted by Louis Marcotte's own testimony, when he admitted that Netterville was invited on the trip because Marcotte and Netterville were such close friends that Netterville was the best man at Louis Marcotte's wedding. (PF 454.)

The House also suggests that the testimony of Rafael Goyeneche, the President of the Metropolitan Crime Commission, who interviewed Judge Porteous in 1994 as part of an investigation by the MCC, supports their contention that Judge Porteous's trip to Las Vegas in 1994 was paid for by the Marcottes. (HF 149.) According to the MCC's report, Goyeneche and his colleague asked Judge Porteous "if he had traveled to Las Vegas with Mr. Marcotte and he confirmed he had. The Judge stated that six or seven people went as a group to Vegas and Marcotte was a member of the group. ... Porteous ... advised that Marcotte did not pay his way to Vegas." (HF 149, House Ex. 69(d), PORT 594-597.) This account of Goyeneche's interviews only reinforces the point that there was no evidence Marcotte paid for Judge Porteous's trip. Under cross-examination, Goyeneche admitted that he was unaware that Judge Porteous had been a speaker at certain bail conventions in Las Vegas, where his travel expenses had been paid for by the Bail Bonds Association, hosting the convention. (PF 552.)

Finally, the House insinuates, without actually stating, that Judge Porteous improperly received things of value from the Marcottes when he attended two different Professional Bail Bonds Conventions in 1996 and 1999. (HF 157, 158) The House alleges that Judge Porteous' food and drinks at the 1996 and 1999 conventions were paid for by the Marcottes but noticeably fails to describe, list, or identify these expenses with any detail.[68] The parties have stipulated that the Marcottes hosted and paid for the costs associated with a cocktail reception for all

[68] The House concedes that Judge Porteous's travel and lodging expenses were properly paid for by the association hosting the convention. (HF 157, 158.)

attendees invited to the convention, which would have necessarily (and properly) included Judge Porteous as he was a featured speaker at both conventions. (PF 344.) If all Judge Porteous did was to attend a reception paid for by the Marcottes at a convention where he was a featured speaker – and there is precious little evidence to support even such an innocuous set of facts – this aspect of Article II should be summarily dismissed.

The House also attempts to suggest that Judge Porteous acted corruptly when his secretary, Rhonda Danos, traveled with Lori Marcotte to Las Vegas. (HF 107, 111.) The House bases a claim of improper conduct ***by Judge Porteous*** on the assertion by Lori Marcotte that she only traveled and spent time with Rhonda Danos because Danos served as Judge Porteous's secretary and "gatekeeper;" and that Judge Porteous was aware of this situation (HF 111). The testimony of the Marcottes and Danos rejects this implausible theory.

Rhonda Danos understood that she and Lori Marcotte were friends, particularly since Lori Marcotte often confided in Danos about Marcotte's personal problems. (PF 324.) Lori Marcotte and Rhonda Danos would often socialize together, go on trips together (even sharing a room at one point) and attended music concerts together. (PF 325.) For some of these events, Lori Marcotte conceded that it she was unsure whether she or Ms. Danos paid for the costs associated with the events. (PF 325.) The relationship was so close that Lori Marcotte and Danos celebrated New Year's Eve together on multiple occasions. (PF 326.) During this friendship, Danos maintained two jobs in addition to her work as Judge Porteous's secretary. She was both a travel agent and a booking agent. (PF 328.) Danos would often assist the Marcottes with the planning of trips and parties that the Marcottes intended to take or host. (PF 327.) Danos testified that she never told Judge Porteous that the Marcottes had paid for her travel expenses. (PF 457.)

Danos denied that her receipt of travel expenses from the Marcottes altered her behavior in any way towards the Marcottes. She testified that the Marcottes received no special access to or special treatment in Judge Porteous's chambers and that Judge Porteous never directed Danos to provide the Marcottes special access to his chambers. (PF 331.) In fact, on occasion, Danos would turn the Marcottes away or make them wait to see Judge Porteous – hardly consistent with the House's allegation that Danos "swung open the gates" to the Judge in favor of the Marcottes. (PF 332.) Contrary to the House's assertions, Danos and Darcy Griffin testified that Judge Porteous maintained an open door policy regarding his chambers and that his office was "open to anybody." (PF 329.) In fact, Judge Porteous's chambers were known as a place where lawyers and court personnel could stop by to have coffee. (PF 330.)

3. Home Repairs

The House alleges that, at some unknown date,[69] but while Judge Porteous was on the state bench, Aubrey Wallace and Jeffrey Duhon repaired a fence for Judge Porteous at his residence. (HF 110.) That single claim is the only allegation regarding the provision of "home repairs" to Judge Porteous during the alleged decades-long "corrupt" relationship between the Marcottes and Judge Porteous. The evidence of this isolated alleged fence repair is based entirely on the parsed and then cobbled together testimony of four felons – the Marcottes, Wallace, and Duhon – as opposed to even a single piece of documentary evidence. (HF 110.)

[69] It is undisputed that the Marcottes and their employees never performed home repairs for Judge Porteous while he was on the federal bench. (PF 433, 443; HF 110 stating that the alleged act occurred "while Judge Porteous was still a state judge".) The House's witnesses concede that, although they are unaware of the date or even year when the home repairs allegedly occurred, they must have occurred during the decade while Judge Porteous was on the state bench. (PF 433, 443.) Beyond that guesstimate, the date of these supposed repairs is such a mystery to the House that in their report, they stated "The fence repairs occurred either prior to Wallace's February 1991 incarceration or subsequent to his August 1993 release." (Report 111-427 at 68.) In other words, the House speculates that Wallace did not break out of jail to fix Judge Porteous's fence. But there still is no real evidence that the fence repair ever took place.

The House has not produced, and the relevant witnesses have conceded that they cannot locate, any records, receipts, photographs, or account statements showing that work was actually performed, completed, or whether it was paid for by the Marcottes or Bail Bonds Unlimited. (PF 437, 439, 441.) In fact, Louis Marcotte has no recollection of who paid for the repairs and neither Louis or Lori Marcotte ever observed the work that was allegedly performed.[70] (PF 438, 439.) Moreover, Louis Marcotte noted that he was often concerned that when Duhon and Wallace were assigned to perform construction work, they would fail to perform the work assigned. (PF 444.)

Further, the House's witnesses admitted that Judge Porteous never asked for such assistance or solicited such work from the Marcottes but claim that Louis Marcotte volunteered to assist Judge Porteous with the task. (PF 434-35.)

Thus, the isolated allegation of a fence repair is unsubstantiated and even if taken as true, cannot be relied upon as evidence of an improper receipt of a thing of value from the Marcottes, given the House's failure to establish any monetary value associated with the alleged repair, much less that the Marcottes actually paid for it. Further, even if there were competent evidence that once upon a time the Marcottes paid to fix Judge Porteous's fence, there is no evidence that the repair influenced any official act by Judge Porteous in his capacity as a state judge. At most, Judge Porteous received a small, non-monetary favor from a professional friend, long before he was on the federal bench. This could not rise to the level of an impeachable offense or even an ethical violation, given the rules in lace at that time. (PF 70, 74-76.)

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[70] The House has alleged that "Louis Marcotte paid for the materials." (HF 110.) But, when asked, during the SITC hearings, "And, in fact, you testified earlier that you didn't -- you weren't quite sure who paid for the materials. Isn't that true?," Louis Marcotte responded "Yes, sir." (PF 439; Senate Vol. II at 570:13-16.)

4. Car Repairs

The House alleges that, while a state judge, Judge Porteous accepted automobile repairs and maintenance from the Marcottes.[71] (HF 101-106.) Judge Porteous does not dispute that, on occasion, the Marcottes or their employees would assist the Judge by dropping his car off at a mechanic's shop but he does dispute the allegations regarding the frequency of such events or that Judge Porteous failed to personally pay for the repairs.

The House has presented no documentary evidence (i.e. credit card statements, receipts, records, photographs, etc.) of the repairs or the costs allegedly associated with this work. (PF 427.) The House did not call, as a witness, the mechanics or proprietors who allegedly performed these repairs or received payment for the work performed. (PF 427.) Instead, the House relies on the testimony of four felons – Louis and Lori Marcotte, Aubrey Wallace, and Jeffrey Duhon.

In the House's proposed findings of facts, they do not even allege that Judge Porteous solicited this assistance from the Marcottes. Instead, Louis Marcotte testified that he offered to assist Judge Porteous in having his automobiles repaired. (PF 426.) Without documentary evidence, the House is forced to rely on general and broad statements, such as Louis Marcotte would make repairs to Judge Porteous's cars "once a month or once every three months." (HF 103.) The testimony elicited during trial casts serious doubt on the frequency of these alleged repairs, if they occurred at all. Jeff Duhon stated that he was not sure how often he took care of Judge Porteous's cars but that it was only "once in a while." (PF 428.) Aubrey Wallace testified that he assisted in the maintenance and repairing of Judge Porteous's care for a period covering only six to eight months. (PF 432.) Further, Wallace stated that he did not know whether Judge

[71] It is undisputed that the Marcottes never paid for or assisted Judge Porteous with any automobile repairs or maintenance while Judge Porteous was on the federal bench. (PF 425.)

Porteous ever reimbursed the Marcottes for any car repairs or maintenance that the Marcottes may have initially paid for. (PF 431.)

The House also alleges that "on several occasions, when Mr. Wallace returned the car to Judge Porteous, the Marcottes would leave presents in the car for Judge Porteous, such as liquor and coolers of shrimp." (HF 105.) The House ignores the fact that Wallace's testimony also specifically stated that these occasions related to holidays – such as Thanksgiving and Christmas – when the Marcottes would give similar gifts to all of the state court judges in Gretna, as well as many court personnel. (Sen. Vol. II at 685:23-686:11.) At the time, the receipt of such gifts did not violate any ethical rule. (PF 70, 74-76.) [72]

### C. Judge Porteous Did Not Abuse the Power and Prestige of His Office as a Federal Judge

As previously discussed, the only federal bench misconduct alleged in Article II is that Judge Porteous "used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes business." The House admits that Judge Porteous as a federal judge conferred no judicial benefit on the Marcottes. The House and its witnesses concede that although the Marcottes did handle certain bonds in federal court, Judge Porteous never handled a bond for the Marcottes or Bail Bonds Unlimited while he was on the federal bench. (PF 304.) Moreover, Louis Marcotte testified that once Judge Porteous took the federal bench, Marcotte requested Judge Porteous's assistance in convincing Federal Magistrate Judge Louis Moore to utilize commercial bonds. (PF 562.) But

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[72] In prior pleadings and proceedings, the House has alleged that Judge Porteous, through one of his sons, received the benefit of free parking in a lot owned by the Marcottes. The House has apparently abandoned this claim. They were well-advised to do so, since Lori Marcotte testified that the Marcottes never provided Michael Porteous with a reserved parking spot, never subsidized his parking, and most importantly that the parking lot that they owned was open to the general public for no fee during the relevant time period. (PF 445-48.)

Marcotte admitted that he had no knowledge of Judge Porteous taking any action in response to this request and, in fact, expressed doubt that Judge Porteous did take any action. (PF 562.)

Without proof of any direct action Judge Porteous took for the Marcottes while on the federal bench, the House argues that Judge Porteous used the "strength" and "power" of his office improperly to assist the Marcottes by (1) attending a handful of lunches with the Marcottes, and (2) vouching for the Marcottes' honesty in conversations with state court judges. In both instances, the House concedes that "there is no evidence that Judge Porteous specifically communicated to these judges that he sought or intended for the Marcottes to form corrupt relationships" with these judges or individuals. (House Report at 20.)

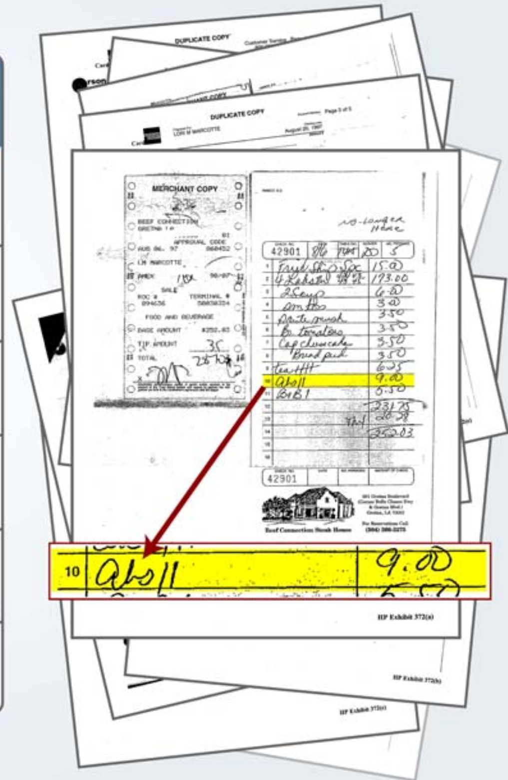
1. Lunches While on the Federal Bench

Once Judge Porteous took his position on the federal bench in October 1994, and for the entire decade during which Judge Porteous actively served as a United Stated District Court Judge, Louis Marcotte estimated that they only had lunch together between **five and eight times**. (PF 410.) The House was only able to locate and produce documentary evidence that shows six such lunches over this same time period. (PF 411.) Even for these lunches, the only evidence that Judge Porteous attended four of the six lunches is that the lunch bill includes a reference to "Abs" or "Abso" which the House believes references an order for Absolut Vodka – a drink Judge Porteous was said to prefer. (PF 415.) There is, of course, no evidence that Judge Porteous was the only guest of the Marcottes who ever drank vodka.

The following chart, used as a demonstrative during the evidentiary hearings, identifies these lunches in greater detail:

## Beef Connection Receipts

| Date | Total Bill | No. of Attendees | Per Person Share |
|---|---|---|---|
| 8/6/97 | $287.03 | 5 | $57 |
| 8/25/97 | $352.43 | 10 | $35 |
| 11/19/97 | $395.77 | 10 | $39 |
| 8/5/98 | $268.84 | 9 | $29 |
| 2/1/00 | $328.94 | 8 | $41 |
| 11/7/01 | $635.85 | 14 | $45 |



The House alleges that among these lunches, the Marcottes took Justice of the Peace Charlie Kerner to lunch at the Beef Connection in 1997 and that, at the lunch, Judge Porteous explained the bond process to Kerner and told Kerner that "he could trust the Marcottes and that the Marcottes were good people.[73] (HF 161.) As an initial matter, there is nothing inherently wrong with Porteous explaining the bond process to a less experienced colleague or telling that individual that the Marcottes (whom Judge Porteous had entrusted with bonds for years as a state judge) could be trusted. Up until that point, Judge Porteous had no reason to distrust the Marcottes, having never found them to provide him with faulty information regarding the criminal background of a specific arrestee. Moreover, the House does not allege that Judge

[73] The House wholly failed to establish the date of this lunch during the evidentiary proceedings.

Porteous urged Kerner to work with the Marcottes, described any type of quid pro quo relationship, or placed any pressure on Kerner to work with Marcottes.

The House then alleges that "Judge Porteous also attended a lunch with Justice of the Peace Kevin Centanni and Lori Marcotte. The House does not allege that Judge Porteous made any comments regarding the bond process or the Marcottes and admits that "nothing resulted from that lunch." (HF 162.)

The House also alleges that Judge Porteous attended a lunch with Norman Stotts – an insurance company representative. (HF 163.) The House makes no allegations and adduced no evidence at trial regarding any statement made by Judge Porteous at the lunch or any action taken by him on behalf of the Marcottes. Instead, the House appears to argue that Judge Porteous's mere attendance at the lunch constituted an impeachable offense.

Finally, the House alleges that Judge Porteous attended a lunch in 2002 with newly elected judge Joan Benge and Judge Ronald Bodenheimer. But the evidence produced during the evidentiary hearings showed that Judge Porteous did not attend the lunch, but, instead, showed up after the Marcottes and Judges Benge and Bodenheimer had finished eating. (PF 419-20.) There is no evidence of Judge Porteous having any conversations with Judge Benge and Judge Bodenheimer regarding the Marcottes or the bail bonds system.

In Article II, therefore, Judge Porteous is being impeached because the House disapproves of his personal associations, a remarkably slippery slope for a new standard of impeachment. Penalizing a judge for his choice of lunch companions is purely guilt by association, a small step away, on a very slippery slope, from penalizing him for belonging to an unpopular political party, an unpopular religion or even an unpopular ethnic or cultural group.

Such a standard, potentially, would have subjected some of the leading jurists of the last two centuries to impeachment. For example, Justice Anton Scalia was criticized for accepting hunting trips with former Vice President Dick Cheney before ruling on a case in which Cheney's office was a party. *See* Gina Holland, *Justice Scalia: No Apologies for Hunting Trip With Cheney*, WASH. POST (Feb. 11, 2004) (*quoting* Justice Scalia as stating "It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack."). Likewise, Justice Felix Frankfurter and some of his colleagues were accused of *ex parte* communications and other conflicts in leading cases. *See generally* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 737 (2002); *see also* David J. Danelski, *The Saboteurs' Case*, 1 JOURNAL OF SUP. COURT HIST. 61, 69 (1996). As Professor Stempel has summarized, the use of the power and prestige of one's office and the showing of favoritism, along with breaches of intra-bench confidentiality, have been deployed routinely by the most respected judges in American history:

- Justice William Johnson, President Jefferson's first appointment to the Court, regularly engaged in lengthy correspondence with Jefferson in which Jefferson sought to influence the internal functioning of the Court. In many of these letters, Jefferson sought to convince Johnson to work to return the Court to the earlier practice of seriatim opinions rather than the single majority opinion pioneered by Jefferson's arch-rival, Chief Justice John Marshall.…

- Justice Samuel Chase, appointed by President Washington in 1796, began his political career as a Republican but converted to the Federalist cause with such enthusiasm that while on the Court he actively and publicly campaigned for the presidency of John Adams. This and some celebrated episodes of intemperance on the bench sufficiently angered Congress that Chase was impeached and tried, but acquitted.…

- Justice Joseph Bradley, who served on the Court from 1870 until 1892, was… criticized for hearing a petition for appointment of a receiver brought by an old friend acting as counsel for the petitioner. His choice of receiver was also criticized by some who alleged misfeasance in the sale of the debtor's properties.…

- Justice Willis Van Devanter, a 1910 Taft appointee, delivered two opinions in cases involving former client the Union Pacific Railroad. Harding appointee Pierce Butler also delivered court opinions involving his former railroad client, the Great Northern Railroad.…

- A perhaps even more suspect extracurricular activity of Justice Frankfurter recently attained considerable attention when his protégé and former law clerk Philip Elman revealed in an interview that he and Justice Frankfurter had numerous conversations regarding internal court discussions. Justice Frankfurter was, in essence, informing Elman, then an Assistant Solicitor General for civil rights cases, of the positions of the Justices regarding segregation, and advising Elman as to how best involve the Government in the litigation chapter of the civil rights movement of the 1940s and 1950s.…

- Justice Abe Fortas's close 'kitchen cabinet' relationship with President Lyndon Johnson demonstrated that the problem of the advisor-Justice did not end with Justices Brandeis and Frankfurter. The weight of authority suggests that Justice Fortas was frequently advising the President on matters ranging from Vietnam War strategy to re-election planning. This seemingly was widely known in Washington and tolerated until Justice Fortas's financial dealings brought him under an unfavorable spotlight.

*See* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOKLYN L. REV. 589, 622-24 (1987) (internal citations omitted).

Here, the House is seeking to convict Judge Porteous for types of conduct that Congress has not previously treated as impeachable offenses. *See Hastings v. Judicial Conference of the U.S.*, 593 F. Supp. 1371, 1382 (D.D.C. 1984) ("Congress therefore did not intend to authorize investigation and formal proceedings against a judge for one or two isolated instances of possibly unethical or inappropriate official conduct unless such conduct, by itself, could amount to an impeachable offense."). To seek impeachment and conviction here is to return to the prior English standard that allowed impeachment for ill-defined "divers deceits."[74] *See* Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938); *see also* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a*

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[74] "Diver deceits" appeared to refer to an alleged pattern of untrue or misleading statements or actions. Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938).

*Madisonian Device*, 49 DUKE L.J. 1, 11 (1999). The guarantee of life tenure and judicial independence mean little if lunching with unpopular companions can lead to impeachment.

2. Cocktail Reception with Bodenheimer

The House also alleges that Judge Porteous abused the power and prestige of his office by telling then newly elected state court judge Ronald Bodenheimer, at a cocktail party, that the Marcottes could be trusted in regards to their provision of information regarding bonds. (HF 165.) Louis Marcotte testified that he had no direct knowledge of the conversation between Judge Porteous and Bodenheimer.[75] (PF 563.)

Bodenheimer, who was of course a percipient witness to his own conversation, testified that Judge Porteous told him "I've dealt with [Marcotte] in the past, he's not going to lie to you about bond information." (PF 564.) When asked about his subsequent experience with the Marcottes, Bodenheimer testified that "it was true – whatever [Marcotte] told me about a particular defendant, and I would check, I believe I would say I would check every time. The information he gave me, I would call the jail and verify it, and I never, ever caught him in a lie." (PF 568.) Bodenheimer also testified that he did not feel that Judge Porteous ever used his position as a federal judge to pressure Bodenheimer to work with the Marcottes or issue any bonds. (PF 565.) Moreover, Bodenheimer stated that Judge Porteous never told him what to do in relation to the Marcottes. (PF 566.)[76] Notably, despite their reliance on Bodenheimer and

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[75] The House also attempts to draw comparisons between Judge Porteous and Bodenheimer, in an effort to convince the Senate that because Bodenheimer ultimately pled guilty and served jail time, the Senate should similarly convict Judge Porteous. As noted by Senator McCaskill during the evidentiary hearings, Bodenheimer's indictment involved far more than allegations of Bodenheimer taking things of value from the Marcottes. (PF 569.) It also involved Bodenheimer pleading guilty to a conspiracy to plant drugs on an individual. (PF 569.)

[76] The House appears to have abandoned a claim that Judge Porteous improperly told Bodenheimer, upon his election, that he would never have to buy lunch again. (*See* House Proposed Findings of Facts, which do not reference the statement.) There is good reason for this

calling him to Washington to testify at the hearing, the House Managers dropped him from their witness list. Had Bodenheimer not been called by the defense, these false representations concerning his prior testimony would have been left uncontradicted.

The House claims that, as a result of Judge Porteous's comments about the Marcottes, Bodenheimer began to do bonds with the Marcottes. (HF 165.) This assertion is directly contradicted by Bodenheimer's testimony. Bodenheimer stated that the pressure he felt regarding bonds stemmed from the "federal court decree that said if you didn't do bonds, they were going to release them with no bonds." (PF 570.) Bodenheimer stated that as a result of the jail overcrowding and the fact that the Marcottes were "doing the lion's share of the bonds, you did have to deal with [the Marcottes]." (PF 570.) Bodenheimer added "But I didn't feel pressure from what I was told by Judge Porteous, no." (PF 570.)

Article II should be dismissed because it is based on pre-federal conduct. It also should be dismissed because the evidence presented by the House does not come close to supporting any allegation of wrongdoing by Judge Porteous before or after he became a federal judge. Article II rests on innuendo and guilt by association. The Framers did not authorize impeachment for socializing with companions whom some Members of Congress find distasteful. The Senate should decisively reject this profoundly deficient Article and the dangerous precedent it seeks to create.

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abandonment. Bodenheimer explicitly stated that he "thought it was a funny statement" and viewed it as a quip or joke, made in front of several people, that individuals laughed, and that Bodenheimer did not believe it to be serious advice or a serious statement. (PF 567.)

## IV. **Article III**

While it is the one Article of Impeachment that involves no pre-federal conduct, Article III is also the only Article that deals exclusively with Judge Porteous's actions as a private citizen, not his official actions as a judge. Article III is unprecedented in the history of U.S. impeachment proceedings. The Senate should reject this attempt to expand the scope of impeachable offenses to include purely private conduct.

There is no evidence that Judge Porteous and his wife did anything intentionally to harm their creditors in the personal bankruptcy case that they filed in 2001. Quite the contrary: it is undisputed that he and his wife completed all of their Chapter 13 plan repayments (totaling over $57,000) and received a discharge of their debts. The Chapter 13 bankruptcy trustee who administered the Porteouses' bankruptcy case was specifically advised by the DOJ and FBI of all of the mistakes relied upon by the House in Article III and yet decided to take no action. With regard to the reporting of Judge Porteous's income, the only mistake that could have materially effected the payouts to creditors, the Chapter 13 trustee specifically advised the FBI that he was not going to take any action to address that issue because, in his expert opinion, doing so would not have "substantially increase[d] the percentage paid to unsecured creditors." (Porteous Ex. 1108 (Beaulieu Letter to FBI).)

The alleged misconduct in Article III consists of mistakes, errors, and omissions that deceived no one and harmed no one. There is no evidence that this alleged misconduct was anything other than honest mistakes, many of which are commonplace in personal bankruptcy cases. Moreover, the evidence presented at trial establishes that these mistakes were the result of erroneous legal advice provided by, and miscommunication with, Judge Porteous's bankruptcy counsel, Claude Lightfoot. After exhaustively investigating Judge Porteous's and his wife's conduct in the bankruptcy, the Justice Department declined to bring any charges against either of

them, citing: (1) its "concerns about the materiality of some of Judge Porteous's provably false statements"; (2) "the special difficulties of proving *mens rea* and intent to deceive beyond a reasonable doubt in a case of this nature"; and (3) "the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters." (House Ex. 4 (DOJ Declination Letter, at 1; emphasis added.)

The Senate should acquit Judge Porteous on Article III.[77]

**A. Article III Allegations: Mistakes, Errors, and Omissions**

Article III alleges that Judge Porteous should be impeached and removed from office – something which has happened in the history of our country only seven times – on the basis of minor mistakes, errors, and omissions in connection with his and his wife's personal bankruptcy case. Specifically, the House alleges only that Judge Porteous:

1. Used a false name and a post office box address to conceal – for less than two weeks – his identity as the debtor in his bankruptcy case;
2. Concealed certain small assets;
3. Concealed two small allegedly preferential payments to creditors;
4. Concealed gambling losses; and
5. Incurred new debts while his bankruptcy case was pending in violation of a bankruptcy court order.

(PF 597-97; 111 Cong. Rec. S1645 (Mar. 17, 2010).)

Equally important to what the House has alleged is what the House has not alleged. The House does not allege that Judge Porteous abused or in any other way misused his official power and authority as a federal judge. (PF 601.) Article III also does not allege any misconduct or improprieties in connection with financial disclosure forms that Judge Porteous completed while

[77] Judge Porteous hereby incorporates by reference the arguments set out in his Motion to Dismiss Article III (filed on July 21, 2010), as well as his Proposed Findings of Fact no. 597 through 811 (filed October 1, 2010).

a federal judge.[78] (PF 600.) Instead, the House seeks to remove Judge Porteous solely on the basis of his conduct as a private citizen attempting to navigate the indisputably complex federal bankruptcy process.

**B. Errors and Omissions Are Exceedingly Common in Bankruptcy**

At the outset, it is critical that the Senate have something of which the House was deprived entirely: context. Contrary to the implication of the House's charges, errors in bankruptcy cases are exceedingly common. Indeed, consumer bankruptcy petitions are rarely, and possibly never, perfect. (PF 798-801.) As a result, the bankruptcy system has well-developed mechanisms to deal with such issues. Those mechanisms – not the constitutional impeachment process – are the appropriate avenue in which to address the allegations raised by the House in Article III.[79]

Throughout this entire case, the House has adopted an overly simplistic (and self-serving) view of the process involved in filling out bankruptcy schedules and seeking bankruptcy protection. At trial, however, Henry Hildebrand – a leading expert in consumer bankruptcy and a standing Chapter 13 trustee[80] – testified about the complexities of the bankruptcy process and the great difficulties that debtors have in accurately completing bankruptcy schedules and forms.

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[78] Despite this undeniable fact, the House Managers have attempted improperly to expand the scope of Article III by presenting and relying upon purported evidence of misconduct or impropriety in connection with Judge Porteous's financial disclosure forms. (*See* HF 190-94.) This effort to insert new allegations against Judge Porteous that the House of Representatives did not adopt is both improper and offensive to the Constitution, and should be rejected forcefully by the Senate.

[79] At trial, bankruptcy experts Henry Hildebrand and former Bankruptcy Judge Ronald Barliant testified that, in their expert opinions, the most appropriate sanction for uncorrected bankruptcy errors of the sort present in this case would be dismissal of the debtor's bankruptcy case, not contempt sanctions or criminal prosecution. (PF 644-45, 771-73, 811.)

[80] *See* Senate Vol. V at 1847:18 – 1848:10 (Chairman McCaskill stating that Henry Hildebrand "will be accepted for the purpose of giving expert testimony in the area of Chapter 13 bankruptcy cases.").

(PF 612, 688, 702, 797-98, 801-06.) He stated that, due to the complexity of those forms, as well as the severe economic stress that they are under, debtors "often do not complete the bankruptcy petition accurately." (PF 797-98, 801; Senate Vol. V at 1852:17 – 1863:8 (Hildebrand).)

Bankruptcy judges throughout the country also have long recognized that bankruptcy schedules prepared and filed by or on behalf of consumer debtors are rife with problems.[81] This was the subject of significant testimony at trial by Professor Rafael Pardo, an expert in bankruptcy law.[82] (PF 799, 805-06.) Additionally, bankruptcy commentators have expressly recognized that completed bankruptcy forms often contain errors.[83] (PF 799, 806; Porteous Ex. 1068 (Porter study), 1070 (Rhodes study).) In fact, shortly before Judge Porteous and his wife filed their bankruptcy case, the Honorable Steven W. Rhodes, U.S. Bankruptcy Judge for the Eastern District of Michigan, undertook a review of the bankruptcy schedules filed in 200 randomly selected consumer cases pending in his court. Judge Rhodes's analysis revealed errors in **99%** (198 of 200) of the schedules reviewed.[84] *See* Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 Am. Bankr. L.J. 653, 678 (1999). (PF 799.)

What all these bankruptcy judges, scholars, and experts have recognized is that preparing bankruptcy schedules is an inherently difficult process, where even experts in the field routinely

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81 *See In re Attanasio*, 218 B.R. 180, 229 (Bankr. N.D. Ala. 1988); *In re Bruzzese,* 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997).

82 *See* Senate Vol. IV at 1409:17-22 (Chairman McCaskill stating that Professor Pardo "will be considered an expert by the panel" in matters of bankruptcy law).

83 *See, e.g.,* Teresa A. Sullivan, Elizabeth Westbrook & Jay Lawrence Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 Law & Contemp. Probs. 195, 229 (1987).

84 One point noted by Judge Rhodes is particularly relevant to the disclosure issues in this case. Neither the Federal Rules of Bankruptcy Procedure nor the Official Bankruptcy Forms require that a debtor's schedules of assets and liabilities be dated on or as of any particular date. *Id.* at 675. The House's assertion in its proposed findings of fact that Judge Porteous was required to file schedules that stated his financial situation precisely as of the date his bankruptcy petition was filed simply is not accurate. (*See* HF 238.)

make mistakes. (PF 611-12, 798, 805.) Hildebrand testified that, in his expert opinion, based on 28 years of experience as a trustee, there are errors in virtually every Chapter 13 case; indeed, he has never seen a perfect Chapter 13 bankruptcy filing. (PF 797-98, 801-04.) These comments were echoed by Professor Pardo, who also noted that creditors (like debtors) frequently make errors. (PF 805-06.)

Despite this uncontradicted evidence, the House has attempted to present the preparation of bankruptcy schedules by Judge Porteous and his late wife as a black-and-white exercise (instead of the complex field of grey that it is in reality), in which any error constitutes evidence of deceit and fraud. The House takes this view even though the evidence clearly establishes that Judge Porteous heavily relied upon his bankruptcy counsel, a fact which Lightfoot corroborated at trial, and that his bankruptcy counsel made several critical mistakes in connection with the Porteouses' bankruptcy case. (PF 609-12, 615-17, 628, 632, 634-36, 649-53.)

When one considers the complexity of the bankruptcy schedules and the stress that debtors are under as they prepare such schedules, it is easy to understand why errors occur, even when debtors are represented by counsel. It is equally easy to understand, therefore, why bankruptcy courts and federal prosecutors regularly decline to jump to the conclusion pushed by the House – that all bankruptcy errors evidence fraud and ill intent – and seldom recommend or pursue criminal charges as a result of bankruptcy errors. Were this not the case, and if bankruptcy courts and federal prosecutors adopted the view urged by the House in this case, virtually every consumer bankruptcy filing could be followed shortly thereafter by a criminal prosecution. Bankruptcy is not an all-or-nothing system. (PF 807-810.)

### C. Judge Porteous's Bankruptcy Should Not be Subject to Harsher Scrutiny Simply Because He Is a Federal District Court Judge

The House contends that Judge Porteous's bankruptcy filing should be subjected to harsher scrutiny because he is a federal district court judge. The uncontradicted evidence, however, is that Judge Porteous had no particular expertise in bankruptcy law or in the complexities of bankruptcy practice. As Professor Pardo testified at trial, most federal district court judges have little experience, knowledge, or expertise concerning bankruptcy issues. (PF 615.) This is true even though district court judges occasionally hear appeals of bankruptcy issues. (PF 615; Porteous Ex. 1067 (Pardo Vanderbilt Law Review article analyzing the disparate quality of appellate review of bankruptcy issues conducted by district court judges versus bankruptcy appellate panels composed of bankruptcy judges).) Indeed, Judge Porteous retained experienced bankruptcy counsel to represent him precisely because he did not have such expertise. It could not be clearer that Judge Porteous and his late wife entered bankruptcy as ordinary private citizens, seeking the same relief sought by millions of other Americans from all walks of life.

### D. None of the Article III Allegations Warrants Removal

#### 1. The Porteouses' Bankruptcy

Judge Porteous and his late wife Carmella, exercising their rights as private citizens,[85] sought bankruptcy protection in 2001 as a result of an untenable financial situation stemming from years of poor financial planning, record-keeping, and discipline. As happens with so many Americans, the couple's expenses, including those associated with raising and educating their four children, simply outstripped Judge Porteous's income. This situation was exacerbated by

[85] *See* Commentary to Canon 4(D) (previously 5(C)) of the Code of Conduct for United States Judges, explaining that "[a] judge has the rights of an ordinary citizen with respect to financial affairs …."

Judge Porteous's (and his late wife's) penchant for gambling in Louisiana and other places in the country where gambling is legal. Ultimately, after obtaining legal counsel and trying unsuccessfully to reorganize their debt and finances informally, Judge and Mrs. Porteous sought shelter in the bankruptcy process. (PF 605, 607, 623-28, 658.) In so doing, Judge Porteous joined the nearly 1.5 million American debtors who in 2001 sought such protection, and an opportunity for a fresh start. (PF 659.)

The complete history of Judge Porteous's personal bankruptcy case is set forth in his Motion to Dismiss Article III, as well as his Proposed Findings of Fact (PF 597-811), both of which are incorporated herein by reference. That history will not be repeated here.

2. Very Brief Use of a Pseudonym

Judge Porteous and his wife did not intend to deceive, and in fact never deceived, their creditors by using the name "Ortous" on their original bankruptcy filing. The evidence is clear. Within twelve days of filing their original bankruptcy petition, the Porteouses filed an amended petition listing their full and correct names and residential address. Even though the brief use of a pseudonym was specifically disclosed to the Chapter 13 trustee, the trustee never sought to impose any bankruptcy sanction on the Porteouses. The Department of Justice, moreover, specifically concluded that criminal prosecution was not appropriate given the lack of evidence of either materiality or intent.

The law is clear that bankruptcy fraud requires fraudulent intent. (PF 647; 18 U.S.C. §§ 152, 157.) The evidence shows clearly that Judge Porteous and his wife never had any fraudulent or ill intent:

1. Judge Porteous and his wife relied extensively on his bankruptcy counsel (Claude Lightfoot) to advise them with regard to bankruptcy law and to prepare their bankruptcy petition and associated papers. (PF 609-12, 617, 632.)

2. Lightfoot, not Judge Porteous, suggested the use of a pseudonym on the original bankruptcy petition and advised Judge Porteous and his wife that this was permissible. (PF 634-40.)

3. Lightfoot timed the filing of other papers in the Chapter 13 case specifically so that no notices would be sent to creditors until after an amended petition with accurate information was filed. (PF 640, 673-75.)

4. Every witness with knowledge testified that the Porteouses' intent was to correct their original bankruptcy petition shortly after its filing. (PF 638-41, 673-75.)

5. Expert witness testimony established that an incorrect bankruptcy petition is not grounds for denial of discharge or referral for criminal prosecution. (PF 644-646.)

6. Judge Porteous and his wife, through their counsel, filed an amended bankruptcy petition correcting the pseudonym less than two weeks after the filing of the original petition, and the very next day after that pseudonym appeared in the Times-Picayune newspaper. (PF 663-64.)

7. Lightfoot informed the Chapter 13 Trustee of the name correction, thereby disproving any attempt to keep this fact a secret. (PF 641.)

8. No creditor ever received any official bankruptcy filing listing anything other than Judge Porteous's correct name. (PF 670-71.)

Prior to filing for bankruptcy protection, Judge Porteous opened – on Lightfoot's advice – a post office box for himself and his wife. (PF 649-652.) Lightfoot then used this new post office box address and the information previously provided to him to put together the Porteouses' bankruptcy petition, schedules, and statement of financial affairs. (PF 618-20, 632-33, 652, 657.) In preparing those documents, it is undisputed that Lightfoot proposed the use of the "Ortous" pseudonym on the petition. (PF 634-637; *see also* HF 230.) He did this solely out of compassion for the Porteouses, as an attempt to spare them the public embarrassment and notoriety that they, as public figures, would uniquely be subjected to as a result of filing for bankruptcy protection. (PF 630-31, 637.) Judge Porteous and his wife relied on their attorney's advice that such action was permissible and justifiable, so long as it was corrected before creditors received inaccurate information. (PF 609-10, 617, 640.) True to this intent, less than

two weeks after filing their original bankruptcy petition, the Porteouses filed an amended petition correcting their names and listing their residential address. (PF 664-667.) As a result, all notices provided to creditors accurately named the Porteouses as the debtors. (PF 668-671, 673-76.) The Porteouses' creditors were never provided with inaccurate information regarding Judge Porteous and his late wife's names. (PF 669-71, 673-76.)

Lightfoot advised Judge Porteous that there was nothing wrong with filing a petition under a fictitious name, so long as the error was corrected in time to ensure that creditors received proper notice of the bankruptcy filing. (PF 640.) Judge Porteous never intended to deceive his creditors.[86] (PF 638-40, 646, 654.) Instead, he simply, and in hindsight foolishly and ineffectually, sought to minimize the media attention and embarrassment to his family that would result from the bankruptcy filing. (PF 637.) The case authority in the Fifth Circuit is clear: a debtor is entitled to rely on the advice of his counsel, and a conviction for false oath cannot be founded on a debtor's following the advice of counsel. *Hibernia Nat'l Bank v. Perez*, 124 B.R. 704 (E.D. La. 1991), *aff'd*, 954 F.2d 1026 (5th Cir. 1992). (*See also* PF 648.)

Moreover, the Chapter 13 bankruptcy trustee overseeing the Porteouses' bankruptcy case (Mr. S.J. Beaulieu) was specifically informed of the Porteouses' use of incorrect names on their initial petition and elected not to take any action. (PF 641-42, 779-81, 783.) In January 2004, while the Porteouses' bankruptcy case was pending and prior to their receipt of a discharge, DOJ

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[86] Indeed, in a signed memorandum to the Fifth Circuit Special Investigatory Committee, Judge Porteous specifically stated:

> The incorrect names in the original [bankruptcy] filing were not done to defraud any creditor, but rather to avoid the embarrassment of news articles. The articles were printed anyway. No creditor was defrauded by the original petition, indeed no creditor even received the incorrect filing. ... Also the names were corrected within two weeks of the original filing.

(House Ex. 6(c) (Porteous Memorandum dated December 5, 2007, at 5; emphasis added).)

lawyers and FBI agents met with Beaulieu concerning the Porteouses' bankruptcy filing. (PF 780.) Despite meeting with the DOJ and FBI for several hours and being alerted to issues concerning the Porteouses' bankruptcy filing, Beaulieu testified that he did not take any action with regard to the Porteouses' temporary use of incorrect names. (PF 780-81, 783, 785; Porteous Ex. 1108 (Beaulieu Letter to FBI).)

Inaccuracies in debtors' names are not that common, but neither are they unprecedented. Henry Hildebrand, the standing Chapter 13 Trustee in Nashville, and an acknowledged expert concerning Chapter 13 bankruptcy cases, testified that he sees several petitions per year with inaccurate names, and his response is to request that the debtors' cases be dismissed unless the errors are corrected. (PF 802.) Beaulieu similarly testified that he has seen a small number of cases filed with incorrect names. (PF 642.) Indeed, even the House's expert witness on bankruptcy issues, Judge Duncan Keir, has experience with a debtor filing a bankruptcy petition under an incorrect name. In the case of *In re Connecticut Pizza, Inc.*, 193 B.R. 217 (Bankr. D. Md. 1996) (Judge Keir presiding), the debtor filed its bankruptcy petition with both an incorrect name and the wrong state of incorporation. *Id.* at 223 n.5 When that information was ultimately corrected, it was clear that venue was proper in the District of Columbia but not in Maryland. *Id.* Nevertheless, Judge Keir retained the case in the interest of judicial efficiency. *Id.* Neither the opinion nor the docket of the case reflects that Judge Keir <u>ever</u> sanctioned the debtor in any way for its errors.

3. <u>Inadvertent Omissions of a Few, Small Assets</u>

The Porteouses' bankruptcy petition and associated schedules disclosed assets totaling more than $263,000, and included all of their significant assets, including their home, financial accounts, and personal property. (PF 667; Porteous Ex. 1100(d) (Chapter 13 Schedules).) The only assets that the House contends Judge Porteous failed to disclose are: (1) a tax refund of

$4,143.72; (2) approximately $2,100 in a Bank One checking account; and (3) a balance of $283.42 in a Fidelity Homestead money market account. (PF 598.) The House presented no evidence to show that these omissions were anything but inadvertent, innocent, and immaterial. Given the ubiquitous errors found in Chapter 13 petitions – an uncontroverted fact in this case – the Senate must give special consideration to the concept of materiality (as the Justice Department did) in evaluating the Porteouses' omissions of certain, small assets.

In the particular context of a Chapter 13 case, materiality has two important components: first, the general magnitude of the asset involved, and second, the fact that a Chapter 13 debtor is specifically entitled to retain his or her assets and need devote only *future* income to the repayment of creditors. (PF 692-93, 704-06.) Thus, even if Judge Porteous and his wife had disclosed the assets discussed here in their schedules, there would have been absolutely no difference in the course of their Chapter 13 case or the recoveries of their creditors. (PF 704-06.)

*Tax refund*

Judge Porteous and his wife signed their tax return on March 23, 2001. (Stipulation 201.) They claimed a refund, but that refund had not been received on the date that he and his late wife filed their original bankruptcy petition. (Stipulation 204, 222.) Indeed, the Internal Revenue Service had not yet processed or approved the return at the time of their bankruptcy filing. Judge Porteous received his tax refund on April 13, 2001, several weeks after filing for bankruptcy and more than two months prior to confirmation of their proposed Chapter 13 plan on June 28, 2001. (Stipulation 204, 222, 278-79.) Judge Porteous and his wife relied – mistakenly – on their counsel in not disclosing the pending refund.[87] (PF 701.) There is no evidence to support a

[87] In his signed memorandum to the Fifth Circuit Special Investigatory Committee, Judge Porteous reiterated "[his] position that [he] told Mr. Lightfoot about [the year 2000 tax refund] and [Mr. Lightfoot] said to place it in [Judge Porteous's] account, but if requested by the

finding of fraudulent intent for a failure to disclose this refund, which the Porteouses would have had the right to retain even if it had been disclosed. (PF 700, 704-06.) Since Judge Porteous and his wife would been entitled to keep their refund in any event,[88] its nondisclosure, while unfortunate, was immaterial.

*Account balances*

Judge Porteous advised his bankruptcy counsel that his Bank One checking account balance was approximately $100, and that figure was used in his and his wife's schedule of assets. (PF 691; Porteous Ex. 1100(d) (Chapter 13 Schedules).) The record does not reflect when this conversation took place or whether their lawyer asked Judge Porteous or his wife for the net (checkbook) balance or advised them to ignore issued but uncleared checks. On the date of the bankruptcy filing, the collected balance of the Bank One account was approximately $2,200, resulting in an under-disclosure of about $2,100. Even assuming all other facts and circumstances favorable to the House's position, however, the understatement of this bank balance by $2,100 simply is of no consequence, for it is undisputed that, as debtors in Chapter 13, Judge Porteous and his wife were permitted to retain the cash in their bank accounts. (PF 692-93.)

The Porteouses' bankruptcy schedules also inadvertently omitted their Fidelity Homestead money market account. That omission appears to have been the result of a miscommunication between Judge Porteous and his counsel. Judge Porteous denies,[89] and there

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bankruptcy trustee, [Judge Porteous] would have to surrender it." (House Ex. 6(c) (Porteous Memorandum, at 6).)

[88] The tax refund represented the proceeds of Judge Porteous's labor during 2000, a pre-bankruptcy period, which, as an asset of his bankruptcy estate, he was entitled to keep (and which could not be recovered by creditors in Chapter 13).

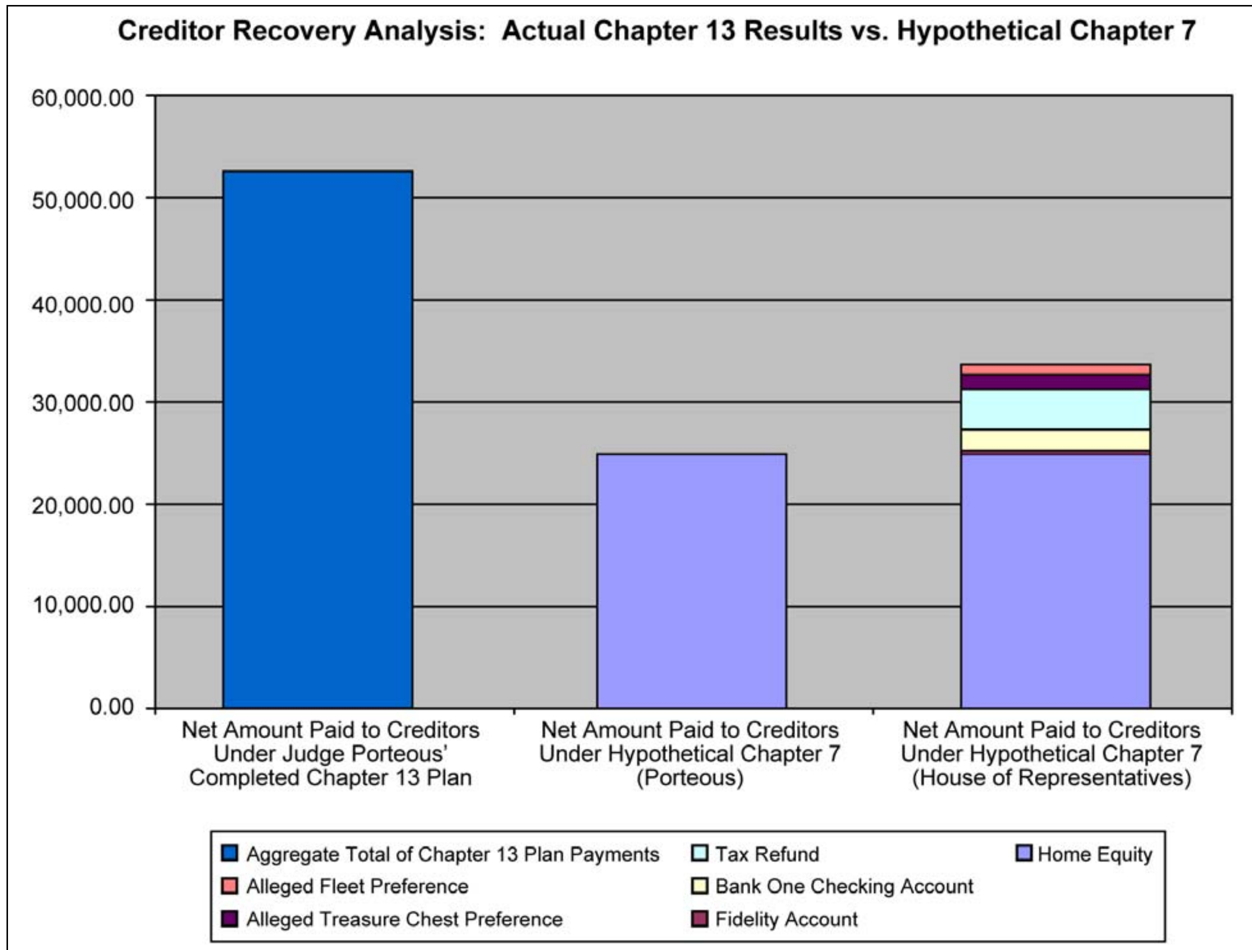
[89] In his signed memorandum to the Fifth Circuit Special Investigatory Committee, Judge Porteous stated that not disclosing the "Fidelity [account] was an oversight of an account

is no evidence to the contrary, that this account was intentionally omitted from the bankruptcy filing. (PF 696-97.) Moreover, while the account should have been included, its omission was plainly immaterial. In fact, on March 28, 2001, the day that the Porteouses filed their bankruptcy petition, the Fidelity Homestead money market account had a **total balance** of **$283.42**, all of which Judge Porteous was permitted to retain in any event. (PF 692-93, 695; Stipulation 230.)[90]

Indeed, the immateriality of each of these inadvertently omitted small assets is confirmed by the so-called "Best Interests of Creditors" Test. That test, a requirement for Chapter 13 repayment plans, requires that a debtor repay his creditors at least as much money through his Chapter 13 plan as those creditors would have received in a Chapter 7 liquidation. (PF 748-51.) It is undisputed that the Porteouses' repayment plan satisfied this test – their creditors received far more through the Chapter 13 repayment plan than they would have in a Chapter 7 liquidation. It is also undisputed, moreover, that the Porteouses' creditors received more through his Chapter 13 bankruptcy case than they would have in a liquidation <u>even if</u> the inadvertently omitted assets discussed above had been disclosed, as the following chart illustrates:

containing $283.42. This was not intentionally omitted with the intend to defraud any creditor and did [not] alter the percentage payback." (House Ex. 6(c) (Porteous Memorandum, at 6).)

[90] Through the testimony of Special Agent Horner and related demonstrative charts, the House has attempted to make Judge Porteous's failure to disclose the Fidelity Homestead account into something meaningful by insinuating that the omission facilitated his continued gambling post-bankruptcy. (*See* HF 253.) Evidence introduced by Judge Porteous, however, unequivocally refuted this claim by the House. A debtor in bankruptcy may use whatever bank accounts he or she chooses, including new accounts opened post-bankruptcy that are never disclosed to anyone. (PF 698.) To the extent that the Senate believes that Judge Porteous is subject to criticism for failing to identify the Fidelity account in their schedules, that criticism must stand on its own merits; it has nothing to do, factually or legally, with Judge Porteous's (now reformed) gambling habits.




Given their small size, and the absolute lack of any evidence of ill intent, the inadvertent omission of these few small assets cannot serve as a basis for removing from office a federal judge.

4. Unintentional Inaccuracies in Projected Income

Chapter 13 of the Bankruptcy Code focuses on a debtor's future income rather than his or her existing assets. (PF 692.) Inaccuracies in income, unlike inaccuracies in assets, thus have the *potential* to affect creditor recoveries. In this case, however, the Chapter 13 trustee – the party responsible for supervising Judge Porteous's Chapter 13 case, and a party with every incentive to maximize recoveries for creditors (since his fee is calculated as a percentage of the monies recovered) – reviewed the situation with full knowledge of the facts and declined to

pursue further action because of the minimal amount involved. (PF 681, 685-86, 780-83, 785; Porteous Ex. 1108 (Beaulieu Letter to FBI, at 1).)

Their bankruptcy counsel, Mr. Lightfoot, prepared the Porteouses' bankruptcy schedules. (PF 632-33.) In disclosing the Porteouses' income, Lightfoot inadvertently used a stale paystub for Judge Porteous.[91] (PF 618, 633, 678.) That paystub was attached to the Porteouses' bankruptcy filing, and thus open and obvious to the bankruptcy judge, the Chapter 13 trustee, all creditors, and anyone else who cared to look. (PF 679-80; Porteous Ex. 1100(d) (Chapter 13 Schedules, at 19.) Using this stale paystub was an innocent mistake by counsel. (PF 678, 682-83, 688-89.) It does not evidence an intent by Judge Porteous to deceive or injure his creditors.[92] In fact, the only likely repercussion from such an error would be for the Porteouses' Chapter 13 repayment plan to be amended to add additional payments, or, at worst, for their discharge to be denied. (PF 784, 811.) This was the uncontradicted testimony of experts Hildebrand and former Judge Barliant. (PF 804, 811.) As it happened, however, the DOJ and FBI brought this issue to the Chapter 13 trustee's attention in early 2004, before the Porteouses received a discharge in their bankruptcy case, and the trustee elected not to take any action with regard to the understated income. (PF 780-84; Porteous Ex. 1108 (Beaulieu Letter to FBI).)

The House also alleges that Judge Porteous should have adjusted his projected disposable income, and thus the amount of payments to his creditors, because his income exceeded the cap on payroll taxes for Social Security contributions (so-called FICA limits). In a perfectly-

[91] Lightfoot testified that he elected to use this stale paystub (and not ask for an updated paystub) even though Judge Porteous had disclosed his net monthly take-home pay to Lightfoot as approximately $7,900. (PF 622, 633, 678; House Ex. 138(b) (Porteous bankruptcy worksheets, at CL0032/SC00672).)

[92] Judge Porteous has specifically denied that the underreporting of his income was intentional. (House Ex. 6(c) (Porteous Memorandum, at 6: "The understating of income was not intentional.").)

executed Chapter 13 case, such an adjustment would have been made. But the undisputed evidence in this case establishes that the Porteouses' bankruptcy attorney was completely unfamiliar with this FICA phase-out issue. (PF 682.) As a result, the Porteouses did not receive any helpful legal advice regarding this issue. (PF 682.) It is manifestly unreasonable to expect a client – even one with training and experience in other areas of the law – to identify and apply such a fine point of bankruptcy law, especially when that issue is unfamiliar even to his counsel, a subject-matter expert. (PF 683.) Moreover, when this issue was brought to the attention of the trustee by the DOJ and FBI, he concluded that the amount involved would not justify his taking further efforts to collect it. (PF 685-86, 780-83; Porteous Ex. 1108 (Beaulieu Letter to FBI, at 1).)

Notwithstanding the alleged omissions, the Porteouses made each payment due under their Chapter 13 repayment plan, totaling more than $57,000, and received a discharge. (PF 776-77, 788.) Moreover, their plan provided for a higher percentage recovery to creditors than typical Chapter 13 plans in the Eastern District of Louisiana in 2001. (PF 278.)

5. Omission of Two Minor Pre-Petition Payments

The House alleges that Judge Porteous made payments to creditors prior to his and his wife's bankruptcy case. (PF 598.) Every debtor makes pre-petition payments to creditors, and Judge Porteous is no exception. The simple fact, however, is that there is nothing inherently wrong, evil, or sinister about pre-petition payments. (PF 707; *In re Huber Contracting, Ltd.*, 347 B.R. 205, 215 (Bankr. W.D. Tex. 2006) (citations omitted) (noting that numerous courts have long recognized that there is nothing inherently wrong with "preferring" a particular creditor, so long as that preference is not made with fraudulent intent).)

The reason for disclosing pre-petition payments in bankruptcy case is that, in certain circumstances, the Chapter 13 trustee is given avoidance powers under Section 547 of the

Bankruptcy Code so that he can seek to retrieve such payments if they are substantial and would have an impact on the payments to other creditors. The two pre-petition payments that the House alleges Judge Porteous improperly failed to disclose are:[93]

1. $1,500.00 paid by Judge Porteous to the Treasure Chest Casino on March 27, 2001; and
2. $1,088.42 paid by Judge Porteous's secretary to Fleet Credit Card Company on March 23, 2001.[94]

Given the small size of these alleged preference payments,[95] however, it is highly unlikely that the trustee would have pursued those payments – given that the costs of collection would have greatly exceeded any payments returned to the bankruptcy estate. (PF 716.) Indeed, the Chapter 13 Trustee, Mr. Beaulieu, testified at trial that the two allegedly preferential payments omitted from the Porteouses' bankruptcy filings "were inconsequential as far as [he] was concerned," "were not to an insider," and, as a result, he "would not have probably done anything on those two items." (PF 715.)

Moreover, there is absolutely no evidence to suggest that Judge Porteous's failure to disclose these payments was caused by anything other than poor record-keeping. Indeed, given Lightfoot's testimony that he had the Porteouses sign <u>but not date</u> their bankruptcy filings (the

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[93] *See* PF 713-14; House Report at 103, 106-07.

[94] At trial, Judge Porteous's judicial secretary, Rhonda Danos, testified that, over the course of their nearly 24-year long working relationship, she and Judge Porteous developed an informal custom whereby she would occasionally write checks on Judge Porteous's behalf (often because he did not have his checkbook with him), for which he would then promptly reimburse her. (PF 708-11.) This was something that Danos did not just for Judge Porteous, but also for other people, including her sons. (PF 712.) There is no evidence to support the allegation that Judge Porteous asked Danos to write a check to Fleet Credit Card Company in March 2001 in order to conceal that payment or with any other ill intent.

[95] While the House contends that these two undisclosed payments constitute preferences, this is a subject about which there is much dispute and as to which the House has failed to carry its burden of proof.

dates of which he then subsequently added prior to filing), the record does not demonstrate that the allegedly preferential payments had even occurred by the time that Judge Porteous signed his statement of financial affairs. (PF 656-57.) Such a scant record simply cannot support the House's claims of intentional nondisclosure, deceit, and/or fraudulent intent. (PF 721.) Moreover, it is by no means clear that either of these payments is, in fact, a recoverable preferential transfer, since the Treasure Chest transaction was a redemption of a marker (which, as discussed below, is not a debt under Louisiana law) and the Fleet transaction was a payment by a non-debtor.

6. Non-Disclosure of Gambling Losses and Debts

The House alleges that Judge Porteous failed to disclose gambling losses. (PF 598.) At trial, the FBI Agent who prepared the chart of gambling losses relied upon by House testified that the chart reflected only the information that he was able to obtain from the casinos that he contacted. (PF 737.) As a result, his chart does not include cash transactions or so called non-rated (or non-recorded) play. (PF 737.) Given this admittedly incomplete evidence, the House has failed to prove its initial premise: that the Porteouses had net gambling losses during the relevant time period. (PF 737-38.) Even if they did, however, the House failed to present any evidence that the Porteouses intentionally omitted gambling losses from their bankruptcy filings, or that they omitted such information with a fraudulent intent. (PF 739.) Finally, since much of Judge Porteous's pre-bankruptcy gambling was done using credit card advances, the creditors that might have reviewed his statement of financial affairs to see if he disclosed gambling losses already had evidence of gambling activity *in their own records*. The non-disclosure thus had no adverse impact on creditors. In the end, this allegation is based solely on speculation and incomplete records, neither of which is sufficient to warrant removal – particularly in the absence of any evidence of intentional nondisclosure.

7. Post-Confirmation Conduct

The House's specific allegation is that Judge Porteous committed bankruptcy misconduct by "incurring new debts while [his bankruptcy] case was pending, in violation of the bankruptcy court's order." (PF 598.) The House asserts that Judge Porteous incurred post-petition debt during three distinct time periods following his bankruptcy filing: (i) March 28, 2001, through May 8, 2001; (ii) May 9, 2001, through June 28, 2001; and (iii) June 29, 2001, through July 22, 2004. (*See* HF 269-96; House Report at 108-15.) The House implies that Judge Porteous violated federal bankruptcy law by incurring debt during the first two time periods, and that Judge Porteous knowingly violated the Bankruptcy Court order confirming his repayment plan by incurring debt during the third time period.

The House's allegations and analysis are overly formalistic and, when analyzed critically, unavailing. First, the Bankruptcy Code does not prohibit debtors from incurring post-petition debt without the permission of the bankruptcy trustee. (PF 757.) Quite to the contrary, the Code clearly contemplates that a debtor may do so, as it specifically states that if a debtor incurs such debts, they may be disallowed as an item to be paid by the trustee, and may be non-dischargeable. 11 U.S.C. §§ 1305(c), 1328(d). To the extent that the House claims that Judge Porteous's actions violated the Bankruptcy Code, or that the trustee's brochure instructing debtors not to incur debts has any legal significance, the House is simply mistaken. (PF 754, 757.)

Second, the Bankruptcy Court's order instructing Judge Porteous not to incur additional debt without trustee approval contemplated that that instruction would not always be followed; indeed, the very next line set out the consequences for ignoring the instruction. (House Ex. 133 (Confirmation Order, at 1).) Because of the court's familiarity with the law, it is not surprising that the consequences spelled out in the order are those set forth in the Bankruptcy Code –

namely, disallowance and non-dischargeability. 11 U.S.C. §§ 1305(c), 1328(d). (*See* PF 763.) Thus, all the order did was warn Judge Porteous that if he incurred debts without the trustee's permission, he would be required to pay those debts in full from sources other than the disposable income he was devoting to his Chapter 13 plan. (PF 765.) Any reasonable construction of the order must take into consideration what it actually says, in its entirety. The House's interpretation of the order – that incurrence of unauthorized debt could lead to contempt charges, or even removal from office, rather than the consequences set out in the order itself – places far more weight on the order than it can reasonably bear.[96]

Finally, it is far from clear that Judge Porteous in fact incurred what would be considered "debt" without the trustee's permission.[97] The House presented evidence that Judge Porteous executed a number of casino markers following the entry of the confirmation order in his bankruptcy case.[98] Markers, however, do not constitute debt. (PF 734-35.) Rather, under Louisiana law, markers are treated as negotiable instruments or checks. *See TeleRecovery of Louisiana, Inc. v. Gaulon*, 738 So. 2d 662, 664-66 (La. Ct. App. 1999) (examining the features and attributes of casino markers and concluding that markers constitute checks under Louisiana law). Indeed, this is precisely the conclusion that four Fifth Circuit federal judges reached in

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[96] Moreover, both former Bankruptcy Judge Barliant and Professor Pardo criticized the confirmation order as entirely unsupported by the Bankruptcy Code, as well as impossible to be complied with literally. (PF 755-61.) Judge Barliant further explained that if he had ever entered such an order, he would have "[k]ick[ed] [him]self for having entered the order" and either vacated it or construed it in a way to make it consistent with the Bankruptcy Code, which – as interpreted by the House – it is not. (PF 762.)

[97] During the Fifth Circuit Special Investigatory Committee hearings, Judge Porteous testified that (1) he disputed whether a marker constitutes credit and (2) he does not believe that purchasing gambling chips at a casino with a personal check would have violated any court order, including the confirmation order entered in his bankruptcy case. (PF 726.)

[98] The House also pointed to a credit card with a *de minimis* limit that was applied for and used post-confirmation. However, no evidence was presented that Judge Porteous, as opposed to his late wife, used the card.

their concurring and dissenting opinion in Judge Porteous's judicial disciplinary proceeding. (House Ex. 6(b) (Fifth Circuit Judicial Council Dissent at 39).)

This is consistent with the view taken by at least one of the casinos that accepted markers (as payment for gambling chips) from Judge Porteous. FBI Agent Horner confirmed at trial that, in 2003, he had a discussion with the Comptroller of the Treasure Chest Casino in Kenner, Louisiana, Mr. Vincent Schwartz, concerning casino markers. (PF 724.) During that conversation, Mr. Schwartz explained to FBI Agent Horner that "a marker is a temporary check," which the casino will negotiate if the marker is not redeemed first. (PF 724.) The House has failed to offer any explanation for why its view that a marker is a debt is more accurate than the view that a marker is a check held by the comptroller of one of the casinos that accepted the very markers at issue in this case.[99]

While the House has attempted to establish that, contrary to Louisiana law, markers do constitute debt, this remains – at most – an open issue, about which reasonable minds can and do disagree. (PF 723.) Such an unsettled and complex legal issue certainly cannot serve as a basis for the removal of a federal judge. Moreover, even if the signing of a marker did involve or was related to the incurrence of some debt, there is no valid distinction between that debt and the debt involved in any check transaction outside of the gambling context. Put another way, there is no legal difference between buying gambling chips at a casino with a marker and buying potato chips at a grocery store with a check.[100] (PF 731.) Thus, if Judge Porteous violated the

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[99] While the three-judge Fifth Circuit Special Investigatory Committee took the position that "[a] gambling 'marker' is a form of credit extended by a gambling establishment, such as a casino, that enables a customer to borrow money from the casino," the Committee cited absolutely no authority for that position, which, as noted, is directly contrary to Louisiana law. (House Ex. 5 at 19 n.10.)

[100] Those two transactions are also identical in another way – neither warrants the impeachment or removal from office of a federal judge.

Bankruptcy Court's order by executing markers, any other debtor who wrote a personal check at a retail establishment would violate that order as well. No one suggests that such a broad interpretation of the order is sensible or was intended by the bankruptcy judge.

### E. Compared with Prior Impeachments, Article III's Allegations of Private, Minor Bankruptcy Misconduct Do Not Justify Removal from Office

In the history of the Republic, no federal judicial officer has been impeached and convicted for purely private conduct that does not constitute an actual abuse of constitutional power. Article III, however, seeks to deviate from this precedent and do just that. The allegations set out in Article III are novel (as well as grossly insufficient to warrant removal) in that they all relate to Judge Porteous's and his wife's purely private conduct in connection with this personal bankruptcy filing. There is no allegation in Article III, and there was no proof at trial, that Judge Porteous actually abused the power entrusted to him as a federal judge in connection with his family's bankruptcy. Moreover, the Justice Department specifically investigated Judge Porteous's conduct in connection with that bankruptcy and formally declined to bring any criminal charges. (PF 780-81, 792-96; House Ex. 4 (DOJ Declination Letter).) Accordingly, the Senate should vote to acquit on Article III.

Since the ratification of the Constitution, only fifteen federal judicial officers have been impeached by the House of Representatives. Of those, seven have been convicted by the Senate and removed from office. In every case resulting in conviction, the House has alleged, and the Senate has found, that the former judge actually abused the power entrusted to him as a federal judge.[101]

[101] For an extensive discussion of those cases where the Senate has voted to convict and remove a federal judge, please see section II (pages 19-23) of Judge Porteous's Motion to Dismiss Article III (filed on July 21, 2010), which is incorporated herein by reference.

This precedent is clear, and it should guide the Senate here. Specifically, the Senate has previously voted to convict judges in impeachment trials only when their conduct is found to constitute an actual abuse of constitutionally entrusted judicial power. The House's Article III in this case, however, alleges no such actual abuse of official power by Judge Porteous. Instead, Article III seeks to convict and remove Judge Porteous solely on the basis of his and his wife's private conduct in connection with their personal bankruptcy filing.

Of the bases for past Senate impeachment convictions, tax evasion (charged by the House against Judges Ritter and Claiborne) is the most analogous to the bankruptcy misconduct alleged in Article III. Both federal tax and bankruptcy laws require full disclosures under oath. Likewise, both filing tax returns and seeking bankruptcy protection are private financial activities, which occur wholly apart from one's employment. Thus, the viability of the House's Article III, which is novel and not supported by prior precedent, can be evaluated by analogy to prior tax evasion impeachment allegations. Such allegations were raised in the Ritter and Claiborne impeachments, and the Senate's treatment of both should guide it here.

The House impeached Halsted Ritter in 1936 on the basis of seven articles. The first six such articles alleged various acts of misconduct in connection with Judge Ritter's actions on the bench, including kickbacks,[102] practicing law while a judge, exhibiting favoritism in connection with cases before him, and tax evasion. With regard to tax evasion, the House alleged that Ritter filed two tax returns that improperly omitted income that he received in connection with his judicial misconduct (*i.e.*, bribes or other gratuities). The seventh article was a catch-all, alleging that Ritter's various acts of misconduct rendered him unfit to serve as a federal judge. Following

[102] The House's second article alleged that Ritter "wrongfully and oppressively exercised the powers of his office to carry into execution" his plan to appoint a receiver and receive a portion of the fees paid to that receiver. *See* S. Doc. No. 185, at 4 (74th Cong. 2d sess., 1936), Articles of Impeachment Presented Against Halsted L. Ritter.

trial, the Senate acquitted Ritter on each of the first six articles – including the two articles that sought his removal on the basis of tax evasion. The Senate then turned, however, to the seventh, catch-all article and voted to convict.

The Ritter impeachment precedent is instructive in how the Senate deals with articles of impeachment directed at private financial conduct. First, the Senate acquitted Ritter on both articles of impeachment that alleged solely personal conduct unrelated to his official position: tax evasion. Those articles omitted any reference to Ritter's abuse of his judicial authority and alleged instead simply that he received income that he failed to report. This result significantly undercuts the House's novel assertion in Article III that purely private, off-the-bench conduct in connection with a personal bankruptcy filing (or, by analogy, a personal tax return) can be the proper basis for an impeachment conviction. Indeed, in the first instance where the Senate considered removing a judicial officer for private conduct not specifically alleged to relate to an actual abuse of official power, the Senate rejected the theory and voted to acquit.

Second, the Ritter impeachment presented a significantly stronger case for removal on the basis of private conduct than that alleged in Article III, and yet it was rejected. In Ritter, the House alleged that there was a nexus between the alleged private misconduct (tax evasion) and the alleged abuse of judicial power (kickbacks). Indeed, the income that Ritter failed to report, which led to the tax evasion charge, consisted of bribes or other gratuities paid in connection with Ritter's actual abuse of his judicial authority. Ritter's private misconduct in connection with his tax returns was, thus, just an extension and continuation of his official misconduct. Nevertheless, the Senate voted to acquit. There is no such nexus in this case; indeed, the House does not allege and did not prove that Judge Porteous's private bankruptcy misconduct was in any way connected with the allegations of official misconduct contained in Articles I and II.

Lacking any such a link, the allegations against Judge Porteous in Article III, which are far weaker than those asserted – and rejected – against Ritter, should likewise be rejected.

The Claiborne impeachment is similarly instructive. In that case, both the House and Senate's impeachment proceedings followed Claiborne's federal conviction for tax fraud. Indeed, the Claiborne articles of impeachment specifically alleged that the "facts [relating to tax fraud] set forth in [Claiborne Articles I and II] were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada." S. Hrg. 99-819, pt. 1, at 7-8 (1986). In addition to the fact that his criminal conduct had already been conclusively determined by a federal jury (a clear distinction from the facts of this case), the Claiborne impeachment presented the unique circumstance that Claiborne had refused to resign his judgeship, was collecting his federal judicial salary while in prison, and intended to return to the federal bench after competing his two-year criminal sentence. These circumstances differ significantly from the Article III allegations against Judge Porteous, who has been neither criminally charged nor convicted of any misconduct in connection with his personal bankruptcy. Quite to the contrary, after conducting an extensive investigation, the Justice Department specifically declined to bring any criminal charges against Judge Porteous. (PF 780-81, 792-96; House Ex. 4 (DOJ Declination Letter).) Thus, the Senate's action in the Claiborne impeachment, which effectively ratified his prior criminal conviction and was necessary to prevent a convicted felon from retaking the bench, does not support the House's attempt in Article III to remove Judge Porteous from office on the basis of allegations of private bankruptcy misconduct that even the Justice Department concluded did not warrant criminal prosecution.

## V. Article IV

Article IV alleges that Judge Porteous should have disclosed the allegedly corrupt relationships with Creely, Amato and the Marcottes which serve as the basis for the false allegations in Articles I and II in response to general questions asking him whether he could identify any matters that: (1) "could cause an embarrassment" to him or President Clinton if publicly known; (2) could be used to "influence, pressure, coerce," "blackmail," or "compromise" him; (3) would "impact negatively on his character, reputation, judgment, or discretion;" or (4) would unfavorably "affect his nomination" as a federal judge. (PF 812-25; 111 Cong. Rec. S1645 (Mar. 17, 2010).)

As already shown at length in the discussion of Articles I and II, there is little or no substance to any of these allegations of misconduct. Judge Porteous did go to lunch with his friends, but he never exchanged curatorships for cash. He did accept non-cash gifts from the Marcottes (as did essentially every judge in Gretna at the time), but he never wrongfully adjusted a bond or a conviction for them, and he was neither accused nor prosecuted in the Wrinkled Robe investigation. Most importantly, it is clear that in 1994 Judge Porteous had no reason to believe any of his past conduct was wrongful – it did not deviate from the norms of the Gretna bench and bar at the time – and therefore it would have made no sense for him to believe it would embarrass him or President Clinton or reflect poorly on him in any way.

Article IV suggests that Judge Porteous "concealed" facts about events that the House readily admits took place in the open – lunches at high-profile restaurants, trips with other judges and lawyers, and the assignment of curatorships through official court activities. It is self-evident that Judge Porteous did not believe that his public behavior was inherently corrupt, embarrassing, or likely to subject him to blackmail. There was thus no reason for him to think it required disclosure. There was no "concealment." Moreover, much of the information that the

House complains Judge Porteous didn't disclose was, in fact, known to the FBI and made available to the Senate, in connection with Judge Porteous's confirmation. Thus, even Article IV's claim that the Senate was "deprived" of this information (whether or not Judge Porteous believed it relevant or significant) is incorrect.

Article IV is little more than an effort by the House to resurrect the pre-federal conduct alleged (but not proven) in Articles I and II. As discussed above, allegations of pre-federal misconduct have never been, and should not become, grounds for conviction in this or any other case. Even more pernicious is the risk that, if the Senate convicts Judge Porteous under Article IV, all federal judges will have reason to fear impeachment by some future Congress based on a subjective determination that the accused should have anticipated that some aspect of his or her past might someday be perceived as embarrassing. An impeachment standard designed by James Madison to impose a clear and high standard would be replaced by a standard of what future Senators in hindsight think was "an embarrassment." It would treat failure to anticipate the subjective judgment of future Senators as the constitutional equivalent of treason.

**A. The Allegations Against Judge Porteous in Article IV**

Article IV alleges that "[i]n 1994, in connection with his nomination to be a judge of the United States District Court for the Eastern District of Louisiana," Judge Porteous "knowingly made material false statements about his past to both the United States Senate and to the FBI in order to obtain the office of United States District Court Judge." (PF 812.) The House then defines the alleged false statements:

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

> (2) During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.
>
> (3) On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees," Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did "not know of any unfavorable information that may affect [his] nomination."

(PF 813-15.) Article IV alleges that these statements were, in fact, false, because Judge Porteous should have responded to the questions above in the affirmative in light of the following information:

- His relationship with Jacob Amato and Robert Creely;
- That he had appointed Robert Creely as a curator in "hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm";
- His relationship with Louis and Lori Marcotte;
- That he had solicited and accepted numerous things of value from the Marcottes while at the same time taking official actions that benefitted the Marcottes;
- That Louis Marcotte made false statements to the FBI in an effort to assist Judge Porteous in being appointed to the federal bench.

(PF 816-19.) As such, Article IV necessarily depends on the Senate finding both that Judge Porteous committed the wrongful pre-federal acts described in Articles I and II, and that Judge Porteous, at the time of his confirmation in 1994, believed those actions to be improper or embarrassing. The House argues that Judge Porteous's failure to disclose these facts "deprived the United States Senate and the public of information that would have had a material impact on his confirmation." (PF 820.)

Article IV also alleges that Judge Porteous "well knew and understood" that Louis Marcotte "made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the federal bench." (PF 823.) This claim is identical – word for word – to the claim made in Article II. Marcotte's conversations with the FBI, however, in which he made these allegedly false statements, took place on August 1, 1994, and August 17, 1994, ***after*** Judge Porteous had filled out his SF-86 and his Supplemental SF-86, and ***after*** Judge Porteous was initially interviewed by the FBI. (PF 903.) Marcotte's conversation with the FBI cannot have been the basis of allegedly false statements Judge Porteous made in forms he completed and an interview he gave prior to that time. This critical fact was never revealed to the House before the vote on impeachment. As demonstrated below, the House's allegations and evidentiary arguments related to Article IV are riddled with such illogical and implausible flaws.[103]

### B. Judge Porteous Did Not Submit False Answers or Withhold Information from the FBI or the Senate

#### 1. SF-86 and Supplemental SF-86

On April 27, 1994, in connection with a possible nomination to the United States District Court for the Eastern District of Louisiana, Judge Porteous signed a completed Standard Form ("SF") 86. (PF 834.) The SF-86 asked a series of detailed questions including "Have you ever been charged with or convicted of a felony offense?" (PF 836.)

Prior to July 6, 1994, Judge Porteous completed and signed a Supplemental SF-86. (PF 837, House Ex. 69(b) PORT 297-98.) The Supplemental SF-86 also asked detailed questions,

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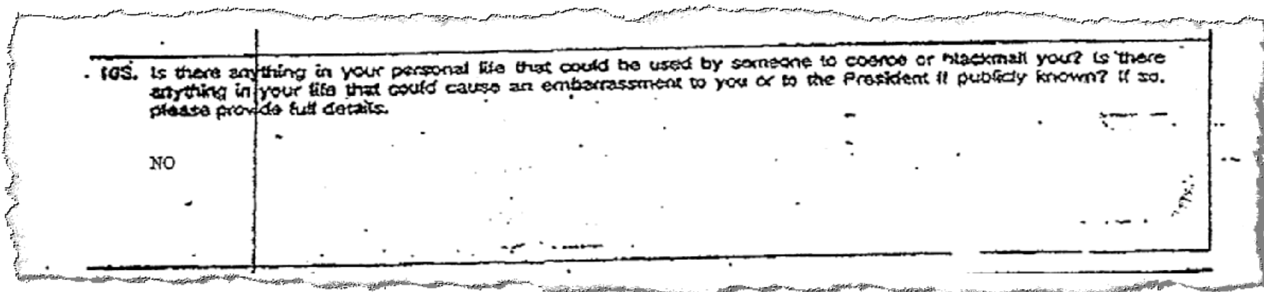
[103] Article IV does not contain a claim that Judge Porteous knew and understood that Robert Creely made false statements to the FBI in an effort to assist Judge Porteous in being appointed to the federal bench. (PF 824.) Nor does Article IV allege that Judge Porteous lied when he stated during his background check that he had not abused alcohol as an adult. (PF 825.) Article IV also does not allege that Judge Porteous suborned false statements. (PF 821.)

such as "Please list all of your interests in real property" and "Have you . . . ever been convicted of a violation of any Federal, state, county, or municipal law, regulation, or ordinance?" The last question on the Supplemental SF-86, No. 10S, asks "Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details." (PF 839, PORT 298.) Judge Porteous responded "No."



10S. Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details.

NO

The House offered no evidence that Judge Porteous understood his response to be false. Judge Porteous was not aware of anything that could have been used to blackmail him or cause embarrassment to him or the President. As discussed, *supra*, Marcotte unequivocally testified that he could not have coerced or blackmailed Judge Porteous. Similarly, Amato did not think that he could influence Judge Porteous. (PF 84, 85.) He testified that he "always felt he [Judge Porteous] was always going to do the right thing"; a view Amato still holds today, and he always thought Judge Porteous did the right thing on the bench. (PF 86, 87.)

The House has argued that a candidate must necessarily be exhaustive and over-inclusive when answering these types of questions. While the House's position may be aspirational, based on the testimony adduced during the evidentiary hearings it is not the practice of most (or, perhaps, of any) nominees. Bobby Hamil, a 25 year veteran of the FBI, and the only fact witness to testify before the Senate regarding Article IV, stated that although he had reviewed various

SF-86's and Supplemental SF-86's in his career, he could not recall a single instance where a candidate responded with an affirmative answer to this question. (PF 841-43.) Professor G. Calvin Mackenzie, an expert in the area of presidential appointments and the appointments process, testified that there are no guidelines as to what constitutes embarrassing information in relation to this question. Mackenzie described this question as "ambiguous" and "very difficult to apply" and reported that he is not aware of any individual who has ever responded affirmatively to this question. (PF 845, 847.) Further, Mackenzie testified that "history is replete with examples of people who have answered no to this question, gone into the confirmation process, or sometimes even gone through successfully the confirmation process, only to have information come out later which was embarrassing to them, sometimes, even embarrassing to the president." (PF 845.) Nonetheless, Mackenzie noted, that in his study of the field, he was unaware of any individual who has ever been prosecuted or removed from office for allegedly falsely answering this question. (PF 846.)

Further, courts have rejected answers to the type of vague, untethered question that appears in the Supplemental SF-86 as the basis for perjury or false statement crimes. In *United States v. Kerik*, Bernard Kerik, the former New York City Police Commissioner and nominee for Secretary of the Department of Homeland Security, was charged with lying to the White House when he sought membership in the Academe & Policy Research Senior Advisory Committee to the White House Office of Homeland Security, among other positions.[104] *See* 615 F. Supp. 2d

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[104] On December 3, 2004, Kerik was nominated by President Bush to succeed Tom Ridge as United States Secretary of Homeland Security. On December 10, 2004, after a week of press scrutiny, Kerik withdrew acceptance of the nomination. Kerik stated that he had unknowingly hired an undocumented worker as a nanny and housekeeper who had used someone else's social security number. *See* Mike Allen and Jim VandeHei, *Homeland Security Nominee Kerik Pulls Out*, WASH. POST (Dec. 11, 2004).

256 (S.D.N.Y. 2009). The questions to which Kerik allegedly provided false answers to included:

> - [W]hen asked whether there was anything embarrassing that he [Kerik] wouldn't want the public to know about, Kerik told a White House official, "Nope! It's all in my book."
>
> - Similarly, when asked whether there was any other information, including information about other members of his family, that could be considered a possible source of embarrassment to him, his family, or the President, Kerik stated, "Not to my knowledge."

*Id*. at 272 n.19. The U.S. District Court for the Southern District of New York, in framing its analysis, noted "[w]here a question is so vague as to be fundamentally ambiguous, [] it cannot be the predicate of a false statement, regardless of the answer given." *Id*. at 271 (citing *United States v. Watts*, 72 F. Supp. 2d 106, 109 (E.D.N.Y. 1999) (noting an answer to a fundamentally ambiguous question "may not, as a matter of law, form the basis of a prosecution for perjury or false statement").) The court further noted that "[t]his proscription holds even where the answer is unquestionably false or fraudulent." *Kerik*, 615 F. Supp. 23 at 271.

Because the word "embarrassing" was used in several of the questions, the court in *Kerik* analyzed the meaning and application of the term in the context of background checks and applications for federal employment:

> Plainly the meaning of the term "embarrassing," . . . is open to interpretation. What is embarrassing to one person may not be embarrassing to the next. If an individual withheld some innocuous but potentially embarrassing secret -- such as one's contentious divorce or one's prescription medication -- it is hard to believe that a federal prosecution [let alone an impeachment] would follow.

*Id*. at 273. The court then delved into a more specific analysis, stating:

> [T]his Court agrees that the term "embarrassing" is not fundamentally ambiguous *per se*. For example, a question about "embarrassing educational history" or "embarrassing business dealings" would not be fundamentally ambiguous because it

> provides the answerer with clarity about the specific information sought by his examiner.

*Id*. The court then stated that the more general questions posed to Kerik, such as "whether there was anything embarrassing that he would not want the public to know about," were more troubling. *Id*. at 273-74. "In contrast" to the more specific questions listed above, the court stated that "this level of abstraction renders the term 'embarrassing' fundamentally ambiguous." *Id*. at 274. The court pointed out:

> The question does not explicitly limit the context to "associations" or specific affiliations. Rather, the question is more like a fishing expedition, seeking *anything* that might embarrass an applicant. Despite the laundry list of answers the Government wishes Kerik would have supplied, it does not follow that Kerik necessarily understood the question in precisely this way.

*Id*. The court concluded that the two questions posed to Kerik provided "no greater clarity." *Id*. Thus, the court found that these two questions were "fundamentally ambiguous." *Id*.

The questions posed by the Supplemental SF-86 (as well as the FBI questioning and the Senate Questionnaire, as will be shown below) are largely identical to the "fundamentally ambiguous" questions posed to Kerik, which the court in that case found so troubling.

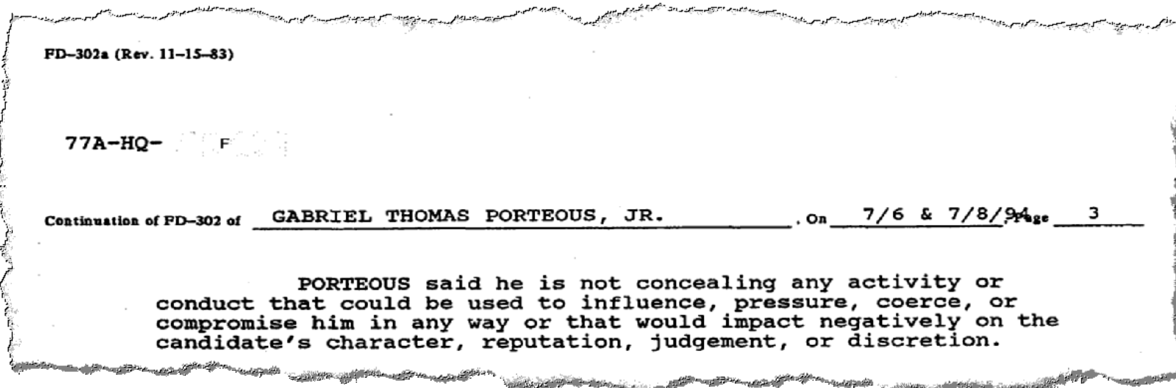
2. <u>FBI Background Check Commences</u>

In the summer of 1994, the FBI began its background investigation of Judge Porteous, interviewing approximately 120 different individuals, including Senators Bennett Johnston and John Breaux. (PF 849-852, 888.) Senator Johnston stated that he had known Porteous "for five to ten years . . . thinks highly of the candidate and believes him to be well-qualified." (PF 851.) Senator Breaux stated that he had known Judge Porteous for approximately nine years . . . thinks highly of the candidate, both on a personal and professional basis, and considered him to be a friend." (PF 852.) Despite Senator Breaux's apparent knowledge of the relationship between Judge Porteous and the Marcottes, he did not raise that issue with the FBI and made no mention

of his own lunches with the Marcottes and Judge Porteous. (House Ex. 69(b) PORT 279; *see also* footnote 61, *supra*, for further discussion for Senator Breaux's previous contacts with the Marcottes.)

3. First FBI Interview of Judge Porteous

On July 6, 1994, well before the FBI had interviewed Louis Marcotte, the FBI, through FBI Special Agent Bobby Hamil and another agent, conducted a lengthy interview of Judge Porteous. (PF 853, 856.) The interview summary prepared by the FBI states that "Porteous said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgment, or discretion." (PF 863, House Ex. 69(i).)



FD-302a (Rev. 11-15-83)

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Continuation of FD-302 of GABRIEL THOMAS PORTEOUS, JR. , On 7/6 & 7/8/94 , Page 3

PORTEOUS said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgement, or discretion.

Hamil conceded that the FBI asks the question in the compound manner in which it appears to have been answered. (PF 864.) During the course of his testimony, Hamil conservatively estimated that he had performed one hundred interviews relating to FBI background checks. (PF 855.) Hamil stated that the question above was a standard question routinely asked of interviewees. (PF 858.)

Based upon the defense's review of the complete FBI file related to Judge Porteous's background check, some form of this question was asked in over 60 of the interviews of

individuals contacted by the FBI. (PF 865, *see* House Ex. 69(b).) Not a single individual answered affirmatively or raised any concerns, issues or questions related to this question. (PF 865, *see* House Ex. 69(b).) Hamil testified that this finding would not have surprised him. (PF 866.) In Hamil's experience, in all of the interviews he has conducted where he has asked that question, he cannot recall a single individual answering in the affirmative. (PF 867.)[105]

As a specific example, Bob Creely was interviewed by the FBI on August 1, 1994. Creely told the FBI that "he was not aware of anything in the candidate's background that might be the basis of attempted influence, pressure, coercion, or compromise or that would impact negatively on the candidate's character reputation, or judgment." (PF 887.) The House claims that Porteous responded falsely to the exact same question by not disclosing his relationship with Creely. If the House's allegation's regarding the relationship and the ability of Creely to coerce Porteous are true (which the defense does not concede) Creely would have similarly been aware of these facts. The House has not alleged that Creely made a false statement and Creely has not been charged with perjury or making a false statement to a federal law enforcement officer.

Professor Mackenzie testified that the question posed to Judge Porteous during his FBI interview question is asked "routinely" and of "virtually everybody who is interviewed." (PF 870.) Professor Mackenzie stated that he is not aware of any individual that has ever responded affirmatively to this question. (PF 871.)

4. <u>First FBI Interview of Louis Marcotte</u>

During its background check, presumably though Judge Porteous, the FBI was made aware that Judge Porteous and Louis Marcotte had a relationship. (PF 875.) On August 1, 1994,

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[105] Hamil noted that the fact that interviewees do not reveal adverse information in response to this question does not mean that they never reveal adverse information – instead they reveal such information in response to specific questions, as opposed to the question for which Judge Porteous is alleged to have falsely responded. (PF 869.)

Louis Marcotte was interviewed by the FBI for the first time in connection with the FBI's background check of Judge Porteous. (PF 877.) Louis Marcotte testified that Judge Porteous did not tell him to be untruthful with the FBI. (PF 884.) Marcotte conceded that he and Porteous never discussed what answers Marcotte would give. (PF 575.)

During the interview, according to the FBI 302 Report that was generated, Marcotte stated that he "knows the candidate professionally and socially" and that "he sometimes goes out to lunch with the candidate and attorneys in the area." (PF 877, House Ex. 69(b) PORT 471.) He told the FBI that in relation to the setting of bonds, "many times the family [of the accused] cannot come up with the 10% so Marcotte goes to the judges to try and lower the bonds." (PF 879, PORT 471.)

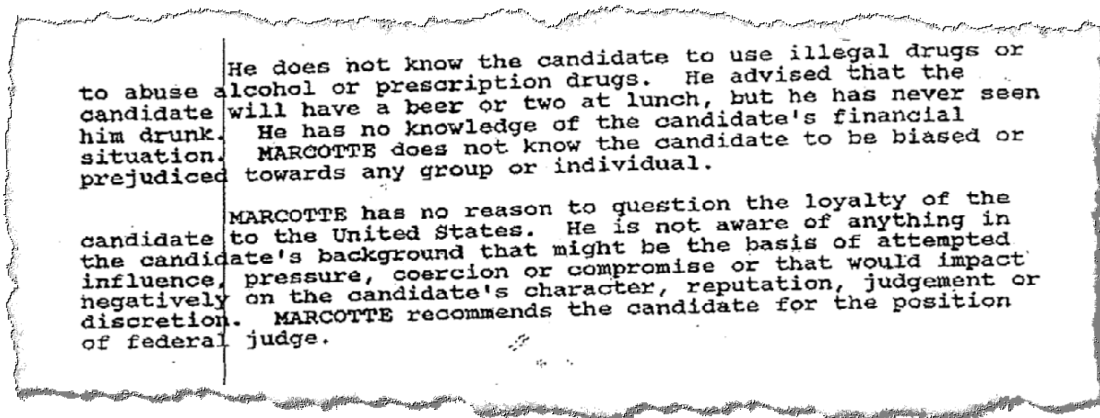
LOUIS M. MARCOTTE III, Bail Bondsman, 221 Derbigny street, P-1 advised that he has known the candidate for approximately ten years, since the candidate has been a judge. He knows the candidate professionally and socially. MARCOTTE said he sometimes goes to lunch with the candidate and attorneys in the area, since MARCOTTE's office is across the street from the courthouse. ...

MARCOTTE believes the candidate has a good professional reputation and has heard the candidate is very bright and makes decisions quickly in the courtroom. MARCOTTE said he is really helpful and available for everybody. He stated that the candidate is open-minded and fair, but is not a "push-over." MARCOTTE advised that the candidate is tough on sentencing.

He said the candidate is a very hard worker and many times is the only judge still working in the evenings when MARCOTTE goes to the Gretna courthouse to negotiate bonds with the judges. MARCOTTE advised that family members of individuals in jail will come to MARCOTTE to get bonds. The family members are supposed to give the bondsman 10% of the set bond. If a bond is set for $10,000 the family has to come up with $1,000 to give to the bondsman. Many times the family cannot come up with the 10%, so MARCOTTE goes to the judges to try to lower the bond. He stated that 2% of money received by the bondsman goes to the judges. He advised that the judges are willing to lower set bonds, because if they don't the families will not be able to pay the bonds at all. This way at least some funds will go back into the court system. ...

MARCOTTE said the candidate is of good character and has a good reputation in general. He said the candidate is well-respected and associates with attorneys who are upstanding individuals. He does not know the candidate to associate with anyone of questionable character.

The interview summary states that Marcotte said he "he does not know the candidate to abuse alcohol or prescription drugs. He advised that the candidate will have a beer or two at lunch." (PF 880, House Ex. 69(b), PORT 472.) Marcotte also reportedly stated that he "has no knowledge of the candidate's financial situation." (PF 882, House Ex. 69(b), PORT 472.)



He does not know the candidate to use illegal drugs or to abuse alcohol or prescription drugs. He advised that the candidate will have a beer or two at lunch, but he has never seen him drunk. He has no knowledge of the candidate's financial situation. MARCOTTE does not know the candidate to be biased or prejudiced towards any group or individual.

MARCOTTE has no reason to question the loyalty of the candidate to the United States. He is not aware of anything in the candidate's background that might be the basis of attempted influence, pressure, coercion or compromise or that would impact negatively on the candidate's character, reputation, judgement or discretion. MARCOTTE recommends the candidate for the position of federal judge.

The House alleges that Marcotte's answers were false because he saw Judge Porteous drink heavily on occasion in Louisiana, because he had knowledge of Judge Porteous's financial situation, and he was aware of things in Judge Porteous's background that might be the basis of attempted influence, pressure, coercion, compromise, or that would impact negatively on Judge Porteous' character, reputation, judgment and discretion. (HF 128-131.) The House argues that Judge Porteous "well knew and understood" that Marcotte made these "false statements to the [FBI] in an effort to assist Judge Porteous in being appointed to the Federal bench." (Article IV.)

As an initial matter, it is important to note the timing of events. Marcotte's interview with the FBI came after Judge Porteous had signed and submitted the SF-86, the Supplemental SF-86, and been interviewed himself by the FBI for the first time. Judge Porteous could not have provided information about questions Marcotte had not yet been asked and answers he had not yet given. Nevertheless, Judge Porteous's failure to disclose events that had not yet occurred is proffered as a basis for his impeachment.

The evidence shows that Judge Porteous never learned about Marcotte's allegedly false statements to the FBI. Marcotte did not take notes during his interview with the FBI, waited several days after the interview to call Judge Porteous to tell him about the interview, and when they finally met and discussed the interview, Marcotte provided only a summary of the interview, as opposed to giving a run-down of questions and answers. (PF 578.) Marcotte testified that he simply told Judge Porteous he had given the FBI a "thumbs up" regarding the questions he had been asked. (PF 575.) As such, there is no evidence that Judge Porteous was ever aware of any of Marcotte's alleged false statements.

Further, it is unclear that anything Marcotte stated to the FBI is demonstrably false. Marcotte testified that Judge Porteous had a high threshold for alcohol and that after several drinks, "you wouldn't even know he had a buzz." (PF 881.) The House cites no testimony or evidence of Judge Porteous having appeared inebriated. Moreover, Marcotte's statement regarding Judge Porteous having one or two drinks at lunch is factually correct, as evidenced by the House's own production of receipts from lunches at which Judge Porteous allegedly attended. (*See* House Ex. 372(a)-(d), 373(d), each of which shows only two drinks having been ordered; 373(a) which show two glasses of wine being ordered.) According to the FBI interview write-up, Marcotte merely said that "the candidate will have a [drink] or two at lunch," which appears to be consistent with the receipts. (PF 880.) Marcotte's statement does not indicate that he had ever seen Judge Porteous take more than one or two drinks. Reading any more into it is disingenuous.

Marcotte did not have knowledge of Judge Porteous's financial situation. The House asserts that because Marcotte observed the state of Judge Porteous's automobile on occasion and knew that Judge Porteous enjoyed gambling, he must have believed that Judge Porteous's

financial affairs were a problem. In reality, Marcotte had no direct knowledge of Judge Porteous's financial affairs. (PF 574.) Marcotte testified that he had no knowledge of Judge Porteous's bank accounts or finances. (Sen. Vol. II at 584:13-18.)

As to the third alleged false statement – that Marcotte falsely stated that he was not aware of anything in Judge Porteous's background that might be the basis of attempted influence, pressure, coercion, compromise, or that would impact negatively on Judge Porteous' character, reputation, judgment and discretion – the House asserts that Marcotte was aware of his own relationship with Judge Porteous, and knew it was improper. (HF 131.) Despite the House's strenuous insistence to the contrary, Marcotte testified that he did not think, at the time of the August 1994 FBI interview, that he could have used any information that he was in possession of to coerce Judge Porteous into taking any action. (PF 579.) Marcotte further stated that he "would never, you know, extort" Judge Porteous "in any kind of way." (PF 902.) When pressed by House counsel on this point and asked "You wouldn't extort him but you did have information that could potentially embarrass him or to use leverage on him?" (PF 902.) Marcotte responded "But I would never have leaned on him in that kind of way." (PF 902.) House counsel then asked "Did you feel that because of what you said in the FBI interview, you might be able to coerce the judge at a later date?" (PF 902.) Marcotte responded "and ask him to do stuff for me? No I don't think that at the time." (PF 902.) Even the felon Louis Marcotte, the House's star witness, disagrees with the House's theory on this point.

5. Anonymous Sources Discussed the Marcotte Relationship, Bond-Setting, and Lunches

Article IV argues that "Judge Porteous's failure to disclose these corrupt relationships deprived the United States Senate . . . of information that would have had a material impact on his confirmation." The evidence, however, shows that they had the relevant information, and

upon FBI investigation it obviously was not material enough to derail Judge Porteous's Senate confirmation.

On August 8, 1994, months before Judge Porteous was confirmed by the United States Senate, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who is referred to as T-6 by the FBI. (PF 889.) This individual stated that "Judge Porteous works with certain individuals in writing bonds, specifically . . . Louis and Lori Marcotte." (PF 889, House Ex. 69(b), PORT 526.) T-6 further reported that:

- The Marcottes "frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks." (PF 890.)
- "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." (PF 891.)
- Judge Porteous "frequently sign[ed] bonds ahead of time for bondsmen." (PF 892.) T-6 also reported that Louis Marcotte told the girlfriend of an individual who had been arrested that it would take $12,500.00 to get [the boyfriend] out of jail" and that "$10,000.00 of this would go to Judge Porteous for the bond reduction." (PF 893.)
- Judge Porteous was "paid to reduce a bond" in a different case and "had been given $1,500 to reduce a bond" in that matter. (PF 894.)
- Judge "Porteous had transferred a case from another division to his [Porteous] to help [redaction follows]." (PF 895.)

As the following chart illustrates, these allegations largely track the allegations in Article II:

| Claim in Article II | Information in FBI Background Investigation of Judge Porteous Provided to Senate Prior to Confirmation |
| --- | --- |
| Judge Porteous knew and was associated with the Marcottes. | Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI that "he has known the candidate for approximately ten years" and that he "knows the candidate professionally and socially." |
| | Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Judge Porteous works with certain individuals in writing bonds, specifically . . . Louis and Lori Marcotte." |
| Judge Porteous dined with the Marcottes | Prior to confirmation, the FBI interviewed Louis Marcotte, who told the FBI "that he sometimes goes to lunch with the candidate and attorneys in the area." |
| Judge Porteous accepted things of value from the Marcottes, including meals, trips, home repairs, and car repairs | Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that the Marcottes "frequently give the judge and his staff cakes, sandwiches, booze, and soft drinks" |
| Judge Porteous set, reduced, and split bonds as requested by the Marcottes | Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that "Louis Marcotte has told people that they 'kick back' money to Judge Porteous for reducing the bonds." This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. |
| | Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge Porteous 'frequently sign[ed] bonds ahead of time for bondsmen." (The Justice Department has refused to reveal the identity of this source to the defense.) |
| | Prior to his confirmation, the FBI interviewed an individual, who asked that their identity remain anonymous, but who stated that the candidate "indirectly received $10,000 from an individual in exchange for the candidate reducing his bond"; the FBI interviewed an individual, whose identity has been redacted from discovery documents, who reported that Louis Marcotte told the girlfriend of an individual who had been arrested that it would take $12,500.00 to get [the boyfriend] out of jail" and that "$10,000.00 of this would go to Judge Porteous for the bond reduction." This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. |
| | Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that "Porteous was "paid to reduce a bond" in a different case and "had been given $1,500 to reduce a bond" in that matter. This information was highlighted in a separate "note" to the Department of Justice, sent on August 19, 1994, months before Judge Porteous was confirmed. |
| Judge Porteous improperly set aside or expunged felony convictions | Prior to his confirmation, the FBI interviewed an individual, who asked that his/her identity remain anonymous, but who stated that Judge "Porteous had transferred a case from another division to his [Porteous] to help [redaction follows]." |

6. <u>The Senate was aware of these allegations or facts at the time of Judge Porteous's confirmation vote</u>

In response to these allegations, the FBI conducted a number of follow-up interviews. (PF 896.) In particular, on August 17, 1994, the FBI asked Marcotte whether he was "aware of an exchange of money with Judge Porteous and others to get a bond reduction" for a specific individual. (PF 896-97.) According to the summary of that interview with Marcotte prepared by

Bobby Hamil, the agent conducting the interview for the FBI, Marcotte was "confronted with questions and information about his knowledge and relationship of specific bond matters" and Marcotte concluded the interview "by totally denying…arranging for a portion of the bond reduction fee to go directly to Judge Porteous as a 'kickback.'" (PF 897-901.)

During this second interview, Marcotte was not asked about Judge Porteous's drinking or financial status. (*See generally* House Ex. 69(b), PORT 513-14.)

On August 18, 1994, Judge Porteous was interviewed by the FBI for a second time. (PF 904.) FBI Agent Hamil again conducted the interview. (PF 905.) Judge Porteous denied the allegations asserted by T-6. (PF 906.) Based on the interview summaries, Judge Porteous was never specifically asked, in either of his FBI interviews, about his relationship with Amato and Creely, gifts Judge Porteous may have received from the Marcottes, or his frequent lunches with Amato, Creely, and the Marcottes, despite the fact that the FBI was aware of all of these issues. (PF 909-911, House Ex. 69(i), 69(k).) Moreover, Hamil testified that had he been aware that Judge Porteous and Marcotte went to lunch together (as was referenced in the first FBI interview of Marcotte), he would not have necessarily raised that issue or asked questions related to that topic in his second interview of Judge Porteous. (PF 908.)

On August 19, 1994, the FBI sent a communication to the Department of Justice, noting that the investigation was complete and specifically highlighting the allegations asserted by T-6. (PF 913.) Six days later, President Clinton formally nominated Judge Porteous to serve as the United States District Court Judge for the Eastern District of Louisiana. (PF 914.)

7. <u>Senate Judiciary Questionnaire, Review, and Investigation</u>

Once nominated, Judge Porteous completed a United States Senate Committee on the Judiciary Questionnaire for Judicial nominees. (PF 915.) The completed questionnaire was signed by Judge Porteous on September 6, 1994. (PF 916.) The questionnaire posed very

specific questions, including, "Were all of your taxes current as of the date of your nomination?" (PF 917, House Ex. 9(f).) The final question, Number 11 on page 34 of the document, asked Judge Porteous to "Please advise the Committee of any unfavorable information that may affect your nomination." (PF 918, House Ex. 9(f).) Judge Porteous responded by stating that "[t]o the best of my knowledge, I do not know of any unfavorable information that may affect my nomination." (PF 918, House Ex. 9(f).)

**11. Please advise the Committee of any unfavorable information that may affect your nomination.**

**To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.**

Professor Mackenzie testified that he is not aware of any individual who has ever responded affirmatively to this or similarly worded questions on the Senate's questionnaire, in part because nominees feel that by this point in the process, they have already been asked this or similar questions on several occasions. (PF 919; *see also* Sen. Vol. V at 2026:9-2027:13.) Moreover, Professor Mackenzie stated that he was not aware of any individual ever having been prosecuted or removed from office for falsely answering such a question. (PF 920.) The House did not contest this testimony or present its own witness on these issues.

At the most basic level, Article IV charges Judge Porteous with making false statements and concealing information in relation to questions such as the one on the Senate Questionnaire. These are allegations which, by their very nature, require some showing of intent. It would challenge any notion of due process to impeach a federal official for accidentally or unknowingly making a false statement. Even the House's own expert witness, Professor Charles Geyh, agreed with a federal judicial misconduct opinion which stated that "even if the alleged inconsistencies

in testimony and submission to the Senate Judiciary Committee were a proper subject for a complaint, dismissal would be required…there's no evidence that respondent intentionally misled or knowingly made false statements to the Senate[.]" (PF 928.) That particular judicial misconduct opinion, authored in 2005 by the Chief Judge of the Third Circuit Court of Appeals on behalf of the Judicial Council of the Third Circuit, addressed allegations that a District Court Judge lied about his prior legal experience on the "questionnaire he submitted to the **Senate's Committee on the Judiciary**." (HP Ex. 1111d at DEF02333.) The Judicial Council opinion noted the importance of intent as an element of such "allegations of criminal conduct" and held that since there was no evidence of such intent, the claim could not survive. (HP Ex. 1111d at DEF02338.) In agreeing with the reliance on intent in that opinion, Professor Geyh testified that, "the knowing nature of the wrong is a relevant consideration…I think that intent is one of the things one would look at, yeah." (PF 929.) Despite this recognition from the House's own expert witness, the House never offered any evidence of Judge Porteous's state of mind.

Following his nomination, but prior to his confirmation, the staff of the Judiciary Committee of the United States Senate reviewed the FBI's background investigation of Judge Porteous and were made aware of the allegations that Judge Porteous took kick-backs, gambled, had a drinking problem, and was living beyond his means." (PF 921-25.) Judge Porteous was confirmed to the federal bench on October 7, 1994.

### C. Proven Misrepresentations Far More Sensational Than the Unsubstantiated Article IV Allegations Have Never Led to Impeachment

Congress has applied the meaning of "high crimes and misdemeanors" by voting to impeach judges only when their alleged conduct has included abuses of constitutionally entrusted powers. ***No one has ever been convicted by the United States Senate in an impeachment for failing to disclose even egregious facts during the nomination process.*** There have been

numerous occasions where previously undisclosed information, obviously embarrassing to a federal civil officer (including Supreme Court Justices, federal judges, and cabinet secretaries), has been discovered after confirmation, but no impeachment proceedings were ever instituted.

For example, in 1997, District Court Judge James Ware, then a nominee for the Ninth Circuit, filled out "the 'Questionnaire for Sensitive Positions,' known as OPM Form 86, which must be completed by all presidential nominees. Judge Ware was asked to list all relatives. He listed 'Virgil Lamar Ware' as his only half brother." (HP Ex. 1111k at DEF02385.) Judge Ware had made repeated public speeches proclaiming that his brother, Virgil, was shot and killed in a racially motivated incident in Birmingham, Alabama in 1963 while the two were riding a bicycle. (HP Ex. 1111k at DEF02382-02384.) Parts of this story were true. Virgil Ware was indeed murdered under these general circumstances. However, Judge Ware had no family relationship to Virgil Ware. (HP Ex. 1111k at DEF02385.) Judge Ware did not ride on the bicycle with Virgil Ware that night. (HP Ex. 1111k at DEF02385.) When he finally admitted that he had fabricated his relationship to Virgil Ware and repeated the lie throughout decades of his career, Judge Ware explained that he included Virgil's name on the questionnaire "in an effort to be consistent with the way he had presented himself publicly." (HP Ex. 1111k at DEF 02385-86.) Confronted with having intentionally lied about Virgil Ware being his half-brother on his OPM Form 86, Judge Ware withdrew himself from consideration for the Ninth Circuit but remains a U.S. District Court judge to this day. (HP Ex. 1111k at DEF02388.) He was eventually reprimanded by the Judicial Council of the Ninth Circuit, but never impeached.[106]

Other examples abound:

[106] At the evidentiary hearing, the House's expert on legal ethics, Professor Charles Geyh, was unaware of the facts of Judge Ware's reprimand or his career long deceit. (Sen. Vol. III at 848:23.)

- In 1937, President Roosevelt nominated Hugo Black for an opening on the United States Supreme Court. *See* Howard Ball, *Hugo L. Black: Cold Steel Warrior*, Oxford Oxfordshire: Oxford University Press 5 (1996). During the confirmation hearings, rumors swirled regarding Black's prior membership in the Ku Klux Klan. *Id*. at 94-95. Senator William E. Borah, Republican of Idaho, made the only statement in Black's behalf on the Klan question. "There has never been at any time one iota of evidence that Senator Black was a member of the Klan," Borah told his colleagues. He said that Black, in private discussion before the nomination, had stated that he was not a member of the Klan. No one, Borah said, had suggested any source from which evidence might be obtained. For himself, the Idaho senator said he would vote against any man whom he knew to be a member of a secret organization of the nature of the Klan. After six hours of debate, the Senate voted 63-16 to confirm Black. *See* Ball at 94. The next month, the Pittsburgh Post-Gazette investigated Black's KKK past and definitively revealed Black's involvement in the Klan. *Id*. at 96. Vacationing senators were tracked down and asked whether they would have voted for Black if they had known of his former membership. Some said they had been "misled"; others passed it off as a "tempest in a teapot." Weeks later, Black addressed the nation by radio, admitting that "I did join the Klan." The Congress never instituted impeachment proceedings against Justice Black, who continued to serve on the Court for the next thirty-four years.

- Prior to his appointment to the Supreme Court, Chief Justice William H. Rehnquist purchased properties in Arizona and Vermont which contained discriminatory deed restrictions. *See* Alan S. Oser, *Unenforceable Covenants are in Many Deeds*, N.Y. TIMES, Aug. 1, 1986. The restriction on the Vermont property prohibited the sale or lease of the property to "members of the Hebrew race." *Id.* The Arizona property contained a restrictive covenant barring sale to "any person not of the White or Caucasian race." *Id.* This was not discovered until he was already a member of the Supreme Court. *Id.* The Chief Justice was called to testify before the Senate Judiciary Committee and stated that he would get rid of the covenants. *Id.* Chief Justice Rehnquist was never impeached. *See* Chief Justice Rehnquist has Died, http://www.cnn.com/2005/LAW/09/03/rehnquist.obit/index.html (last visited July 18, 2010).

- Gerald Carmen was the head of the General Services Administration under President Reagan. *See* Gregory Gordon, *GSA Head Says He Forgot to Mention Loan*, UNITED PRESS INTERNATIONAL, Jul. 16, 1982. Carmen did not include a $425,000 federal loan in stating his finances to a Senate committee before he was confirmed. *Id.* William Roth, Chairman of the Senate Governmental Affairs Committee, demanded an explanation from Carmen, who claimed it was an oversight. *Id.* Carmen was never impeached, and served as Administrator until 1984, when President Reagan appointed him U.S. Permanent Representative to the United Nations in Geneva. *See* Gerald P. Carmen, http://people.forbes.com/profile/gerald-p-carmen/31618 (last visited July 18, 2010).

- Jay Bybee was confirmed to the Ninth Circuit by the Senate on March 13, 2003. *See Sen. Leahy Issues Statement on Nomination of David Nahmias*, U.S. FED NEWS, Sept.

30, 2004. After his confirmation, it was discovered that Judge Bybee had signed a controversial memo advising President Bush to ignore laws forbidding torture. *Id.* Senator Patrick Leahy indicated that had Judge Bybee's role in sanctioning cruel, inhumane, and degrading treatment and abandoning the rule of law been known before his confirmation, the Senate would not have accepted his promise to follow the law. *Id.* Judge Bybee has not been impeached.

- William F. Baxter was the Assistant Attorney General in charge of the Antitrust Division in 1982. *See* Andrew Pollack, *Baxter Role Upheld in I.B.M. Case*, N.Y. TIMES, June 18, 1982, at D1. Baxter dismissed a thirteen-year old antitrust case against I.B.M. *Id.* Baxter did not disclose his past dealings with I.B.M. during his Senate confirmation hearings, which included aiding the evaluation of expert witnesses in a different case, research funded with an I.B.M. grant, and arguing on I.B.M's behalf before officials of the European Economic Community, which also had an antitrust suit pending against the company. *Id.* Baxter was never impeached. *See* Michael M. Weinstein, *W.F. Baxter, 69, Ex-Antitrust Chief, is Dead,* N.Y. TIMES, Dec. 2, 1998.

- William J. Casey, Director of the Central Intelligence Agency, did not disclose his stock holdings in three corporations in the financial disclosure report he filed with the Senate Select Committee on Ethics during his confirmation proceedings in 1981. *See* Edward T. Pound, *Casey Tells Federal Ethics Agency He Omitted Three Stock Holdings*, N.Y. TIMES, July 31, 1981, at A11. His interest in the companies were valued at approximately $75,000, and he claimed his failure to report was "just an oversight." *Id.* Casey was never impeached, and he later resigned as director of the CIA because of his failing health. *See Shultz Among Mourners at Casey's Wake*, L.A. TIMES, May 8, 1987.

- Federico Pena had already been confirmed as Transportation Secretary when he acknowledged that he had failed to pay Social Security taxes for a baby-sitter who looked after his children in 1991. *See* Michael J. Sniffen, *Nominees Sunk by Tax and Nanny Problems for Years*, ASSOCIATED PRESS, Jan. 14, 2009. He promised to pay back taxes, was never impeached, and kept his position for President Clinton's first term. *Id.* Pena was then tapped as Energy Secretary, and resigned after one year to return to private life. *See* Matthew L. Wald, *Pena Resigns as Energy Secretary, Citing Concerns for Family*, N.Y. TIMES, Apr. 7, 1998.

There are also numerous other instances where a federal nominee failed to disclose certain information at the initial stages of his or her nomination, only then to have the information discovered by a third-party and disclosed by that party or whereby sufficient pressure was apparently placed on the nominee so that nominee disclosed the information at a

later date. In each of the examples listed below, the Senate confirmed the individual despite the lack of full and timely disclosure of relevant material:

- Justice Stephen G. Breyer was a candidate to succeed Justice Byron White in 1993. *See* Aaron Epstein & Angie Cannon, *Consensus-Building Skills Gave Nominee the Edge*, THE MIAMI HERALD, May 14, 1994 at A13. Prior to his nomination, it was revealed that he had failed to pay Social Security taxes for a household helper. *Id.* Justice Breyer later paid the tax, but President Clinton nominated Justice Ruth Bader Ginsburg instead. *Id.* Justice Breyer was subsequently nominated and confirmed the next year as Justice Harry A. Blackmun's replacement. *Id.*

- Justice Sonia Sotomayor failed to disclose to the Senate Judiciary Committee a document she had authored arguing that the death penalty was "racist" and a violation of the present "humanist" thinking of society. *See* Pete Winn, *Sotomayor Failed to Disclose to Senate Memo in which She Argued Death Penalty is "Racist"*, June 5, 2009, http://www.cnsnews.com/news/print/49218 (last visited July 18, 2010). The Judicial Confirmation Network stated that the memo should have been disclosed as required under Question 12(b) of the Senate questionnaire. *Id.* Justice Sotomayor also did not reveal that she was a member of an allegedly gender-exclusive club – from which she subsequently resigned. *See* Sotomayor Resigns from Women's Club, http://www.cnn.com/2009/POLITICS /06/19/sotomayor.womens.club/index.html (last visited July 18, 2010). Republican senators had called for more information about her participation in the club. *Id.* Justice Sotomayor was subsequently confirmed by the Senate. *See* Amy Goldstein and Paul Kane, *Sotomayor Wins Confirmation*, WASH. POST, Aug. 7, 2009.

- Justice Ruth Bader Ginsburg initially failed to list as a gift on her financial disclosure forms a $25,000 initiation fee for a country club near Washington. *See* Neil A. Lewis, *Ginsburg Hearings End in a Secluded Meeting*, N.Y. TIMES, July 24, 1993. The Woodmont Country Club routinely waived fees as a courtesy to members of the federal bench. *Id.* Justice Ginsburg said that she regretted not listing the waived fee as a gift on the form. *Id.* Justice Ginsburg was subsequently confirmed. *See #48 Ruth Bader Ginsburg, The 100 Most Powerful Women*, Aug. 19, 2009, http://www.forbes.com/lists/2009/11/power-women-09_Ruth-Bader-Ginsburg_D8D7.html (last visited July 19, 2010).

- Judge Alex Kozinski was a nominee in 1985 to the Ninth Circuit Court of Appeals. *See* Chris Chrystal, *Levin: Kozinski Lacks Judicial Temperament*, United Press International, Nov. 2, 1985. Senate confirmation stalled because of allegations by former employees that he was harsh, cruel and demeaning. *Id.* Senator Carl Levin stated Judge Kozinski misled the Judiciary Committee by claiming an excellent working relationship with his former staff when six people had filed affidavits that he treated employees unfairly. *Id.* Another allegation stemmed from his lack of disclosure about the circumstances surrounding his firing of Mary Eastwood, his predecessor at the Office of Special Counsel. *Id.* Eastwood testified that Judge

> Kozinski was "less than honest" with the panel by implying she had dropped her appeal of the firing when she had not, and by failing to disclose that she eventually won with back pay. *Id.* The Senate still confirmed Judge Kozinski. *See* Robert L. Jackson & Philip Hager, *Senate Narrowly Confirms Kozinski as Appeals Judge*, L.A. Times, Nov. 8, 1985.

As these examples demonstrate, the Senate has routinely confronted nominees who failed fully to disclose information that the Senate as a whole, or individual Senators, believed to be relevant and material. Moreover, the Senate has previously confirmed the appointments of nominees who initially concealed significant information. If nondisclosure ranging from the failure to fully list stock holdings to the failure to admit prior membership in the Ku Klux Klan does not prevent confirmation, it cannot be grounds for impeachment.

There is no excuse for such knowing failures to disclose, but even in cases far more egregious than the tenuous and unsubstantiated nondisclosure allegations against Judge Porteous they have never resulted in impeachment or, usually, even derailed a confirmation. This is as it should be. The constitutional basis for impeachment would become a political bagatelle if judges who took unpopular positions could be impeached simply by dredging up some colorably embarrassing episode from their past that they failed to disclose in their background check. Senators could hold questionnaires as pocket impeachments to be used against an unpopular judge or even for the purpose of creating judicial vacancies to be filled by nominees of the party currently in power. For their part, judges would serve at the whim of Congress. In effect, Article IV invokes the very standard James Madison worked so hard to avoid in the Constitution.

The Senate should reject Article IV, both because it is unsupported by evidence and because it falls far short of alleging impeachable misconduct.

## VI. Epilogue

The defense appreciates and thanks the Committee and its staff for their professionalism and assistance during this process. The defense would be remiss, however, for purposes of the historical record, not to point out various procedural issues and pre-trial rulings that the defense believes prevented Judge Porteous from receiving a full and fair trial. These include (but are not limited to):

- Despite the efforts of the Committee staff, the Department of Justice refused to provide requested relevant and material discovery on a timely basis. The defense received literally hundreds of pages of material documents (including FBI 302 Reports) on the eve of – and even during – trial. Indeed, some documents relevant to particular witnesses were not provided until *after* those witnesses had already testified. In one case, dozens of pages of documents relevant to Judge Bodenheimer were produced literally hours after he was excused from further testimony.

- The Committee severely limited the number of defense-requested depositions to four. The House faced no such limitation during its discovery and, indeed, conducted depositions of more than 25 witnesses in connection with its investigation and trial preparation, as well as conducted some 70 interviews during the House's investigation. This deprivation was only aggravated by the fact that this case did not follow either a criminal or civil trial, thereby leaving the defense with no alternative compulsory process to investigate and prepare for trial. The result was that many witnesses refused to speak to the defense after speaking with the House, with the result that the defense had virtually no idea what witnesses would contribute to the trial.

- The Committee declined the defense motion to subpoena a witness from the Department of Justice to testify concerning the Department's decision not to prosecute Judge Porteous. Similarly, the Committee declined to require the Justice Department to produce internal memorandum on the same subject, although there is past precedent for the Justice Department providing similar documents in prior impeachment trials.

- The House refused to provide for open file discovery or even to provide an index or general listing of relevant materials in its possession, despite the fact that the House had done so in prior impeachment proceedings.

- Through various actions – including declining to consider in good faith and accept or propose alternatives to defense proposed stipulations, and refusing to support or supervise its negotiator once discussions of stipulations began – the House repeatedly and blatantly refused to negotiate stipulations in good faith, resulting in a substantial commitment by the defense to duplicative and wasted negotiations, all on the eve of trial.

- The Committee declined to take any actions to sanction the House for its refusal to participate in good faith in the stipulation process, contrary to the Committee's commitment that there would be serious sanctions for such misconduct.

- The Committee limited the evidentiary hearings to 20 hours per side – less than the average time afforded in prior impeachments even though this case lacked any prior trial record. The Committee's decision necessarily limited the number of witnesses that the defense believed it could call in the time allotted, and required the defense to truncate its trial presentation. As a result, while the parties had a small amount of time left over from their allotted 20 hours, the defense clearly indicated that it had wanted to present more witnesses but had to reduce the number of those witnesses in light of the abbreviated schedule.

- The Committee declined the defense's request for defense funding, including (1) funds for litigation costs (such as copying and courier expenses), (2) funds for logistical costs (such as for travel to allow defense counsel to meet with potential witnesses), and (3) funds for expert witness travel to Washington, D.C. to testify at trial. By all accounts, the House was able to fund its discovery and trial preparation expenses through the budget of the House Impeachment Committee, which provided funds for numerous trips to Louisiana to interview personally and interrogate relevant witnesses. This left the defense at a severe disadvantage, particularly since defense counsel – who handled this matter on a *pro bono* basis – began representing Judge Porteous only four months before trial.

- At this time, the defense has not been told whether the Senate will allow it to present argument concerning central constitutional issues raised in this case, about which the defense previously filed dispositive motions. In a judicial proceeding, such issues would be given a separate hearing prior to trial, and certainly would not be relegated to passing references during abbreviated closing statements. Nevertheless, at this point, the defense has been assured only a relatively brief time to present the facts and testimony to the Senate. More time should be allotted, as a separate presentation of these important constitutional issues would serve to fully inform the Senate's consideration of and deliberations on the Article of Impeachment.

The defense does not expect that these considerations should or will affect the deliberations of the Senate with regard to the Articles of Impeachment, and does not seek to cast blame on any individual. Nonetheless, because Senate impeachment trials are rare and historical events, where all parties look to past precedent for guidance, the defense is obliged to make a record of these issues, with the hope that they will not be similarly inflicted upon the accused in future impeachment trials.

## CONCLUSION

For all these reasons, the Senate should acquit Judge Porteous on all four Articles of Impeachment.

Respectfully submitted,

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Dated: October 29, 2010

## CERTIFICATE OF SERVICE

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

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