MEMORANDUM

TO: **Members, Committee on the Judiciary**

FROM: **John Conyers, Jr.**
Chairman

DATE: **January 26, 2010**

RE: **Full Committee Markup**

The Committee on the Judiciary will meet to markup H.R. 569, the "Equal Justice for Our Military Act of 2009"; H.R. 3695, the "Help Find the Missing Act" or "Billy's Law"; H.Res. 1031, Impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors; and H.R. 4506, the "Bankruptcy Judgeships Act of 2010." The markup will take place on Wednesday, January 27, 2010, at 10:15 a.m., in room 2141 of the Rayburn House Office Building.

I. H.R. 569, the "Equal Justice for Our Military Act of 2009"

A. Purpose

H.R. 569 proposes to amend the federal judicial code[1] to expand United States Supreme Court jurisdiction to review courts-martial decisions. Current law does not grant Supreme Court jurisdiction to review courts-martial decisions that were not first reviewed by the Court of Appeals for the Armed Forces (CAAF). Similarly, current law does not grant Supreme Court jurisdiction to review decisions by the CAAF that deny relief to a writ for extraordinary relief or interlocutory appeal. In other words, if the CAAF refuses to review a court-martial decision, or if the CAAF denies relief to a writ for extraordinary relief or interlocutory appeal, a service member is foreclosed from seeking direct review by the Supreme Court. The government,

[1] Specifically, H.R. 569 as amended by the Manager's amendment adopted by the Subcommittee on Courts and Competition Policy on July 30, 2009, proposes amendments to sections 1259 and 2101(g) of title 28, United States Code.

however, has no comparable barriers to Supreme Court review. H.R. 569 thus attempts to correct this inequity by granting Supreme Court jurisdiction over courts-martial decisions that were not reviewed by the CAAF, or decisions by the CAAF to deny relief to a writ for extraordinary relief or interlocutory appeal.

B. Background

1. Courts-Martial and Appellate Review

The Uniform Code of Military Justice (UCMJ)[2] lays out a comprehensive military justice system, which includes a penal code consisting of traditional offences (e.g., theft) and military-only offences (e.g., desertion), establishes the trial-like procedure called a court-martial as the primary mechanism to determine the guilt or innocence of service members accused of a crime, and creates a multi-level military court appellate procedure. All active duty service members in the Army, Navy, Marine Corps, Air Force, and Coast Guard, regardless of where they are, are subject to the UCMJ[3].

Court-martial decisions that provide a sentence that includes dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, confinement of one year or longer, or death, must be referred to a Court of Criminal Appeals for review[4]. Further review of a court-martial decision may be made by the military's highest court, the Court of Appeals for the Armed Forces (CAAF). The CAAF is required to hear cases involving the sentence of death or cases in which the government has referred the case to the CAAF for review[5]. The CAAF has

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[2] Uniform Code of Military Justice (UCMJ), 64 Stat. 109 (1950), *codified* at 10 U.S.C. § 801, *et. al.*
[3] 10 U.S.C. § 802.
[4] 10 U.S.C. § 866(b). The Courts of Criminal Appeals include the Army Court of Criminal Appeals (ACCA), the Air Force Court of Criminal Appeals (AFCCA), the Navy-Marine Corps Court of Criminal Appeals (N-MCCA), and the Coast Guard Court of Criminal Appeals (CGCCA). Referral to a Court of Criminal Appeals is accomplished when the Judge Advocate General (JAG) (the military's legal office) for the relevant service branch certifies the court-martial to the Court of Criminal Appeals.
[5] 10 U.S.C. § 867(1)-(2). Again, it is the JAG acting on behalf of the government who certifies courts-martial decisions for CAAF review.

discretion to hear all other appeals[6]. The Supreme Court may further review a court-martial decision by writ of certiorari,[7] but only under limited circumstances.

Specifically, section 1259 of Title 28, provides the Supreme Court with jurisdiction to consider writs of certiorari to review cases from the CAAF in four specific circumstances: 1) cases in which a death sentence has been affirmed by a Court of Criminal Appeals; 2) cases that the government referred to the CAAF; 3) cases in which the CAAF granted a petition for review; and 4) cases that do not fall in the other categories but in which the CAAF has granted relief. The first two categories represent the two circumstances in which the CAAF must grant appeals. The third category represents the cases in which the CAAF has exercised its discretion to grant an appeal. And the final category is a catch-all provision for other cases in which the CAAF might grant relief and is generally considered to refer to writs for extraordinary relief and interlocutory appeals that are ordinarily sought by an accused service member.

2. Overview of H.R. 569

a. Purpose of the Bill

The purpose of H.R. 569 is to broaden the scope of courts-martial decisions that may be reviewed by the Supreme Court by writ of certiorari. This broadening of Supreme Court jurisdiction is meant to correct an inequity in the opportunity to directly appeal courts-martial decisions to the Supreme Court that favors the government over service members.

As discussed above, the government has the right to appeal to the Supreme Court any case that it has referred to the CAAF, thus effectively giving the government the right to have any case it chooses eligible for Supreme Court review. However, service members convicted in a court-martial have no parallel right unless the sentence imposed is death. The CAAF has full discretion to decline to review all other courts-martial decisions that are appealed by service members. Statistics show that the vast majority of court-martial decisions appealed to the CAAF by service members were in fact not taken up by the CAAF.[8] In declining to review these appeals, the CAAF has foreclosed the possibility of direct review by the Supreme Court.[9]

Also under current law, CAAF decisions that grant relief to petitions for extraordinary relief or interlocutory appeals may be appealed to the Supreme Court, but CAAF decisions that

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[6] 10 U.S.C. § 867(3)

[7] A writ of certiorari is an order to review a decision of a lower court.

[8] Between fiscal years 2001 and 2005, only about 16% of appeals made to the CAAF were granted. Letter from Daniel J. Dell'Orto, Acting General Counsel, U.S. Dept. of Defense, to Senator Carl Levin, Chairman, Comm. on the Armed Services, U.S. Senate (Jun. 27, 2008) (on file with Subcommittee on Courts and Competition Policy) [HEREINAFTER "Dell' Orto Letter"].

[9] Service members may attempt to collaterally attack a court-martial decision in a federal court, however the scope of review that federal courts apply to court-martial decisions are generally narrow and only look to whether the military courts simply addressed each constitutional claim made.

deny relief in these cases may not. As mentioned above, granting of relief in these cases generally benefit an accused service member. Here then the government is again advantaged, since it can appeal the CAAF's grant of relief to an accused service member by writ of certiorari to the Supreme Court, but a service member who has been denied relief is not permitted to any further appeal of the CAAF's decision.

The American Bar Association has noted that "this statutory framework creates a disparity in our laws governing procedural due process whereby the government has far greater opportunity to obtain Supreme Court review of adverse courts-martial decisions than is afforded convicted service members," and recommended that a broad remedial approach similar to H.R. 569 is needed "to provide service members with due process access to discretionary Supreme Court review similar to that which is permitted the government."[10] The District of Columbia Bar Association, the Fleet Reserve Association, the Jewish War Veterans Association, the Military Officers Association of America, the National Association of Criminal Defense Lawyers, and the National Institute for Military Justice have all echoed the American Bar Association's concerns in their written letters of support for H.R. 569.

b. Effect of H.R. 569

H.R. 569 will give the Supreme Court jurisdiction to hear appeals of courts-martial decisions that were denied review by the CAAF. H.R. 569 will also give the Supreme Court jurisdiction to hear appeals of CAAF decisions that denied relief to a writ for extraordinary relief or an interlocutory appeal.

Concerns have been raised that granting Supreme Court jurisdiction to these cases will impose unwarranted costs and strain on the military justice system, since the UCMJ already provides a robust appeal process.[11] In scoring a similar measure last Congress, the Congressional Budget Office (CBO) noted that while the bill did not involve any direct expenditures that would raise a pay-go issue, it did estimate that the increased workload of government attorneys and Supreme Court clerks would cost $1 million per year.[12]

It was pointed out during the legislative hearing on H.R. 569 that the CBO has significantly overestimated the costs of the bill, since most courts-martial decisions will likely not be appealed, and most of those decisions that are appealed will not have the benefit of

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[10] David Craig Landin, *Standing Committee on Federal Judicial Improvements Report to the House of Delegates*, American Bar Association Annual Meeting, Report No. 116, 5-6 (2006) [HEREINAFTER "ABA Report"].

[11] The Department of Defense under the Bush Administration wrote two letters to Congress opposing measures similar to H.R. 569, citing the additional costs it would mean for the military justice system and the more than appellate review procedures service members already benefit from. Dell' Orto Letter, supra note 6; Letter from Department of Defense General Counsel William J. Haynes II to Representative Lamar Smith, Chairman, Subcomm. on Courts, the Internet and Intellectual Property (Feb. 6, 2006). The Obama Administration has not yet taken a position on H.R. 569.

[12] Congressional Budget Office, Cost Estimate for S. 2052, Equal Justice for United States Military Personnel Act of 2007 (Oct. 22, 2008).

government provided attorneys. These points were also raised by the ABA in its written testimony regarding H.R. 569, which concluded "[w]e believe that the CBO cost estimate is erroneously predicated on an assumption that several hundred cases will be filed, when in fact the number of petitions that will be prompted by enactment of this legislation is likely to be minimal . . ."[13] Furthermore, according to the Counselor of the Chief Justice of the United States Supreme Court, if historical experience concerning the rate of appeals from CAAF decisions is any guide, there should at most 120 additional Supreme Court petitions.[14] This represents a tiny fraction of the thousands of appeals the Supreme Court receives every year.

c. Legislative History of H.R. 569

In the 109th Congress, H.R. 1364 was introduced by Rep. Susan Davis. H.R. 1364 sought to amend paragraph (4) of 28 U.S.C. § 1259 to grant Supreme Court jurisdiction over writs for extraordinary relief or interlocutory appeals that have been granted or denied by the CAAF. The bill was referred to the Judiciary Committee, but no action was taken on it.

In 110th Congress, H.R. 3174 was introduced by Rep Susan Davis. H.R. 3174 sought to amend paragraphs (3) and (4) of 28 U.S.C. § 1259 to grant Supreme Court jurisdiction over any case that the CAAF granted or denied review in, as well as over writs for extraordinary relief or interlocutory appeals that have been granted or denied by the CAAF. H.R. 3174 was passed by the House of Representatives under suspension of the rules on September 27, 2008. An identical measure, S. 2052, was introduced in the Senate and was reported without amendment by the Senate Committee on the Judiciary on September 12, 2008, but was not considered by the full Senate.

On January 15, 2009, H.R. 569, The Equal Justice for our Military Act of 2009, was introduced in the 111th Congress by Rep. Susan Davis and currently has 19 co-sponsors.[15] The Senate introduced a companion bill, the Equal Justice for United States Military Personnel Act of 2009, S. 357, on January 30, 2009. On June 11, 2009, the House Committee on the Judiciary's Subcommittee on Courts and Competition Policy held a hearing on H.R. 569. H.R. 569 was reported out of the Subcommittee on Courts and Competition Policy on July 30, 2009, as amended by a Manager's amendment in the nature of a substitute.

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[13] Legislative Hearing on H.R. 569, The Equal Justice for Our Military Act of 2009, Before the Subcomm. on Courts and Competition Policy of the H. Comm. On the Judiciary, 111th Cong. 6 (2009) (statement of H. Thomas Wells, Jr., President, American Bar Association).

[14] Letter from Jeffrey P. Minear, Counselor of the Chief Justice of the United States Supreme Court to Representative Henry Johnson, Chairman, and Howard Coble, Ranking Member, Subcomm. on Courts and Competition Policy (June 18, 2009).

[15] Co-sponsors of H.R. 569 include Rep. Ackerman, Rep. Berman, Rep. Bordallo, Rep. Brady, Rep. Frank, Rep. Grijalva, Rep. Hinchey, Rep. Holt, Rep. Loebsack, Rep. Massa, Rep. McDermott, Rep. Ortiz, Rep. Schakowsky, Rep. Scott, Rep. Sestak, Rep. Skelton, Rep. Tauscher, Rep. Wexler, and Rep. Woolsey.

C. Section-by-Section Analysis

Sec. 1. Short Title. This section sets forth the short title of the bill as the "The Equal Justice for our Military Act of 2009."

Sec. 2. Certiorari to the United States Court of Appeals for the Armed Forces. Section 2 amends paragraphs (3) and (4) of 28 U.S.C. §1259 to give service members the right to appeal to the Supreme Court any case that the CAAF granted or denied review in, as well as any decision by the CAAF concerning any petition for extraordinary relief or an interlocutory appeal. Section 2 also authorizes a technical and conforming amendment to be made to 10 U.S.C. § 867(a), which presently prohibits Supreme Court review, by a writ of certiorari, any action of the CAAF in refusing to grant a petition for review

D. Manager's Amendment

On July 30, 2009, the Subcommittee on Courts and Competition Policy held a markup for H.R. 569 and adopted a Manager's amendment by voice vote. The manager's amendment makes a technical change to section 2 of the bill, and adds a new section 3 which provides an effective date. Specifically:

1. Section 2 is amended to add a provision amending section 2101(g) of title 28 of the United States Code to clarify the statutory authority of the Supreme Court to write rules governing deadlines for certiorari petitions following a decision by the CAAF.

Explanation: Under 28 U.S.C. 2101(g), the Supreme Court is authorized to establish by rule how much time a petitioner has to submit an application for a writ of certiorari following a decision by the CAAF. However, it is not clear whether a decision by the CAAF to not review a case is a decision for purposes of 28 U.S.C. 2101(g). To eliminate any ambiguity, this amendment will explicitly permit the Supreme Court to establish rules regarding the time in which a petitioner has to submit a writ for certiorari following the CAAF's denial of review.

2. A new section 3 is added to provide that the amendments made by the Act shall take effect after 180 days from the date of enactment of the Act and that the changes made by this act shall apply to any petition granted or denied by the CAAF after that effective date. An exception to that effective date is made such that the authority of the Supreme Court to make rules regarding the deadline for petitioning for certiorari will take effect on the date of enactment of the Act.

Explanation: H.R. 569 does not currently provide an effective date and in its current form would go into effect on the date of enactment. This is problematic since the Supreme Court will need time to establish rules governing the timeliness of applications for a writ of certiorari. Delaying the date the bill goes into effect by six months will give the Supreme Court time to

amend its rules concerning timeliness of applications. It also specifies that CAAF decisions made on or after the effective date will be eligible for appeal to the Supreme Court.

II. H.R. 3695, the "Help Find the Missing Act" or "Billy's Law"

A. Introduction

H.R. 3695, the "Help Find the Missing Act" or "Billy's Law" was introduced by Congressman Chris Murphy (D-CT) on October 1, 2009, with Congressman Ted Poe (R-TX) as an original cosponsor. This bill would authorize funding for, and increase accessibility to databases maintained by the FBI and the National Institute of Justice (NIJ) related to missing persons and unidentified remains. The Subcommittee on Crime, Terrorism, and Homeland Security held a legislative hearing on this bill on January 21, 2010. The Department of Justice sent a letter to the Subcommittee on January 19, 2010 stating that it "strongly supports this legislation."

B. Background

H.R. 3695 is intended to help private citizens, law enforcement, coroners, and medical examiners gain access to information about missing persons and the unidentified remains of persons. Every year, tens of thousands of Americans become missing and are never found by their loved ones. It is estimated that there are 40,000 unidentified remains in the offices of the nation's medical examiners and coroners or remains that were buried or cremated before being identified. Information about these remains and missing persons is often reported to existing federal databases, but the bill's sponsors believe the databases need to be supported through a commitment to adequate funding and by encouraging law enforcement and others to submit more information so that the databases are more comprehensive.

The databases are not only important for the use of law enforcement, but for the families and friends of those who go missing who wish to do all they can to find their loved ones. The efforts of private individuals take on particular significance in the cases of missing adults because the federal government has not been involved in assisting state and local law enforcement entities in the same way that it has with missing children cases. Unlike children, adults have the legal right to go missing in most cases, and law enforcement agencies may be hesitant to devote resources to missing adult cases, given competing priorities. Access by private individuals to the relatively new databases maintained by the National Institute of Justice allows them to more fully participate in the search for missing persons of all ages.

The FBI's National Crime Information Center (NCIC) is a computerized index of information concerning crimes and criminals, and it also includes files for missing persons and unidentified persons.

NCIC Missing Persons File: Since 1975, the NCIC has maintained records of missing persons (known as the Missing Persons File) who are reported to the FBI by federal, state, and local law enforcement agencies. Available information about the gender, race, dental records, and other characteristics of the missing individuals are entered into this database.

Current law requires records of missing children under age 18 to be immediately entered into the Missing Persons File, as well as information about missing adults aged 18 through 20 years. Law enforcement agencies are not mandated under federal law to submit missing persons records of adults over the age of 21 into this database.

NCIC Unidentified Persons File: Some individuals who go missing may be deceased, and their remains, intact or not, may be the only available clues concerning their identity and circumstances surrounding their disappearance. Since 1983, the NCIC has also maintained an Unidentified Persons File, which consists of reports of unidentified deceased persons, persons who are living and unable to determine their identity, and unidentified catastrophe victims. Nearly all of the entries in this database are for deceased unidentified bodies, which include information about bodies in various states, ranging from the recently deceased to skeletal remains.

In 2007, the Justice Department's National Institute of Justice (NIJ) established an online repository for information about missing persons and unidentified remains. This system is called "NamUs" and it consists of two databases, one for missing persons and the other for unidentified remains.

The critical difference between the NamUs databases and the NCIC databases is that NCIC information is only available to law enforcement agencies, while NamUs information is available and searchable online by anyone, most notably the families of the missing persons. The public may also contribute information to the NamUs databases.

NamUs Missing Persons Database: This database includes information submitted by law enforcement, but also allows members of the public to submit information (unlike the NCIC databases). Profiles of missing persons may include photographs and information about the circumstances around their disappearance, their dental records, DNA, physical appearance, and police contact information, among other items. This database allows members of the public, law enforcement, coroners, and medical examiners to search the database based on these attributes.

NamUs Unidentified Remains Database: This database allows law enforcement, medical examiners, and coroners to submit information, which includes descriptive information about the remains. The public may not enter information into this database, but they may search the files online (although only law enforcement has access to certain of the information, such as photographs). Website users may search based on factors such as where the remains were found, physical characteristics, dental information, and distinct body features.

The bill would specifically authorize the NamUs databases, which, according to the Department of Justice, would "be an important step forward in growing and sustaining these critical activities." DOJ stated that the bill "would lead to substantial improvements in how information is shared between NCIC and NamUs."

C. Section-by-Section Analysis

Sec. 1. Short Title. This section defines the short title of the bill as "Help Find the Missing Act" or "Billy's Law."

Sec. 2. Findings. This section includes 15 findings related to missing adults, including various statistics.

Sec. 3. Authorization of the National Missing and Unidentified Persons System (NamUs). This section authorizes the Attorney General, through the Director of the National Institute of Justice, to maintain the NamUs databases for missing persons and unidentified remains and requires that the databases continue to operate as it currently does if the bill were enacted. The bill would authorize $2.4 million for each of FY2010 through FY2015 to maintain NamUs.

Sec. 4. Sharing of Information Between NCIC and NamUs. This section requires the Department of Justice (DOJ), within one year of enactment, to facilitate the sharing of information between the FBI's Crime Information Center's (NCIC) Missing Person File and Unidentified Person File with NamUs. The online data entry format must be updated to provide State criminal justice agencies, as well as offices of medical examiners and coroners the option to authorize the submission of new information and data entered into one database to be simultaneously submitted to the other. Within 30 days after the online data entry format is updated, the Department, upon approval of the States, must transmit existing data in NCIC into NamUs, and transmit existing data in NamUs into NCIC. By one year of enactment, the Attorney General, in consultation with the Director of the FBI, and the Criminal Justice Information Services (CJIS) Advisory Policy Board, shall promulgate rules specifying what law enforcement-sensitive or confidential information entered into NCIC may not be shared with NamUs. Amends the National Child Search Assistance Act of 1990 to require reports of missing children (defined currently in law as those individuals under age 21) submitted to the NCIC also be submitted to NamUs. These changes would apply to reports made before, on, or following the last day of the 30-day period in which the Attorney General must update the online data forms for the NCIC and NamUs databases to facilitate information sharing between the databases.

Sec. 5. Incentive Grants. This section establishes, by October 1, 2010, a program within the Department of Justice to provide grants to law enforcement agencies, medical examiners' and coroners' offices, and state criminal justice agencies to facilitate the reporting process of missing adults and unidentified remains to the connected NCIC/NamUs databases. Grantees must report these cases to the connected NCIC/NamUs databases within 72 hours. Not later than 60 days after the original entry of the report, grantees, must, to the greatest extent possible, submit DNA

samples to the National DNA Index System, and provide other information such as dental records or finger prints. Authorizes $10 million for each of the fiscal years 2011 through 2015 to carry out this program.

Sec. 6. Report on Best Practices. This section requires the Attorney General to issue a report within one year after the bill is enacted to offices of medical examiners; offices of coroners; and federal state, local, and tribal law enforcement agencies. The report would describe best practices for collecting, reporting, and analyzing data and information on missing persons and unidentified remains. The best practices would (1) provide an overview of the NCIC and NamUs databases; (2) describe how local law enforcement agencies and offices of medical examiners and coroners should access and use the databases; (3) describe the appropriate and inappropriate uses of the databases; and (4) describe the standards and protocols for collecting, reporting, and analyzing information on missing persons and unidentified remains.

Sec. 7. Report to Congress. This section would require the Attorney General to issue a report within one year after the bill is enacted and biennially thereafter, to the House and Senate Judiciary Committees. The report would describe the status of the databases, including information on the process of sharing between the databases and the programs funded by the incentive grant program.

Sec. 8. Definitions. This section provides definitions for various terms.

III. H.Res. 1031, Impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors

House Resolution 1031 sets forth 4 Articles of Impeachment against Judge G. Thomas Porteous, Eastern District of Louisiana. This Resolution was introduced Thursday, January 21, 2010, and embodies the unanimous recommendations of the Impeachment Task Force. The Resolution was introduced by Mr. Conyers, for himself and Mr. Smith, as well as Task Force Members Mr. Schiff, Mr. Goodatte, Ms. Jackson Lee, Mr. Sensenbrenner, Mr. Delahunt, Mr. Lungren, Mr. Cohen, Mr. Forbes, Mr. Johnson of Georgia, Mr. Gohmert, Mr. Pierluisi, and Mr. Gonzalez.

A. Judge G. Thomas Porteous

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

From 1971 to 1973, G. Thomas Porteous was Special Counsel to the Office of the Louisiana Attorney General. He then served as an Assistant District Attorney from approximately 1973 through 1984. During that time period, Assistant District Attorneys could

also hold outside employment. During some portion of this time, Judge Porteous was a law partner of Jacob J. Amato. Robert Creely also worked at this firm.

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

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

B. Procedural Background

In or about late 1999, the Department of Justice (the Department or DOJ) and the Federal Bureau of Investigation (the FBI) undertook a criminal investigation of Judge Porteous. The criminal investigation continued for several years, and ultimately ended in or about early 2007, without an indictment.[16]

However, in a letter dated May 18, 2007, the Department submitted a formal complaint of judicial misconduct to the Honorable Edith H. Jones, Chief Judge, United States Court of Appeals for the Fifth Circuit. This letter described numerous instances of alleged misconduct by Judge Porteous that potentially related to his fitness as a judge.[17] The alleged misconduct included soliciting and accepting things of value from litigants, attorneys and other interested persons (such as the owners of a bail bond company) with matters before the judge. The misconduct was alleged to have commenced while Judge Porteous was a state judge serving on the 24th Judicial District Court in New Orleans (from 1984 to 1994) and to have continued while

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[16]Among the reasons the Department gave in declining prosecution was that some of the conduct at issue was barred by the statue of limitations, and that some of the demonstrably false statements may not have been "material" as a matter of law. Letter from John C. Keeney, Deputy Assistant Attorney General, U.S. Department of Justice, to Hon. Edith H. Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, Re: Complaint of Judicial Misconduct Concerning the Honorable G. Thomas Porteous, Jr., May 18, 2007 (hereinafter "DOJ Complaint Letter") at 1 (Ex. 4).

The documents that have been obtained have been assigned "HP" [House Porteous] Exhibit Numbers by the Task Force Staff, and the documents are cited as "(Ex. [#])." Facts that are generally undisputed – such as the date Judge Porteous was nominated or confirmed, are not always cited. The testimony cited in this Memorandum consists of the following: 1) testimony of witnesses before the House Impeachment Task Force in one of the four factual hearings, generally cited as "Task Force Hrg. [#]; 2) testimony of the witnesses before the Fifth Circuit Special Investigatory Committee Hearing in October of 1997, cited as "[Witness] SC Hrg. at [page]," or otherwise referencing the speaker if the person quoted is not the sworn witness; 3) testimony of witnesses before the federal grand jury, cited as "[Witness] GJ at [page]"; and 4) deposition testimony taken by Task Force Staff, in the late summer and fall of 2009 or early 2010, cited as "[Witness] Dep. at [ ]."

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

he was a federal district judge. In addition, the Department also set forth information that Judge Porteous, while on the federal bench, allegedly made false statements and engaged in other dishonest conduct in connection with his personal bankruptcy matter (for example, he filed for bankruptcy under a false name).

Upon receipt of the Department's complaint, the Fifth Circuit appointed a Special Investigatory Committee (the Special Committee) to investigate the Department's allegations. A hearing was held October 29 and 30, 2007, at which Judge Porteous, representing himself, testified,[18] cross-examined witnesses, and called witnesses on his own behalf. Thereafter, the Special Committee issued a Report to the Judicial Council of the Fifth Circuit (the "Judicial Council") dated November 20, 2007. The Special Committee's Report concluded that Judge Porteous committed misconduct which "might constitute one or more grounds for impeachment."[19]

On December 20, 2007, by a majority vote, the Judicial Council of the Judicial Conference of the United States accepted and approved the Special Committee's Report, and likewise concluded that Judge Porteous "has engaged in conduct which might constitute one or more grounds for impeachment under Article II of the Constitution."[20]

Thereafter, the Judicial Conference of the United States forwarded to Speaker of the House a Certificate dated June 17, 2008, certifying "that consideration of impeachment of United States District Judge G. Thomas Porteous (E.D. La.) may be warranted."[21] This determination was similarly based on the November 2007 Special Committee's Report. On September 10, 2008, the Judicial Council of the Fifth Circuit issued an "Order and Public Reprimand" taking the maximum disciplinary action allowed by law against Judge Porteous, including ordering that no new cases be assigned to him and suspending his authority to employ staff for two years or "until Congress takes final action on the impeachment proceedings, whichever occurs earlier."[22]

On September 17, 2008, the House of Representatives of the 110th Congress passed House Resolution 1448, which provided, in pertinent part: "Resolved, That the Committee on

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

[19]Report by the Special Investigatory Committee to the Judicial Council of the United States Court of Appeals for the Fifth Circuit, In the Matter of Judge G. Thomas Porteous, Jr. United States District Judge, Eastern District of Louisiana, Dkt. No. 07-05-351-0085 (Nov. 20, 2007) (Ex. 5). A dissent looked at each of his acts individually and concluded, under that analysis, that Judge Porteous's conduct did not warrant impeachment.

[20]Memorandum Order and Certification, In re: Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr. Under the Judicial Conduct and Disability Act of 1980, Judicial Council of the Fifth Circuit, Dkt. No. 07-05-351-0085, at 4 (Dec. 20, 2007) (Ex. 6).

[21]Certificate of the Judicial Conference of the United States, to the Speaker, United States House of Representatives [Re: Determination that Consideration of Impeachment of Judge G. Thomas Porteous may be Warranted], June 17, 2008 (Ex. 7).

[22]Order and Public Reprimand, The Judicial Council of the Fifth Circuit, Dkt. No. 07-05-351-0085 (Sept. 10, 2008) (Ex. 8).

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." H. Res. 1448 (2008). On January 6, 2009, Chairman Conyers introduced House Resolution 15, which continued the authority of House Resolution 1448 of the 110th Congress for this Congress. H. Res. 15 (2009). On January 13, 2009, House Resolution 15 passed the full House by voice vote.

C. Committee and Task Force Actions

On January 22, 2009, the impeachment matter was referred by the Judiciary Committee to a Task Force established to conduct the inquiry.[23] On July 29, 2009, the Judiciary Committee voted to permit the House General Counsel to seek immunity orders to compel the testimony of 8 witnesses.

1. In General

Task Force Staff reviewed materials provided from the Fifth Circuit (which included DOJ materials). Task Force Staff obtained additional documents from DOJ and from other entities, interviewed numerous individuals, and took numerous depositions. The documentary materials, including deposition transcripts, that are pertinent to this Inquiry will be made part of the record at the January 21, 2010 Meeting.

2. Litigation and the Attempts by Judge Porteous to Frustrate the Task Force Inquiry

Judge Porteous has litigated in three different courts to try to preclude the Committee from obtaining critically-needed information in this impeachment inquiry. Moreover, he has sought to disqualify numerous judges from considering his positions in an effort to delay the Committee from obtaining the information. The Committee, represented by Counsel to the Hosue of Representatives, successfully obtained access to the grand jury materials.

In addition to the grand jury litigation, on the eve of the first evidentiary hearing of the Task Force, Judge Porteous filed a lawsuit in the United States District Court for the District of Columbia seeking a permanent injunction preventing the Committee – and by implication the entire Congress – from using or even reading his sworn immunized testimony that had been provided to the Committee by the Judicial Conference, which is presided over by the Chief Justice of the United States. On an emergency basis, he sought a temporary restraining order to enjoin three aides to the Impeachment Task Force – and again by implication, the entire Congress – from using testimony he had provided under a grant of immunity to the Fifth Circuit Special Committee more than two years earlier.[24] On an expedited schedule, the Committee moved to dismiss this motion,[25] and Judge Porteous replied.[26] United States District Judge

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[23] See Reestablishment of the Task Force on Judicial Impeachment: Before the H. Comm. on the Judiciary, 111th Con. (2009) (statement of John Conyers, Jr., Chairman, Committee on the Judiciary) available at http://judiciary.house.gov/hearings/transcripts/transcript090122.pdf at 30-34.

[24] Complaint for Declaratory Judgment and Injunctive Relief, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 12, 2009); Plaintiff G. Thomas Porteous, Jr.'s Motion for a Temporary Restraining Order and Preliminary Injunction, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 12, 2009).

[25] Defendants' Motion to Dismiss, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 13, 2009).

Richard J. Leon of the United States District Court for the District of Columbia denied Judge Porteous's motion for a temporary restraining order after oral argument on November 16, 2009.[27] Per the Court's request, the Committee filed a supplemental memorandum in support of its motion to dismiss.[28] Judge Porteous opposed this motion[29] and the Committee replied. The motion to dismiss is under advisement.

3. Task Force Hearings

The Task Force held four hearings. On November 17, 2009 and November 18, 2009, Attorneys Robert Creely, Jacob Amato, and Joseph Mole testified.

On December 8, 2009, Attorney Claude Lightfoot, FBI Special Agent Dewayne Horner, and United States Chief Bankruptcy Judge for the District of Maryland Duncan Kier testified.

On December 10, 2009, Bail Bondsman Louis I Marcotte, III, and his sister Lori Marcotte testified.

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

On December 15, 2009, Professors Akhil Reed Amar, Charles Geyh, and Michael Gerhardt testified.

On January 21, 2010, the Task Force held a meeting to consider impeachment articles, and by a unanimous vote (8-0, with four Members not present), voted to recommend to the Full Committee four Articles of Impeachment. On that same date, H. Res. 1031 was introduced, containing the four recommended articles.

D. The Facts

The factual basis for the Articles is set forth in materials that have been separately distributed in advance of the markup.

E. A Brief Discussion of Impeachment

1. Pertinent Constitutional Provisions

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[26] Judge G. Thomas Porteous, Jr.'s Reply Memorandum to Defendants' Opposition to his Motion for a Temporary Restraining Order and a Preliminary Injunction, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 14, 2009).
[27] Bench Order, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Nov. 16, 2009) (denying motion for a temporary restraining order).
[28] Defendants' Supplemental Memorandum in Support of Motion to Dismiss, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Dec. 18, 2009).
[29] Judge G. Thomas Porteous, Jr.'s Memorandum in Opposition to Defendants' Motion to Dismiss, *Porteous v. Baron*, Case No. 1:09-cv-2131 (D.D.C. Jan. 8, 2010).

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

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

In this regard, it has long been recognized that federal judges are "civil Officers" within the meaning of Article II, Section 4.[30] Finally, as to the life tenure of federal judges, the Constitution provides:

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[30]A commentator wrote in 1825:

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

Article III, § 1:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, ...

2. The Meaning of "High Crimes and Misdemeanors"[31]

There have been a number judicial impeachment proceedings during our Nation's history. The precedents from these prior judicial impeachments as to the meaning of the phrase "high crimes and misdemeanors" is highly instructive.

The Report accompanying the 1989 Resolution to Impeach United States District Court Judge Walter L. Nixon summarized the British precedents for impeachment, the events at the Constitutional convention leading to the adoption of the "high crimes and misdemeanors" formulation for impeachable conduct, and the interpretation of that term in the 12 judicial impeachments that had occurred prior to1989. In its summary of the historical meaning of the term, the Report noted:

> The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined "other high Crimes and misdemeanors" to be serious violation of the public trust, not necessarily indictable offenses under criminal laws. Of course, in some circumstances the conduct at issue, such as that of Judge Nixon, constituted conduct warranting both punishment under the criminal laws and impeachment.[32]

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

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

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

[31]This discussion in this Section tracks closely the language used in H.R. Rep. No.111-159, *Impeachment of Judge Samuel B. Kent, Report of the Committee of the Judiciary to Accompany H. Res. 520*, 111th Cong., 1st Sess. (2009) [hereinafter "Kent Impeachment Report"] at 5-6.

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

That Report concluded:

> Thus, from an historical perspective the question of what conduct by a federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge's conduct calls into questions his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.[33]

The Impeachment Report that accompanied the Alcee Hastings impeachment resolution stated that the phrase "high crimes and misdemeanors" "refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal misconduct."[34] That Report stressed that impeachment is "non-criminal," designed not to impose criminal penalties, but instead simply to remove the offender from office,[35] and that it is "the ultimate means of preserving our constitutional form of government from the depredations of those in high office who abuse or violate the public trust."[36] The fact that the individual who is impeached and removed from office "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law," makes it further clear that impeachment is simply a remedial provision, not a punitive one.[37]

3. Discussion of pre-Federal Bench Conduct, and Conduct that Is not Committed in the Judge's Official Capacity, as Bases for Impeachment

The facts associated with this impeachment inquiry involve conduct that occurred prior to when Judge Porteous became a federal judge, as well as conduct that Judge Porteous committed arguably in a "personal" rather than a judicial capacity while he was a federal judge. These areas of conduct are discussed at greater detail in the "Article by Article" Section of this memorandum. Nonetheless, the following general comments as to the potential significance of Judge Porteous's pre-federal bench conduct are in order.

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[33]Id. at 12.

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

[35]Hastings Impeachment Report at 7.

[36]Id. at 7. The last four judicial impeachments – those of Judge Samuel B. Kent, Judge Walter L. Nixon, Judge Alcee Hastings, and Judge Harry Claiborne – followed federal criminal proceedings, and the impeachment articles were to a great extent patterned after the federal criminal charges. However, the principles that underpin the propriety of impeachment do not require that the conduct at issue be criminal in nature, or that there have been a criminal prosecution.

[37]U.S. Constitution, Article I, Section III, cl 7.

The Constitutional standard of "Treason, Bribery, or other high Crimes and Misdemeanors" defines the types of conduct for which impeachment is warranted, it does not speak to when that conduct must be committed, and, perforce, does not restrict Congress from considering only conduct that occurs when the individual occupies the federal office that is the subject of the impeachment. Indeed, such a limitation would make little sense if it were demonstrated that the federal judge, for example, committed treason or bribery (or an even more heinous offense) prior to becoming a federal judge, or other "high crimes and Misdemeanors" that, in the view of Congress, bears on fitness for office. This is particularly the case if the conduct – be it bribery, treason or other "high crimes and misdemeanors" – were not known to the Senate at the time of the individual's confirmation to the federal office and if the individual took affirmative steps to conceal the information from the Senate.

Thus, as a practical mater, the factors that go into a determination by the House and Senate as to whether pre-federal bench conduct justifies impeachment are really no different from the determination whether post-federal bench conduct justifies impeachment. Such a determination requires a consideration of the nature of the conduct at issue and whether that conduct is of the sort that renders the individual unfit to hold his position – for example, because it demonstrates the individual is not fit for the position of trust or otherwise because the conduct is so shameful that it brings disrepute upon the judiciary for that individual to continue to have the powers and position of a federal judge. In making such a determination, evidence that an individual committed misconduct in the nature of "bribery" while occupying the position as a state judge, close in time to being appointed to the federal bench, may more clearly demonstrate that individual's unfitness for office than other misconduct in a purely personal capacity at a time-frame remote from the judicial appointment.

F. Article by Article Analysis of the Proposed Articles

1. In General

In connection with the impeachment of one Federal Judge George W. English in 1926, the House Committee on the Judiciary noted: "Each case of impeachment must necessarily stand upon its own facts. It can not, therefore, become a precedent or be on all fours with every other case."[38] That observation is particularly true in regard to Judge Porteous, who has committed misconduct in several spheres of activity over many years. As one scholar noted, the lack of factual precedents directly on point "has to do with more the nature of Judge Porteous's misconduct than with anything else. The facts is that we are discovering or finding in this case a pattern of misbehavior that extends over such a long period of time that is virtually unique in the annals of impeachment."[39] Nonetheless, a review of prior judicial impeachments reveals that the

[38]"Impeachment of Judge George W. English," excerpts from Cong. Rec. (House), Mar. 25, 1926 (6283-87), *reprinted in* "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) at 163.
[39]*Hearing to Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr,. Part IV: Hearing Before the Task Force on Judicial Impeachment of the House Comm. on the Judiciary,* 111th Cong. ___ (Dec. 15, 2009) [hereinafter TF Hrg, (IV)"] (statement of Prof. Michael J. Gerhardt, University of North Carolina).

Articles against Judge Porteous are consistent with impeachment precedent and standard understandings of Constitutional law.

2. Discussion of the Articles

a. Article I

Article I sets forth Judge Porteous's conduct in the course of presiding over the Liljeberg case, including his failure to recuse himself despite close personal and financial relationships with attorneys for the Liljebergs (in particular, his prior financial relationship with Amato and Amato's partner Creely); making false and deceptive statements at the recusal hearing to conceal his relationship and otherwise failing to disclose his prior financial relationship; and continuing to solicit and accept things of value from the attorneys in that case, including cash. Though it will be necessary to prove at trial certain conduct by Judge Porteous when he was a state court judge – involving his assignment of curatorships and receipt of a portion of the fees – as a predicate to proving Judge Porteous's misconduct in connection with his handling the recusal motion, Article I alleges only Federal bench conduct as grounds for impeachment.

The sort of conduct alleged in Article I – financial entanglements with persons having business before the court – is consistent with conduct that has previously formed the basis of articles of impeachment. In 1912, the House voted articles of impeachment against Circuit Judge Robert W. Archbald alleging numerous incidents of improper financial involvement with attorneys and parties. Articles 7 through 9 described complicated relationships through which Judge Archbald obtained money from counsels for parties with cases in front of him when he was a district court judge. Article 10 charged that as a district court judge, Judge Archbald received money from an individual who was an officer and director of major railroad corporations "which in the due course of business was liable to be interested in litigation pending in the said court over which [Archbald] presided as a judge." That Article further charged that Judge Archbald's acceptance of the money was thus "improper and had a tendency to and did bring his said office of district judge into disrepute." Article 11 charged that Judge Archbald did "wrongfully accept and receive" money that was "contributed to [him] by various attorneys who were practitioners in the said court presided over by [Judge Archbald]."[40]

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

Articles 1 though 6 against Judge Archbald described complicated financial schemes whereby, while he was a judge of the Commerce Court, Judge Archbald enriched himself through financial dealings with companies and attorneys with cases before the Court. For example, Article 1 alleged that judge Archbald sought to purchase property from a coal company, which in turn was owned by Erie Railroad Co., a company with a case in front of the Commerce Court, and that Archbald "willfully, unlawfully, and corruptly took advantage of his official position as such judge to induce and influence the officials of [Erie and its subsidiary] to enter into a contract with him [and his partner] for profit to themself ... ." Article 3 alleged that Archbald "unlawfully and corruptly did use his official position and influence" as a Commerce Court judge to secure a lease agreement from a coal company, which in turn

Similarly, in 1936, the House voted articles of impeachment against Judge Halsted L. Ritter.[41] In particular, Article I of the Ritter Articles set forth financial dealings between Judge

Ritter and his prior law partner in which Judge Ritter corruptly received $4,500 from that individual after he had been paid a $75,000 as a receiver, a position that he had been appointed to by Ritter. This fee had been originally set at $15,000 by another judge, but Judge Ritter had increased it.[42]

b. Article II

Article II describes Judge Porteous's corrupt relationship with Louis Marcotte and Lori Marcotte, spanning from the late 1980s-early 1990s through Judge Porteous's tenure as a federal judge and into approximately 2004. This article alleges what is in substance a bribery scheme, whereby Judge Porteous solicited and accepted things of value from the Marcottes, and, in return, Judge Porteous took numerous actions to assist the Marcottes, both as a state judge and a federal judge. This type of conduct is specifically mentioned in the Constitution as a grounds for impeachment – that is as "Treason, Bribery, or other high Crimes and Misdemeanors."

Some of the conduct alleged to constitute a basis for impeachment in Article II occurred prior to Judge Porteous taking the federal bench. This is consistent with the impeachment of Judge Archbald, and is supported by the facts of this case and a common-sense interpretation of the Constitution and Congress's impeachment power.

Pre-Federal Bench Conduct – The Archbald Impeachment

Judge Robert W. Archbald was a District Court Judge in the Middle District of Pennsylvania from March 29, 1901 through January 31, 1911, at which point he was appointed

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was owned by a railroad company with a lawsuit then pending in front of the Commerce Court. Article 5 alleged that Judge Archbald intervened in a dispute between an individual and a railroad, and thereafter "wilfully, unlawfully, and corruptly did accept as a gift, reward, or present from [the individual], tendered in consideration of favors shown him by [Archbald] in his efforts to secure a settlement and agreement with the railroad ... and for other favors shown ... a certain promissory note for $500... ." Id. at 177 (Article 1), 178 (Article 3), and 179-180 (Article 5). Archbald was ultimately convicted in the Senate of 5 of the 13 articles, Articles 1, 3, 4, and 5 involving circuit court conduct, and Article 13, a "catch-all" article involving both district court and commerce court conduct. VI Cannon's Precedents of the House of Representatives, §512, p. 707.

[41]"Impeachment of Judge Halsted L. Ritter," H Res. 422, 74th Cong., 2d Sess. (March 2, 1936) and "Amendments to Articles of Impeachment Against Halsted L. Ritter," H. Res. 471, 74th Cong., 2d Sess. (March 30, 1936), *reprinted in* "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) at 188-197 (H. Res 422), 198-202 (H. Res. 471).

[42]*Impeachment of Judge Halsted L. Ritter*, H Res. 422, 74th Cong., 2d Sess. (March 2, 1936), *reprinted in* "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) at 188-189. Judge Ritter's conduct is similar in material aspects to Judge Porteous's arrangement with attorneys whereby they provided him a portion of the curatorship fees. Judge Ritter was acquitted of that Article in the Senate, however it is not possible to determine the basis for the verdict – whether it was for failure of proof or because of some other reason. In any event, Judge Ritter was convicted of a different Article – Article 7 – which re-alleged the $4,500 cash payment from his former partner.

to the Circuit Court for the Third Circuit. While on the Circuit Court, he also sat on the United States Commerce Court.[43]

In 1912 – while he was a circuit court judge – the House voted articles of impeachment against Judge Archbald, alleging improper conduct both as a circuit judge (sitting on the Commerce Court) (Articles 1 through 6) and in his prior position as a district judge (Articles 7 through 12). Article 13 set forth a "catch-all" article alleging, in essence, a course of conduct encompassing the numerous schemes spanning his service both as a district judge and as a circuit judge sitting on the Commerce Court. Article 13 alleged that:

> [D]uring 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, ... at divers [sic] times and places, has sought wrongfully to obtain credit from and through certain persons who were interested in the result of suits then pending and suits that had been pending in the court over which he presided as judge of the district court, and in suits pending in the United States Commerce Court, of which the said Robert W. Archbald is a Member." [44]

The Report that accompanied the Articles specifically addressed the fact that some of the Articles were based on conduct that occurred prior to Judge Archbald being appointed to the Circuit Court (from which removal was sought). In the section of the Report entitled "Impeachment for Offenses Committed in Another Judicial Office," the Report stated:

> It is indeed anomalous if the Congress is powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments.[45]

Applying this reasoning to the situation of Judge Porteous, it would be just as "anomalous" if Congress were "powerless to remove a corrupt or unfit Federal judge from office because his corruption or misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other [state] judicial office."[46] Moreover, Article II against Judge

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

[44]*Impeachment of Robert W. Archbald*, excerpts from Cong. Rec. (House) July 8, 1912 (8705-08), *reprinted in* "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) at 182 (emphasis added).

[45]*Impeachment of Robert W. Archbald*, excerpts from the Congressional Record (House) July 8, 1912 (8705-08), reprinted in "Impeachment, Selected Materials," House Committee on the Judiciary," House Committee Print, 93d Cong., 1st Sess. (Oct. 1973) at 175.

[46]Id.

Porteous, like Article 13 against Judge Archbald (of which he was convicted), alleges a single scheme, encompassing conduct that occurred both in his current and former judicial offices. Finally, for reasons discussed below in considering the views of Constitutional scholars, there is no basis in reason or in the Constitution for the House or Senate to take a "narrow" or "technical" view of their Constitutional powers that would, in effect, immunize a federal official from impeachment for even the most egregious conduct.

Further, the Archbald Report stressed that the prior office in which Archbald committed impeachable conduct (district court judge) was similar to the office from which Archbald was then holding and from which he was then being impeached (circuit court judge). The Archbald Report noted that certain state court precedent supported impeachment of a public official for misconduct that occurred in a prior term of office.

> Even though the offices held by the defendant at the time of their impeachment had not been the same offices which they held at the time of the commission of the alleged offenses, it might well have been decided, on principle, that impeachment would lie if in fact the prescribed functions of such offices were of the same general nature and susceptible to the same malversations and abuse.[47]

Again, with Judge Porteous, the "prescribed functions" of his prior office as state court judge were "of the same general nature" as the district court judgeship that he presently occupies and for which impeachment is sought, and thus "susceptible to the same malversations and abuse."

Pre-Federal Bench Conduct – Views of Constitutional Scholars

In addition, there is broad support among scholars that certain pre-Federal bench conduct – especially of the sort that was committed while Judge Porteous held a similar state position – may properly constitute a basis for impeachment. As noted impeachment expert Professor Michael Gerhardt testified: though the Constitution describes in Article II certain types of conduct for which impeachment is warranted ("Treason, Bribery, or other high Crimes and Misdemeanors), "it does not say *when* the misconduct must have been committed,"[48] and certainly does not command that such conduct occur during the tenure of the federal office from which impeachment is sought. Rather, "[t]he critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgement that are required in order for him to continue to function" as a Federal judge.[49]

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[47]*Impeachment of Robert W. Archbald*, excerpts from Cong. Rec. (House) July 8, 1912 (8705-08), reprinted in "Impeachment, Selected Materials," House Committee on the Judiciary," House Committee Print, 93d Cong., 1st Sess. (Oct. 1973) at 175.

[48]Task Force Hrg. (IV) at ___ (statement of Prof. Michael J. Gerhardt, University of North Carolina) (emphasis in original).

[49]Task Force Hrg. (IV) at ___ (statement of Prof. Michael J. Gerhardt, University of North Carolina).

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

> Say, for instance, that the offence was murder – it is as serious a crime as we have, and its commission by a judge completely undermines both his integrity and moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern that the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process.[50]

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

> Let's take bribery. Imagine now a person who bribes his very way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can't immunize the briber from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place. [51]

In light of the Judge Archbald precedent, in which a circuit court judge was impeached by the House for judicial conduct that occurred prior to his becoming a circuit judge, and in which the Report specifically recognized it would be "anomalous" if Congress was constrained from doing just that; in light of the fact that the conduct alleged in Article II is a form of bribery and is thus specifically contemplated in the Constitution as a basis for impeachment; in light of the fact that Judge Porteous's pre-Federal bench conduct alleged in Article II occurred in a judicial capacity immediately proximate in time to his appointment as a Federal judge and, indeed, spanned both his state court and Federal court appointments; in light of the plain reading of the Constitution that sets forth no limitation as to when impeachable conduct must occur; and finally, in consideration of what are, at bottom, commonsense and persuasive views of leading Constitutional scholars as to the propriety of considering pre-Federal bench conduct as a basis for impeachment, the Committee is convinced that Judge Porteous's conduct alleged in Article II – conduct, which, when committed by others similarly situated, resulted in felony convictions and prison sentences – warrants his impeachment.

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[50]Task Force Hrg. (IV) at ___ (statement of Prof. Michael J. Gerhardt, University of North Carolina). This particular example is used to illustrate the principle that pre-Federal bench conduct may justify impeachment; it is not intended to suggest that such conduct must be comparable to homicide. Rather, "[f]rom there you simply have to ask yourself whether the conduct as a State judge is sufficiently egregious to rise to an impeachable standard." Id. at ___ (statement of Prof. Charles Geyh, University of Indiana).

[51]Task Force Hrg. (IV) at ___ (statement of Prof. Akhil Reed Amar, Yale University).

c. Article III

Article III alleges that Judge Porteous committed a fraud on the confirmation process by misstatements to the FBI and on his Senate Judiciary Committee Questionnaire in response to questions as to whether there was anything in his past that could be used blackmail or coerce him. Judge Porteous answered "no" to such inquiries, notwithstanding his improper relationships with certain attorneys and with the Marcottes.

For reasons set forth in the above discussion of Article II, it is appropriate to consider pre-Federal bench conduct as a basis to impeach. Even though this conduct was not in Judge Porteous's capacity as a state judge, and did not carry over when he took the Federal bench, it had particularly aggravating features. As Professor Akhil Reed Amar testified to the Task Force, after stating why pre-Federal bench "bribery" would constitute impeachable conduct:

> Now what is true of bribery is equally true of fraud. A person who procures a judgeship by lying to the President and lying to the Senate has wrongly obtained his office by fraud and is surely removable via impeachment for that fraud.[52]

Professor Gerhardt agreed that "lying to or defrauding the Senate in order to be approved as a Federal judge "is likely to justify impeachment." First of all, that conduct is itself serious as a stand-alone matter in that it "plainly erodes the essential, indispensable integrity without which a federal judge is unable to do his job."[53] Professor Gerhardt noted, however, that in the case of Judge Porteous, it is not necessary to determine whether the false statements themselves demonstrated his unfitness.

> For, by defrauding the Senate in his confirmation proceedings, Judge Porteous has engaged in misconduct that is egregious and has a more than obvious connection to his present position. The nexus is that Judge Porteous deprived the Senate of information that would undoubtedly have changed the outcome in his confirmation hearing. His failure to disclose is nothing less than an attack on the integrity of the confirmation process and an affront to the constitutional responsibilities of the President and the Senate.[54]

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Even though the questions at issue as part of the background check may have been broad and the denials sweeping, they are sufficiently precise for purposes of concluding that the false answers were knowing, intentional, and warrant impeachment.

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[52]Task Force Hrg. (IV) at ___ (statement of Prof. Akhil Reed Amar, Yale University).
[53]Task Force Hrg. (IV) at ___ (statement of Prof. Michael J. Gerhardt, University of North Carolina).
[54]Task Force Hrg. (IV) at ___ (statement of Prof. Michael J. Gerhardt, University of North Carolina).

> [E]veryone knows what is actually at the core of the question[s]. Are you an honest person? Are you a person of integrity? Do you have the requisites to hold a position of honor, trust, and profit? Do you have judicial integrity? That is at the core of all these questions. That is not at the periphery.
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> And what he lied about was his gross misconduct as a judge: taking money from parties, taking money in cash envelopes, not reporting any of this to anyone. ...
>
> [W]e know what those questions at their core [were] about, and he lied at the core. There is vagueness at the periphery, but this was really central.[55]

d. Article IV

Article IV alleges that Judge Porteous committed numerous acts of misconduct in handling is personal bankruptcy, including making false material statements under oath and otherwise violating court orders. This Article is analogous to the tax evasion, perjury, and obstruction of justice bases of impeachment set forth in the impeachments of Judge Harry E. Claiborne, Judge Walter Nixon and Judge Samuel B. Kent.

In the case of Judge Harry E. Claiborne, a United States District Judge for the District of Nevada, the House voted four Articles of Impeachment. Articles I and II each alleged that Judge Claiborne:

> did willfully and knowing make and subscribe a United States Individual Income Tax Return for [calendars years 1979 and 1980 respectively], which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue, Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of [$80,227.04 and $54,251 respectively] where, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return [in violation of law].

Each Article further alleged that because of such conduct, Judge Claiborne "was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office."

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[55]Task Force Hrg. (IV) at ___ (statement of Prof. Akhil Reed Amar, Yale University). Professor Amar further noted that these questions did not constitute some sort of "trap" for the unwary: "All he has to do is say, ['I do not wish to be considered for this position.']" Id. at __.

In the impeachment of District Court Judge Walter L. Nixon, Jr., the first two Articles each alleged, in substance, discrete incidents of perjury before the Grand Jury, namely, that "[i]n the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make material false or misleading statement to the grand jury." Each Article summarized the substance of the alleged perjurious statement. Article I, for example, alleged that "[t]he false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon." Each Article concluded: "Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office."[56]

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

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Article IV against Judge Porteous is consistent with these Articles from the above-referenced impeachments. As with the Judge Claiborne impeachment, Article IV against Judge Porteous charges that he filled out forms related to his own personal financial situation under penalties of perjury, on which he concealed material facts as to his financial affairs. And, as with the perjury and acts of obstruction alleged in the Judge Walter Nixon and Judge Kent impeachments, Judge Porteous's violations of a court order (just as violations of an oath to tell the truth) occurred in the context of a federal judicial proceeding and demonstrated a disregard of, and contempt for, the authority of the supervising federal court.[57]

e. "Bringing Disrepute to the Judiciary" Allegations

Several of the prior impeachments have include an article charging that the judge, by his conduct, harmed the judicial system by bringing it into disrepute. Such a harm to the judicial system constitutes a separate and discrete, and indeed profound, injury that constitutes a high crime or misdemeanor in its own right and may warrant impeachment. When Judge Porteous denies a recusal motion and it is later revealed he had financial entanglements with certain of the attorneys, not only does he harm one of the parties seeking a fair trial (Lifemark), but he harms the judicial system as a whole by inviting cynicism as to its fairness and by suggesting to the public at large that in order to prevail at trial it may be necessary for a party or attorney to have paid the judge or taken him to lunch or on a trip.[58]

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[56]H.R. Rep. No. 99-688, *Impeachment of Judge Harry E. Claiborne, Report of the Committee on the Judiciary to Accompany H. Res. 461*, 99th Cong., 2d Sess. 1-2 (1986) [hereinafter "Claiborne Impeachment Report"].

[57]One Professor noted that the violation of the bankruptcy laws "reflects a level of disdain for the law that I think is just simply incompatible with being a Federal judge." Task Force Hrg. (IV) at ___ (statement of Prof. Michael J. Gerhardt, University of North Carolina).

[58]One of the Articles against Judge Harold Louderback accused him of partiality so as "to excite fear and distrust and to inspire a widespread belief in and beyond said norther district of California that causes were not decided in said court according to their merits, but were decided with partiality and prejudice and favoritism to certain

G. The Department of Justice's Decision Not to Prosecute Judge Porteous

As noted at the outset, the Department of Justice decided not to criminally prosecute Judge Porteous. Several observations are in order.

First, the nature of Congress's determination whether to impeach is fundamentally different than the Department of Justice's decision whether to prosecute. Congress does not decide guilt or innocence with reference to a criminal statute. Rather, it is for Congress to make what is in essence a "fitness for office" determination. Congress alone has the power to remove an unfit federal judge, and conduct that renders a judge unfit may not be criminal, just as all conduct by a judge that may be criminal may not render him unfit to continue on the bench.

Second, Congress has an independent responsibility to review the evidence, and cannot rely on the Department's assessment of what the evidence reveals. Thus, just as the House heard the evidence involving Judge Samuel B. Kent (and before that of Judges Walter Nixon and Judge Robert Collins) and did not rely on the mere fact of those judges' federal criminal convictions, so it is proper for Congress to itself consider and review the evidence that relates to the conduct of Judge Porteous, even though some of that evidence (but not all) was considered by the Department of Justice.

Third, even though aspects of the Judge Porteous's conduct may appear to support a criminal prosecution, the Department faced numerous practical obstacles that would necessarily have impacted its considerations as to whether prosecution was in order. One problem in particular involved the statute of limitations – an issue in criminal prosecutions but not for impeachment. Some of the most corrupt conduct – that involving Judge Porteous's relationship with a bail bondsman while a state judge – was time-barred by the statute of limitations and could not have been prosecuted, no matter how strong the evidence. As a result, though Judge Porteous's conduct appears to have been comparable in pertinent respects to that of the two Louisiana state judges and other state law enforcement employees who were convicted of federal crimes as a result of having received things of value from the Marcottes, most – but not all – of Judge Porteous's actions in the nature of receiving things of value from the Marcottes could not have been the subject of a prosecution as such a prosecution was barred by the running of the statute of limitations. Similarly, Judge Porteous's scheme with attorney Robert Creely involving the Judge's assigning Creely "curatorships" and then receiving back from Creely the fees

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individuals ... all of which is prejudicial to the dignity of the judiciary." H. Res. 403 (1933), *Articles of Impeachment Against Harold Louderback, reprinted in* "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) at 185. This same language was used in the articles of impeachment against Judge George W. English, which accused him of conduct so as to "excite fear and distrust and to inspire a widespread belief ... that causes were not decided in said court according to their merits but were decided with partiality and with prejudice and favoritism to certain individuals ... ." *Impeachment of Judge George W. English*, excerpts from Cong. Rec. (House), Mar. 25, 1926 (6283-87), *reprinted in* "Impeachment, Selected Materials, House Comm. on the Judiciary," Comm. Print (1973) at 163. Numerous of the judicial impeachments, including those of Judges Claiborne, Nixon and Ritter, have thus included a "summary" article that recites the essential facts which had been set forth in discrete articles, and alleged that by virtue of that conduct the judge has brought such disrepute to the federal courts that the judge should be impeached.

received by Creely for the curatorships could not have been the subject of a prosecution, even if deemed criminal, because such a prosecution would have been barred by the statutes of limitations. Nonetheless, this conduct, even if it cannot be proven in a federal court to support a federal criminal prosecution, may be profoundly relevant to a congressional determination as to whether he should be a federal judge, and profoundly relevant to the ethical issues associated with Judge Porteous's handling of the Liljeberg case.

Fourth, another problem facing the Department was the Federal Rules of Criminal Procedure as they related to joinder of offenses, as well as other rules of evidence that would have impacted the Department's ability to demonstrate before a jury the complete picture of Judge Porteous's conduct. That conduct consists of a stream of dishonest and unethical acts as a federal judge, all stemming from profound financial problems (which in turn were based on gambling), involving relationships with different individuals, consisting of different types of conduct, in different spheres of activity (state court, federal court, bankruptcy courts, financial disclosure forms). The Department would not have been able to bring all these areas of conduct before a single jury or fact-finder. For example, a bankruptcy fraud charge could not necessarily be brought in the same proceeding as a corruption charge; charges stemming from what appears to involve kickbacks in state court cannot be joined in a single trial with false financial disclosures on federal forms; the evidence of the curatorship scheme would not have been admissible in a false statements charge relating to the financial disclosure forms.

Fifth, the Impeachment Task Force Staff has interviewed new witnesses and uncovered new evidence that simply was not considered by the Department. A "fitness for office" inquiry is necessarily broader than an inquiry into whether specific conduct occurred that amounts to a crime. Thus, the Task Force Staff has interviewed and obtained testimony from persons associated with certain conduct that was time-barred for criminal prosecution, but certainly bears on fitness for office; it obtained evidence of trips received from the oil rig companies that were defendants before Judge Porteous and where such trips were not disclosed to the opposing parties; it obtained depositions from Louis Marcotte, Lori Marcotte, their employees and associates relating to their relationship with Judge Porteous – testimony that had not been obtained by the Department; it obtained the curatorship records that corroborate and suggest the scale of the financial relationship with Creely and Amato that was not otherwise developed by the Department of Justice; it obtained the recusal hearing transcript in connection with the Lifemark's recusal motion in the Liljeberg case; and, finally, the Task Force had the benefit of the Fifth Circuit hearings, which expanded on the evidence available to the Department.

IV. H.R. 4506, the "Bankruptcy Judgeships Act of 2010"

H.R. 4506, the "Bankruptcy Judgeship Act of 2010," authorizes the creation of 13 new permanent bankruptcy judgeships, the conversion of 22 temporary judgeships to permanent judgeships, and the extension of 2 temporary judgeships for another 5 years. The bill also raises the filing fees for debtors filing Chapter 7 or Chapter 13 cases by $1 and for those filing Chapter 11 cases by $42 to satisfy the "pay-go" offset requirement. The bill reflects the bankruptcy

judgeship recommendations of the Judicial Conference of the United States ("Judicial Conference.")

A. Background on Bankruptcy Courts and Judges

Bankruptcy courts are not independent components of the federal judiciary but, rather, derive their power from jurisdiction that Congress has conferred upon federal district courts and, therefore, function as units of the district court.59 Unlike federal district or circuit judges or Supreme Court justices, bankruptcy judges are not appointed pursuant to Article III of the Constitution and, therefore, lack the life tenure and salary protections that Article III judges enjoy.60 Instead, bankruptcy judges are appointed for 14-year terms by the Court of Appeals for each circuit and serve as judicial officers of the district court.61 Bankruptcy judges receive compensation that is equal to 92 percent of the salary of a district judge.62 Bankruptcy judges are also authorized to hire law clerks and other assistants.63 Bankruptcy judges may be reappointed upon the expiration of their terms.64 Bankruptcy judges can be removed prior to the expiration of their terms only for incompetence, misconduct, or disability and only by the judicial council of the circuit in which the judge's official duty station is located.65 A bankruptcy judgeship can be authorized on either a permanent or temporary basis.[66]

The scope of issues that a bankruptcy judge must address can be somewhat broad. Jurisdiction over bankruptcy matters is conferred on the federal district courts by 28 U.S.C. § 1334, while 28 U.S.C. § 157 provides for the referral of bankruptcy matters from district courts to bankruptcy courts. With respect to the bankruptcy case (i.e., the petition and its adjudication) and proceedings "arising under" the Bankruptcy Code or "arising in" a bankruptcy case, bankruptcy judges can issue final determinations and the role of the district court is limited to

[59]28 U.S.C. § 151 (2007).

[60]U.S. CONST., art. III, § 1.

[61]28 U.S.C. § 152(a)(1) (2007).

[62]28 U.S.C. § 153 (2007).

[63]28 U.S.C. § 156 (2007).

[64]28 U.S.C. § 152(a)(1) (2007).

[65]28 U.S.C. § 152(e) (2007).

[66]*See* 28 U.S.C. § 152 hist. nn. (2007) (noting temporary bankruptcy judgeships). All bankruptcy judges are appointed for 14-year terms. "Temporary judgeships" refer to offices of bankruptcy judges that are authorized on a temporary basis (usually five years). During those five years, any vacancy in that office can be filled. After that five-year period lapses, the first vacancy in the office cannot be filled unless Congress extends the temporary authorization or converts the temporary authorization to a permanent one. *Bankruptcy Judgeship Needs: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Judge Barbara M.G. Lynn, Chair, Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States).

appellate review.67 With respect to matters that are "related to" a bankruptcy case, bankruptcy judges can issue recommendations, but only the district court can enter a final order or judgement.68

B. Judicial Conference Recommendations

Pursuant to 28 U.S.C. § 152(b)(2), the Judicial Conference is required periodically to submit to Congress recommendations regarding the number of bankruptcy judges needed and to identify in which districts they are needed.69 On February 9, 2009, the Judicial Conference transmitted recommendations concerning additional bankruptcy judgeships to the Chairman and Ranking Member of the House Judiciary Committee and to the Majority and Minority Leaders of the House of Representatives.70

In testimony before the Subcommittee on Commercial and Administrative Law ("CAL") in her capacity as Chair of the Judicial Conference's Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), U.S. District Judge Barbara Lynn stated that the need for additional bankruptcy judgeships is "critical, with filings increasing to near-record levels and the bankruptcy courts in peril of losing many of their judicial resources."[71] Similarly, the Judicial Conference asserted in its submission to the Committee that its proposal is "essential to the efficient functioning of the bankruptcy court system," noting that bankruptcy "case filings are increasing dramatically in the current state of our economy."[72]

In addition to the growing number of case filings, Judge Lynn also noted that bankruptcy courts "now face bankruptcy cases that are more complex and time consuming than anything previously handled. Cases such as Chrysler, Circuit City, and other national and international corporate reorganizations consume a tremendous amount of a bankruptcy court's time."[73]

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[67]28 U.S.C. §§ 157(b)(1), 158 (2007).

[68]28 U.S.C. § 157(c)(1) (2007). Parties, however, may consent to allow the bankruptcy court to make a final disposition of these matters. 28 U.S.C. § 157(c)(2).

[69]28 U.S.C. § 152(b)(2) (2007).

[70]Letter from James C. Huff, Secretary of the Judicial Conference of the United States, to the Hon. John Conyers, Jr., Chairman of the H. Comm. on the Judiciary (February 9, 2009) (on file with Subcommittee.)

[71]*Bankruptcy Judgeship Needs: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Judge Barbara M.G. Lynn, Chair, Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States).

[72]Letter from James C. Huff, Secretary of the Judicial Conference of the United States, to the Hon. John Conyers, Jr., Chairman of the H. Comm. on the Judiciary (February 9, 2009) (on file with Subcommittee.)

[73]*Bankruptcy Judgeship Needs: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Judge Barbara M.G. Lynn, Chair, Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States).

Bankruptcy judgeships were last authorized in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and Congress authorized those judgeships on a temporary basis.[74] These judgeships are set to expire soon.[75]

1. Methodology

The recommendations are the result of a process established by the Bankruptcy Committee.76 The process begins with a survey of all the federal judicial circuits in order to evaluate bankruptcy judgeship needs and then, applying several factors to determine the workload in a given district, formulates recommendations to Congress.

a. Survey

The Judicial Conference conducts a survey of all the federal judicial circuits to consider whether a particular circuit needs to add new bankruptcy judgeships, convert existing temporary judgeships to permanent status, or extend the terms of existing temporary judgeships. This survey process consists of five steps: (1) each bankruptcy court seeking additional judgeships or conversions or extensions of existing temporary judgeships submits its request to the district court, which then forwards the request to the circuit court; alternatively, the district court may submit a judgeship request to the circuit court on its own; (2) the circuit's judicial council considers the request and approves, disapproves, or modifies it and then, if it approves the request or approves it with modification, submits it to the Judicial Conference's Bankruptcy Committee and its Subcommittee on Judgeships; (3) the Subcommittee on Judgeships reviews the circuits' requests, conducts on-site evaluations, and submits its findings and recommendations to the Bankruptcy Committee; (4) the Bankruptcy Committee considers the Subcommittee's findings and makes recommendations to the Judicial Conference; and (5) the Judicial Conference submits its recommendations to Congress.77

b. Workload determinations

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[74]28 U.S.C. § 152, hist. n. (2007); *Bankruptcy Judgeship Needs: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Judge Barbara M.G. Lynn, Chair, Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States).

[75]*Bankruptcy Judgeship Needs: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Judge Barbara M.G. Lynn, Chair, Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States).

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[76]JUDICIAL CONFERENCE OF THE UNITED STATES, BANKRUPTCY JUDGESHIP RECOMMENDATIONS 1 (2009) (on file with Subcommittee).

[77]*Id*. at 2, app. 1.

At every step of the survey process, the Judicial Conference applies judicial workload factors in assessing bankruptcy judgeship requests. These factors include: (1) weighted case filing data; (2) the nature and mix of the court's caseload; (3) historical caseload data and filing trends; (4) district-specific geographic, demographic, and economic factors; (5) the bankruptcy court's case management efforts; (6) the availability of alternatives to additional judgeships or converted or extended temporary judgeships; and (7) the impact of additional resources on the court's per judgeship caseload.78

Among the various factors that the Judicial Conference considers in making its bankruptcy court workload determinations, the most important is the weighted caseload filing data.79 The weighing of caseloads is designed to account for the degree of difficulty of different types of cases and, therefore, the amount of work that a bankruptcy judge would have to devote each type of case.80 To support the creation of a new judgeship or the conversion of a temporary judgeship to a permanent one, the standard is that a bankruptcy court should have weighted caseload filings of 1,500 per judgeship to justify additional resources.[81] This 1,500 weighted caseload threshold for additional resources is based on the Judicial Conference's estimate of an average weighted caseload of 1280.[82]

The case weight used to determine weighted caseloads is an estimate of the amount of case-related time that judges devote to each bankruptcy case type.83 The case weight formula was devised by the Federal Judicial Center in 1991 based on workload data collected during 1989-90.[84] The case weights are intended to more faithfully and accurately measure judicial work than raw case filing numbers alone would indicate. In total, the Judicial Conference categorizes cases into one of 17 different case types based on the form of bankruptcy relief under which a case is filed, the size of the case based on estate assets, and whether the case involves a business or non-business bankruptcy.[85]

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[78] *Id.* at 2-3, app. 1.

[79] *Id.*, app. 1.

[80] *Id.*

[81] *Id.* In the case of temporary judgeships, if the per-judgeship weighted caseload in a district would exceed 1,500 should the temporary judgeship expire, the Conference would recommend conversion of the judgeship from temporary to permanent status. *Id.* If, under the same scenario, the per-judgeship weighted caseload would exceed 1,000 but not 1,500, the Conference would recommend extension of the temporary judgeship. *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

The Judicial Conference also considers actions taken to maximize the use of existing bankruptcy judgeships when determining judgeship recommendations. These actions include the assignment of bankruptcy judges to districts other than their own in order to assist other bankruptcy courts with larger caseloads, recalling retired bankruptcy judges to assist overburdened districts, sharing judgeships with other districts, and employing technology to create better time and workload efficiency.86 Where these alternatives to additional judgeships have been exhausted, additional judgeships or converted or extended temporary judgeships may be warranted.

2. Specific Recommendations

The Judicial Conference proposes the addition of 13 permanent bankruptcy judgeships in 10 judicial districts and the conversion of 22 existing temporary bankruptcy judgeships in 15 judicial districts to permanent status.87 Additionally, the Judicial Conference proposes to extend the temporary authorization for judgeships for an additional five years.88 Overall, the proposal affects 25 judicial districts in 9 of the 12 geographically based federal judicial circuits (all except the Seventh, Tenth, and District of Columbia Circuits.)89

C. Recent Congressional Consideration

The CAL Subcommittee held a hearing on "Bankruptcy Judgeship Needs" on June 16, 2009, during which it considered the Judicial Conference's bankruptcy judgeship recommendations. The witnesses were the Hon. Barbara Lynn, Judge, United States District Court for the Northern District of Texas, on behalf of the Judicial Conference of the United States; the Hon. David Kennedy, Chief Judge of the United States Bankruptcy Court for the Western District of Tennessee, on behalf of the National Conference of Bankruptcy Judges; William O. Jenkins, Director, Homeland Security and Justice Issues, Government Accountability Office; and Carey D. Ebert, President of the National Association of Consumer Bankruptcy Attorneys.

Congress did not address the issue of bankruptcy judgeship needs during the 110th Congress. The last hearing concerning bankruptcy judgeships was held before CAL on May 22,

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[86] *Id.*, app. 3.

[87] *Bankruptcy Judgeship Needs: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Judge Barbara M.G. Lynn, Chair, Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States).

[88] *Id.*

[89] *Id.*

2003, when it considered the Bankruptcy Judgeship Act of 2003.90 Congress most recently authorized additional bankruptcy judgeships in BAPCPA,91 although it authorized only 28 of the 47 bankruptcy judgeships that the Judicial Conference had recommended.[92] Moreover, BAPCPA authorized only temporary judgeships.[93] Prior to BAPCPA, Congress had not authorized new bankruptcy judgeships since 1992.[94]

D. Section-by-Section Analysis

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Bankruptcy Judgeship Act of 2010."

Sec. 2. Additional Permanent Offices of Bankruptcy Judges. Section 2 amends 28 U.S.C. § 152(a)(2) to reflect the creation of 13 new permanent bankruptcy judgeships and the conversion of 22 temporary judgeships to permanent judgeships as follows:

- 1 additional judge in the eastern and western districts of Arkansas;
- 2 additional judges in the eastern district of California
- 5 additional judges in the district of Delaware
- 1 additional judge in the middle district of Florida
- 1 additional judge in the northern district of Florida
- 2 additional judges in the southern district of Florida
- 2 additional judges in the northern district of Georgia
- 1 additional judge in the southern district of Georgia
- 3 additional judges in the district of Maryland
- 3 additional judges in the eastern district of Michigan
- 1 additional judge in the northern district of Mississippi
- 2 additional judges in the district of Nevada
- 1 additional judge in the district of New Hampshire
- 1 additional judge in the district of New Jersey
- 1 additional judge in the northern district of New York
- 1 additional judge in the southern district of New York
- 1 additional judge in the eastern district of North Carolina
- 1 additional judge in the western district of North Carolina

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[90]*The Bankruptcy Judgeship Act of 2003: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 108th Cong. (2003).

[91]Pub. L. No. 109-8, 119 Stat. 23 (2005).

[92]JUDICIAL CONFERENCE OF THE UNITED STATES, BANKRUPTCY JUDGESHIP RECOMMENDATIONS 1 (2009).

[93]*See* 28 U.S.C. § 152 hist. nn. (2007) (noting temporary bankruptcy judgeships authorized by BAPCPA).

[94]*Id*; *Bankruptcy Judgeship Needs: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Judge Barbara M.G. Lynn, Chair, Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States).

- 1 additional judge in the middle district of Pennsylvania
- 1 additional judge in the eastern district of Tennessee
- 1 additional judge in the western district of Tennessee
- 1 additional judge in the eastern district of Virginia
- 1 additional judge in the southern district of West Virginia

Sec. 3. Conversion of Certain Temporary Offices of Bankruptcy Judges to Permanent Offices. Subsection (a) converts a total of 19 temporary bankruptcy judgeships authorized by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to permanent judgeships. Subsection (b) converts 3 temporary bankruptcy judgeships authorized by the Bankruptcy Judgeship Act of 1992 to permanent judgeships. These conversions are reflected in the additional permanent judgeships outlined in section 2 of the bill.

Sec. 4. Extension of Certain Temporary Offices of Bankruptcy Judges Established by Public Law 109-8. Subsection (a) extends BAPCPA's temporary authorization for two bankruptcy judgeships (1 in the eastern district of Pennsylvania, 1 in the middle district of North Carolina) by another 5 years. Subsection (b) clarifies that, except as noted in subsection (a), BAPCPA's provisions relating to temporary judgeships remain in force.

Sec. 5. Paygo Offset. Subsection (a)(1) increases the filing fees for Chapter 7 and Chapter 13 filings by $1 each ($245 to $246 for Chapter 7 filings and $235 to $236 for Chapter 13 filings.) Subsection (a)(2) increases the filing fee for Chapter 11 filings by $42 (from $1,000 to $1,042.) Subsection (b) reduces the percentage allocation of filing fees for Chapter 7, Chapter 11, and Chapter 13 cases to the United States Trustee System Fund in proportion to the increased filing fees so that the actual dollar amounts of the allocations remain the same. Similarly, subsection © reduces the percentage allocation of bankruptcy filing fees to the federal judiciary in light of the filing fee increases.

Sec. 6. Effective Dates. Subsection (a) sets the enactment date as its effective date except with respect to section 5 of the bill, which increases filing fees. Subsection (b) specifies that the increase in filing fees pursuant to section 5 will take effect 180 days after the enactment date.