In The Senate of the United States

Sitting as a Court of Impeachment

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

THE HOUSE OF REPRESENTATIVES'S CONSOLIDATED OPPOSITION TO JUDGE G. THOMAS PORTEOUS, JR.'S FIVE MOTIONS TO DISMISS THE ARTICLES OF IMPEACHMENT

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The House of Representatives (the "House"), through its Managers and counsel, respectfully opposes Judge Porteous's five pre-trial motions to dismiss the Articles of Impeachment.[1] The facts, as alleged in the Articles of Impeachment, clearly establishes that Judge Porteous has violated the public trust and brought disrepute upon the office he serves. The allegations against Judge Porteous in each Article meet the standard for impeachment and removal from office. The factual disputes raised in his motions must be resolved by the trial.

Judge Porteous's Motions to Dismiss should be denied. In support of this Consolidated Opposition, the House respectfully submits:

OVERVIEW

I. PRELIMINARY JURISDICTIONAL CONSIDERATIONS

A. Overview

The Constitution assigns the House the "the sole Power of Impeachment." In the exercise of its Constitutional responsibility, the House has determined unanimously that Judge Porteous should be removed from the bench as a result of conduct specified in four Articles of Impeachment. The Senate, with the "sole Power to try all Impeachments," has, under Rule XI of the "Procedure and Guidelines of Impeachment Trials in the United States Senate"[2] assigned this matter to this Trial Committee, which in turn, has scheduled an evidentiary hearing for September 13, 2001.

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[1] This Consolidated Opposition addresses Judge Porteous's Motions to Dismiss Articles I, II, III, and IV, individually, and also addresses Judge Porteous's "Motion to Dismiss the Articles of Impeachment as Unconstitutionally Aggregated; or, in the Alternative, to Require Voting on Specific Allegations of Impeachable Conduct."

[2] See Procedure and Guidelines of Impeachment Trials in the United States Senate (hereinafter "Senate Impeachment Procedures"), Senate Doc. 99-3, 99th Cong., 2d Sess., at 4 (1986).

Judge Porteous's motions to dismiss seek to have the Senate take the extraordinary step of dismissing the four Articles prior to trial, thereby denying the House the right to pursue its claim that Judge Porteous is unfit to be a federal judge. In light of the gravity of purpose with which the House considers and votes on Articles of Impeachment, and the seriousness of the Impeachment function, it is therefore not surprising that "the Senate has never dismissed articles of impeachment [without a trial]."[3] Dismissal by the Senate at this stage in the proceedings would be truly unprecedented.

Moreover, any motion to dismiss an Article of Impeachment prior to trial must, of necessity, be limited to challenging the facial validity of the Articles of Impeachment, thereby accepting the Articles' allegations as true. No other factual record exists for the Committee or the Senate to consider the motions at this time. Though couched as legal challenges to the Articles, Judge Porteous's motions to dismiss largely turn on his factual claims. Accordingly, his motions are essentially motions for acquittal. These arguments can only be decided after trial and the development of a factual record.

B. THE SENATE COMMITTEE SHOULD DENY THE MOTIONS AT THIS TIME AND PERMIT JUDGE PORTEOUS TO RAISE THEM BEFORE THE FULL SENATE AFTER THE EVIDENTIARY HEARING

Rule XI of the Senate's Impeachment Procedures under which this Committee is established, provides that the Committee is "to receive evidence and take testimony," and thereafter, to "report to the Senate in writing a certified copy of the transcript of the proceedings and the testimony had and given before such committee."[4] Accordingly, Judge Porteous seeks

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[3] See Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 DUKE L. J. 1, 102 (1999).

[4] See Senate Impeachment Procedures, supra note 2, at 4.

relief from the Senate Committee that is not contemplated by this mandate or the resolution establishing the Committee.[5]

Trial Committees in prior impeachments have declined to refer pre-trial motions – even ones styled as dispositive legal motions – to the full Senate for consideration prior to trial. For example, the procedural context of Judge Porteous's requests for relief is in pertinent aspects indistinguishable from the request of Judge Harry Claiborne to dismiss Articles in connection with his 1986 Impeachment trial on the grounds that they failed to allege impeachable offenses. In denying Claiborne's Motion, Senator Mathias, Chairman of the Trial Committee concluded: "Because the committee has no jurisdiction to determine the legal issue which Judge Claiborne presents, we will refer Judge Claiborne's motion to the full Senate together with our report, at the time we submit our report."[6]

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[5] Rather, Senate Resolution 458, submitted March 17, 2010, tracks Rule XI, and states in pertinent part:

> Sec. 4. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

S. Res. 458, 111th Cong. 2d Sess. 2 (2010). Judge Porteous appears to concede that the Senate Committee does not have the power to grant the motions: "Judge Porteous recognizes that, in the past, certain Motions to Dismiss were not resolved until after the evidentiary hearings. It is unclear if that is the Senate's intent in this proceeding." See Judge Porteous's Motion to Dismiss Article IV, at 12, fn. 12.

[6] See Hearings Before the Senate Impeachment Trial Committee (Judge Claiborne) (hereinafter, "Claiborne Hearings"), S. Hrg. 99-812, 99th Cong., 2d Sess. 113 (1986) (statement of Senator Mathias). Similarly, the Claiborne Trial Committee denied the House's request to refer to the Senate its pre-trial motions for "summary disposition" and "collateral estoppel." As he did with Judge Claiborne's motion, Senator Mathias ruled that the House could raise these motions at the time the matter was referred to the full Senate after trial: "Now, this committee has no jurisdiction to rule on the managers' first and second motions . . . . Now, we shall, of course, refer the managers' summary disposition and collateral estoppel motions to the full Senate when we report to the Senate the evidence which presented to us." Id. at 108 (emphasis added).

Similarly, in the Judge Nixon Impeachment proceedings, Judge Nixon sought for the full Senate to consider his pre-trial motion that he filed with the Senate Trial Committee to dismiss Article III. In declining to refer the matter to the full Senate prior to trial, the Nixon Senate trial Committee addressed the merits of Judge Nixon's claim and concluded that Article III was fairly drafted.[7] The Committee further ruled that "Judge Nixon may press his effort to dismiss Article III before the full Senate after the conclusion of the Committee's proceedings."[8]

The procedural context of the Judge Hastings Impeachment – where the full Senate did hear Judge Hastings' motion to dismiss – is readily distinguishable. In that case, the Articles of Impeachment were filed in August of 1988, the Answer by Judge Hastings was filed September 9, 1998, and the Replication by the House was filed September 23, 1988. The Senate concluded it did not have time to conduct the Impeachment trial before it recessed for the term. In February 1989, the Senate passed Senate Resolution 39, introduced by Senator Wendell Ford of the Rules Committee, which authorized the Senate to resume its consideration of the Hastings Articles and explicitly permitted Judge Hastings to file his motion with the full Senate to dismiss the Articles on double jeopardy grounds. The full Senate did in fact consider that motion on March 15, 1989, prior to voting to establish the Impeachment Trial Committee in that case, which it did on March 16, 1989. See generally S. Res. 38, 101st Cong., 1st Sess. (1989). However, unlike the Hastings situation, the rules for this Impeachment do not provide that Judge Porteous may file motions with the full Senate, and, as noted, no Senate Trial Committee has ever referred a pre-trial motion to the full Senate.

[7] The approach of the Nixon Trial Committee is consistent with that sought by the House here. The Committee can deny Judge Porteous's motions "on the merits" at this juncture because, as noted, he raises nearly no claims that challenge the facial validity of the Articles. The Committee can also permit Judge Porteous leave to renew these arguments to the Senate after trial.

[8] See Impeachment Trial Committee Disposition of Pretrial Motions, First Order (hereinafter "Nixon Pretrial Disposition"), at 5 (July 25, 1989) reprinted in Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., (hereinafter, "Nixon Senate Impeachment Report"), S. Hrg. 101-247, 101st Cong., 1st Sess., at 323 (1989).

Senate Trial Committees have been reluctant to refer other motions to the full Senate pre-trial as well. Judge Hastings and Judge Nixon each sought that the full Senate consider their respective motions to pay defense funds. Both Committees denied the respective motions and ruled that the respective Judges could pursue their claim when the matter was reported from the Committee to the full Senate. See Disposition of Motion Requesting Funds for Respondent's Defense, at 1 (May 18, 1989), reprinted in Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings (hereinafter, "Hastings Senate Impeachment Report"), S. Hrg. 101-194, 101st Cong., 1st Sess., at 483 (1989) ("Judge Hastings may renew his

Accordingly, the House recommends the Senate Committee deny Judge Porteous's Motions to Dismiss, with leave for Judge Porteous to renew these motions before the full Senate after the evidentiary hearing in light of the full factual record.[9]

II. FACTUAL SUMMARY[10]

A. Judge Porteous's Corrupt Conduct as a State Court Judge with Lawyers and Bail Bondsmen

In 1984, Judge G. Thomas Porteous, Jr. was elected judge of the 24th Judicial District of Louisiana. He remained in that position until October 28, 1994 when he was sworn in as a United States District Judge for the Eastern District of Louisiana.

Throughout that decade, Judge Porteous abused his power as a judge to engage in pervasive corrupt relationships with lawyers and bail bondsmen. These relationships benefited him personally, supporting him in a lifestyle which he could not otherwise afford, but to which he aspired.

Specifically, during his tenure on the state bench, Judge Porteous solicited money from attorney Robert Creely and the law firm of Amato & Creely. These funds amounted to

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request for defense funds at the close of the Senate's proceedings on the Articles of Impeachment."); see also Nixon Pretrial Disposition, at 7, reprinted in Nixon Senate Impeachment Report, at 325 ("Judge Nixon may renew his request for defense funds at the close of the Senate's proceedings on the Articles of Impeachment.").

[9] Notwithstanding the House's position that the best course of action for the Committee is to deny the motions at this time, the House will be prepared to argue them if so decided by the Committee.

[10] Judge Porteous tries to have it both ways in his five Motions to Dismiss the Articles of Impeachment. He concedes that, for these motions, all facts alleged by the House must be taken as true. See, e.g., Judge Porteous's Motion to Dismiss Article II, at 1, fn. 1. Yet, he thereafter proceeds to spend pages of text contesting the factual evidence in this case and presenting his own version of those facts. While the House believes that all of the facts alleged in the Articles of Impeachment should be taken as true for purposes of ruling on Judge Porteous's motions to dismiss, the House nevertheless feels compelled, in light of the approach taken by Judge Porteous, to present what it believes to be the evidence established in the proceedings heretofore.

thousands of dollars, were paid in cash, and were never reported. Eventually, in the late 1980s, Creely balked at continuing to support Judge Porteous's lifestyle of gambling, drinking, and extravagant dining. As a result, Judge Porteous, over time, appointed close to 200 "curatorships" to Creely, which generated fees of $200 per referral and required little work. This was Judge Porteous's way of generating funds for Creely, which Creely could return to Judge Porteous without the monies coming from Creely's own pocket. Indeed, Judge Porteous would call Creely's office from time to time to have "curator money" sent to him in cash, and Creely and his partner Jacob Amato would take draws from their law firm's bank account to meet Judge Porteous's requests. A conservative estimate would put Judge Porteous's share of these funds at about $20,000.

In his testimony before the Fifth Circuit Special Investigatory Committee, Judge Porteous acknowledged the essential aspects of this relationship: that he solicited and received monies in cash from Creely and his law firm; that at some point Creely balked ("He [Creely] may have said I had to get my finances under control."); and that Judge Porteous assigned curatorships to Creely and "occasionally" got money from Creely thereafter. Judge Porteous was uncertain as to the dollar amount.

Simultaneously, Judge Porteous sustained a corrupt relationship with local bail bondsmen, Louis Marcotte and his sister Lori, whereby Judge Porteous would set bail bonds as requested by the Marcottes in amounts that would maximize their profits, and in return received hundreds of expensive meals, car maintenance and repairs, home repairs, and trips to Las Vegas. In addition, at the Marcottes' request, Judge Porteous improperly expunged the criminal records of two Marcotte employees. In one of these cases, Judge Porteous delayed setting aside the conviction until <u>after</u> Senate confirmation for his federal judgeship, but before he left the state

bench and took the federal oath of office, so that this highly irregular, if not outright illegal, conduct would not jeopardize his federal appointment.

B. Judge Porteous Lies to Obtain the Office of Federal Judge

In 1994, Judge Porteous was being considered for a federal judgeship. As a part of the vetting process, Judge Porteous was required to respond to two questionnaires – one under oath – and was also interviewed twice by the Federal Bureau of Investigation ("FBI"). Knowing that truthful disclosures of his corrupt relationships would derail his nomination, Judge Porteous made false statements and withheld critical information.

First, Judge Porteous filled out and signed a document entitled "Supplement to Standard Form 86 (SF-86)." That form sets forth the following question and answer by Judge Porteous:

> [Question] Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the President if publicly known? If so, please provide full details.
>
> [Answer] NO[11]

Judge Porteous signed that document under the following statement:

> I understand that the information being provided on this supplement to the SF-86 is to be considered part of the original SF-86 dated April 27, 1994 and a false statement on this form is punishable by law.[12]

Second, when interviewed by the FBI on July 8, 1994, Judge Porteous was asked a series of standard questions designed to elicit derogatory information. The FBI Agent, in her write-up of the interview, recorded Judge Porteous as stating:

> PORTEOUS said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or

[11] See Supplement to Standard Form 86 (SF-86), at PORT000000298 (Attachment 1).

[12] Id.

> that would impact negatively on the candidate's character, reputation, judgement, or discretion.[13]

Judge Porteous was interviewed a second time by the FBI on August 18, 1994 about concerns related to 1993 allegations that he had received monies from an attorney and a bail bondsman to reduce a bond. In the FBI Agent's write-up of that interview, Judge Porteous is once again recorded as stating "that he, was unaware of anything in his background that might be the basis of attempted influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgment or discretion."[14]

Finally, on his United States Senate Committee on the Judiciary "Questionnaire for Judicial Nominees," Judge Porteous was asked the following question and gave the following answer:

> [Question] Please advise the Committee of any unfavorable information that may affect your nomination.
>
> [Answer] To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination.[15]
>
> The signature block in the form of an "Affidavit," reads as follows:
>
> AFFIDAVIT
>
> I, Gabriel Thomas Porteous, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.
>
> Gretna, Louisiana, this 6 day of September, 1994.

It is signed by Judge Porteous and a notary.[16]

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[13] See FBI Interview of Judge G. Thomas Porteous, Jr., at 3 (July 8, 1994) (Attachment 2).

[14] See FBI Interview of Judge G. Thomas Porteous, Jr., at 2–3 (hereinafter "August 18, 1994 FBI Interview of Judge Porteous") (August 18, 1994) (Attachment 3).

[15] See Judge Porteous's United States Senate Committee on the Judiciary "Questionnaire for Judicial Nominees," at 34–35 (September 6, 1994) (Relevant Excerpts attached as Attachment 4).

Judge Porteous well knew that a truthful response to these inquiries would require the disclosure of his corrupt relationships with Amato and Creely and with the Marcottes. Judge Porteous, however, never disclosed those relationships. The argument that he subsequently could have believed that these questions did not call for him to reveal those relationships is simply not credible.

This very issue of honesty by the candidate in responding to questions posed during the background investigation to become a federal judge was explored in the House hearings with Professor Akhil Amar of Yale Law School and Professor Michael Gerhardt of UNC-Chapel Hill Law School. It is worth quoting at length:

> Congressman Schiff:
>
> The Senate, in the background interviews conducted through the FBI or in questionnaires or in testimony obviously can't ask a specific question, did you receive kickbacks from attorneys while you were on the State bench, because they don't know the conduct specifically to ask about, so they generally ask fairly general questions. I would like to acquaint you with some of the questions that were asked of the judge and ask you whether there was an affirmative obligation to disclose such that the failure to disclose would be considered a fraud on the Senate.
>
> In the FBI background interview, the FBI agent reports Judge Porteous said he is not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgment, or discretion.
>
> Similarly, there was a question in one of the Senate questionnaires which said: "Please advise the Committee of any unfavorable information that may affect your nomination," and the judge's answer was: "To the best of my knowledge, I do not know of any unfavorable information that may affect my nomination."
>
> Similarly there was another question: "Is there anything in your background that, if it came out, could embarrass the President?"

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[16] Id.

Were these questions sufficient to raise an obligation of disclosure on the part of the judge such that the failure to disclose either the relationship with the bail bondsman or the kickback relationship with the attorneys would in your view constitute a fraud on the Senate sufficient to warrant his impeachment?

Mr. GERHARDT. I suspect we are all in accord on this. I think the answer is overwhelmingly yes.

I think that this is actually not a hard case, Mr. Chair. The fact is that, to begin with, you can use your common sense to simply look at the questions that were asked and look at the kind of misbehavior, the kind of conduct that wasn't disclosed, and understand that that is exactly the kind of thing the Senate would have wanted to know.

In fact, the behavior here isn't just accidental. It is not one or two circumstances. It is a pattern of misconduct that suggests a level of intent that is disturbing. And I suspect that it is exactly the kind of thing the President would have wanted to know, and it is also the kind of thing the Senate would have wanted to know. And I think the failure to disclose is an affront to both the President's nominating authority and Senate's confirmation responsibility.

I might just go one step further, if I may. I have actually thought about that question a lot, Mr. Chair. And I keep come back to the same thing. I think, what do I tell my students? We have the responsibility of educating law students. And if they are faced with a question like this and you don't impeach, they get the message that there is a level of corruption that is permissible, that there is a level of disclosure they don't have to make to accountable bodies.

The fact is that common sense suggests that there should have been disclosure. The very fact that these things weren't disclosed I think suggests, again, a disturbing level of intent but also a refusal to do something I think that is plainly required by those questions.

* * *

Professor Amar:

Here, though, it is so much easier, it seems to me, because we are not talking about putting him in jail, we are talking about withdrawing the very position that he wrongfully got through these lies and that he never would have gotten had he been truthful, had he told the whole truth, as was his obligation.

Third, yes, the questions were broad, partly because it is impolite to be more specific, especially without any basis for this, but everyone knows

> what is actually at the core of the question. 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.
>
> 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. There is a pattern.[17]

Judge Porteous obtained his federal judgeship by intentionally misleading the Senate. In answering these questions dishonestly, he exhibited the same mindset which led him to postpone his setting aside of the criminal record of a Marcotte employee until after his Senate confirmation, lest he thereby lose his federal appointment.

C. Judge Porteous's Deceptive Omissions of Fact, Failure to Recuse, and Solicitation of Cash in the Liljeberg Case

In October 1994, Judge Porteous was sworn in as a federal district judge. As a result, Judge Porteous was no longer in a position to refer curatorships to lawyers or set bail bonds for the Marcottes. This did not end his corrupt relationships with either the lawyers or the bondsmen, however, because Judge Porteous did not change his approach once he was on the federal bench. He continued to accept numerous expensive lunches and other benefits from Amato and Creely, once he became a federal judge.[18]

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[17] See To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., Part IV, Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary (hereinafter, "Task Force Hearing, Part IV"), Ser. No. 111-46, 111th Cong., 1st Sess., at 33–34 (Dec. 15, 2009).

[18] Judge Porteous also persisted in his relationship with Louis and Lori Marcotte once on the Federal bench. The Marcottes continued to take Judge Porteous to expensive lunches and to provide him with other hospitality. In exchange, Judge Porteous helped the Marcottes – whom Judge Porteous knew to be corrupt – in ways that were still available to him. In particular, Judge Porteous vouched for the Marcottes with other state court judges, helping them forge relationships (and in one instance a corrupt relationship) with certain judges.

The corrupt nature of these relationships came to a head in connection with the case of Lifemark Hospitals La., Inc. ["Lifemark"] v. Liljeberg Enterprises ["Liljeberg"].[19] This was a complex case with tens of millions of dollars at stake. Just six weeks before Judge Porteous was to try the case without a jury, Creely's partner Jacob Amato, on behalf of the law firm Amato & Creely, entered his appearance for the Liljebergs.[20] Counsel for Lifemark thereafter filed a motion to recuse Judge Porteous. He had heard of the friendship between Judge Porteous and both Amato and Creely, but had no idea that there was a history of thousands of dollars going to Judge Porteous or of the arrangement with the curatorships.

The transcript of the recusal hearing demonstrates Judge Porteous's disingenuous approach to the disclosure requirements and recusal obligations of a federal judge. After explaining he well understood that the standard for recusal goes beyond actual impropriety and includes even the appearance of impropriety, he then deliberately misled the parties about the financial nature of his relationship with Amato and Creely. An excerpt from the transcript tells it all:

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

[19] Case No.: 2:93-cv-01794-GTP.

[20] Another close friend of Judge Porteous's, Leonard Levenson, also entered an appearance on behalf of the Liljebergs.

* * *

> THE COURT: The first time I ran [for the state bench], 1984, I think is the only time when they gave me money.

* * *

> THE COURT: I have always taken the position that if there was ever any question in my mind that this Court should recuse itself that I would notify counsel and give them the opportunity if they wanted to ask me to get off.[21]

Judge Porteous never revealed the corrupt financial relationship he had with the Amato & Creely firm or the thousands of dollars they funneled to him in cash. Indeed, he deliberately misled counsel for Lifemark by making it appear that the only time he got any money from them was in an early election campaign. Judge Porteous ultimately denied the motion to recuse.[22]

Judge Porteous tried the Liljeberg case without a jury and kept the case under advisement for nearly three years before rendering a verdict. During that time period, Judge Porteous continued to accept meals and other financial benefits from counsel in the case. Most egregiously, on June 28, 1999, while the Liljeberg case was still pending, Judge Porteous went on a fishing trip with Amato. It is undisputed that, while on that trip, Judge Porteous solicited, and that Amato subsequently gave him, $2,000 in cash. As Judge Porteous grudgingly admitted before the Fifth Circuit:

> Q. Do you recall in 1999, in the summer, May, June, receiving $2,000 for [sic: should be ''from''] them?

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[21] See Hearing Transcript on Plaintiff's Motion to Recuse, Lifemark Hospitals Inc. v. Liljeberg Ents. Inc., Case No. 2:93-cv-01794-GTP, at 4, 6–8, 17 (October 16, 1996). (A copy of the Hearing Transcript is attached to Judge Porteous's Motion to Dismiss Article I as Exhibit 1. It is also marked as HP Exhibit 56 on the House's Exhibit List.)

[22] See Judgment, Lifemark Hospitals Inc. v. Liljeberg Ents. Inc., Case No. 2:93-cv-01794-GTP (October 17, 1996). (A copy of the Judgment is marked as HP Exhibit 57 on the House's Exhibit List.)

A. I've read Mr. Amato's grand jury testimony. It says we were fishing and I made some representation that I was having difficulties and that he loaned me some money or gave me some money.

Q. You don't—you're not denying it; you just don't remember it?

A. I just don't have any recollection of it, but that would have fallen in the category of a loan from a friend. That's all.[23]

* * *

Q. [W]hether or not you recall asking Mr. Amato for money during this fishing trip, do you recall getting an envelope with $2,000 shortly thereafter?

A. Yeah. Something seems to suggest that there may have been an envelope. I don't remember the size of an envelope, how I got the envelope, or anything about it.

* * *

Q. Wait a second. Is it the nature of the envelope you're disputing?

A. No. Money was received in [an] envelope.

Q. And had cash in it?

A. Yes, sir.

Q. And it was from Creely and/or——

A. Amato.

Q. Amato?

A. Yes.

Q. And it was used to pay for your son's wedding.

A. To help defray the cost, yeah.

Q. And was used——

A. They loaned—my impression was it was a loan.

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[23] See Fifth Circuit Special Committee Hearing Transcript (hereinafter "Fifth Circuit Transcript"), at 121 (October 29, 2007). Relevant excerpts from the Fifth Circuit Transcript are attached to this Consolidated Opposition as Attachment 5.

Q. And would you dispute that the amount was $2,000?

A. I don't have any basis to dispute it.[24]

Several months later, Judge Porteous ruled in favor of Amato's client in a decision that would have meant a fee of close to a million dollars to Amato's firm if it had stood up on appeal. However, Judge Porteous's decision on the central issues in the case was reversed in a scathing opinion from the Fifth Circuit that characterized his ruling as "bordering on the absurd," "a chimera," "nonsensical" and "constructed out of whole cloth."[25] Judge Porteous's effort to reward his friends Amato and Creely was only thwarted by the court of appeals.

D. Judge Porteous's False Statements, Intentional Omissions of Fact, and Violation of a Court Order in his Bankruptcy

As documented in the House Impeachment Report, Judge Porteous had a serious gambling habit and abused alcohol.[26] Over time, despite the monies and benefits he solicited and received from lawyers and bail bondsmen, his financial situation deteriorated to the point of having to file for bankruptcy protection in 2001. His financial predicament was due largely to massive gambling losses.[27]

A review of Judge Porteous's conduct in the bankruptcy proceedings shows behavior consistent with his prior conduct. Judge Porteous and his attorney entered into a scheme to avoid public disclosure of his bankruptcy, whereby Judge Porteous knowingly and purposefully filed

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[24] Id. at 136–137.

[25] See In the Matter of Liljeberg Enterprises Inc., 304 F.3d 410, 428–29, 431–32 (5th Cir. 2002). (Attachment 6).

[26] H.R. Rep. No. 111-427, Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, Report of the Committee on the Judiciary to Accompany H. Res. 1031 (hereinafter, "Porteous Impeachment Report"), 111th Cong., 2d Sess., at 38, 73, 92 (2010).

[27] Id. at 92.

his bankruptcy petition under a false name ("Ortous") and used a recently obtained post office box as his address instead of his home address. He signed that petition under penalty of perjury.[28]

Judge Porteous's bankruptcy proceedings were permeated with false schedules, undisclosed preferential payments, undisclosed assets such as a $4,000 income tax refund, and indebtedness incurred in violation of a bankruptcy judge's order. The evidence of Judge Porteous's repeated and consistent pattern of lying and deceiving both his own counsel and the bankruptcy court utterly refutes any notion that these were inadvertent oversights or misunderstandings.

E. Conclusion

A review of Judge G. Thomas Porteous Jr.'s career on the state and federal bench is a record of ongoing, disgraceful, corrupt conduct, laced with falsehoods whenever the truth stood in Judge Porteous's way. He lied to lawyers, to judges, to the FBI, to the White House and to the Senate. He hid the fact that he had taken substantial sums of cash from lawyers and deceitfully postured on the record how he would recuse himself if he had any question about the propriety of continuing to hear the case. He then solicited and received from a lawyer in the case $2,000 while his decision was pending.

The contention that Judge Porteous's conduct prior to taking the federal bench may not be considered finds no support in the language of the Constitution. The fact that Judge Porteous was confirmed by the Senate by concealing his corrupt prior conduct and lying under oath only

[28] Many people filing for bankruptcy may view this experience as embarrassing and would like to avoid public disclosure of their financial predicament. A judge may find it particularly embarrassing. However, the fact that this concealment – filing and signing under a false name – was committed by a Federal judge, under oath, is far more offensive, and far less forgivable, than if committed by a average citizen.

underscores his unfitness to remain on the federal bench. The House of Representatives voted unanimously in favor of all four Articles of Impeachment against Judge Porteous, including Article IV, based upon misconduct engaged in by him prior to assuming federal office. As Professor Gerhardt stated:

> The second issue has to do with whether or not somebody may be subject to impeachment conviction and removal for conduct done prior to occupying that particular position. I think this can be a difficult question, but I don't think it is a difficult question here.
>
> As I suggest in my written statement, any egregious misconduct not disclosed prior to election or appointment to an office from which one may be impeached or removed is likely to qualify as a high crime or misdemeanor. While murder would be one obvious example of such misconduct, it is not the only example.
>
> Another example I think is lying to or defrauding the Senate in order to be approved as a Federal judge. Such misconduct is not only serious but obviously connected to the status and responsibilities of being a Federal judge. Such misconduct plainly erodes the essential indispensable integrity without which a Federal judge is unable to do his job.[29]

If the Senate were to grant the motion to dismiss or acquit Judge Porteous on the grounds that some of his egregious misconduct occurred in prior to assuming the federal bench, it would be an invitation to make the federal bench a lifetime safe harbor for a person who may have engaged in the most reprehensible behavior, so long as he is able to conceal it and is willing to lie to the FBI and the Senate. The House submits that is an utterly untenable conclusion, neither sanctioned by the Constitution nor contemplated by the Framers.

III. THE STANDARD FOR IMPEACHMENT

A critical assumption that permeates nearly all of Judge Porteous's pre-trial motions is that an impeachment trial is the nature of a criminal proceeding, with criminal law standards and

[29] See Task Force Hearing, Part IV, supra note 17, at 24.

the procedural protections of a criminal case.[30] This assumption is wrong. An impeachment trial is not a criminal case, as the Senate has already recognized in this very case.[31] Judge Porteous's conduct may well have violated the criminal laws of the United States, but both the substantive law and the procedural requirements that govern impeachments make clear that the standards to be applied in an impeachment have no foundation in the criminal laws of this country.

A. The Substantive Law Governing Impeachments and Removal

Both the House and Senate have interpreted the Constitution's "high crimes and misdemeanors" formulation for impeachable conduct to include violations of public trust beyond the confines of criminal law.[32] The Walter Nixon Impeachment Report reviewed the "high crimes and misdemeanors" terminology from 12 judicial impeachments that had occurred prior to 1989 and found that the term "misdemeanor," as used in the Constitution, "did not denote a

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[30] See, e.g., Motion to Dismiss Article I (arguing that the Supreme Court's limitation of the federal criminal honest services statute on grounds of constitutional vagueness undermines the Article); Motion to Dismiss Article II (arguing that the House has failed to establish the elements of criminal concealment of assets and false oaths under 18 U.S.C. § 152); Motion to Dismiss Article IV (arguing that under the Kerik case from the Southern District of New York, the House could not satisfy the elements of proving a criminal false statement); Motion to Exclude Previously Immunized Testimony (arguing that the Fifth Amendment's protection against use of immunized testimony in a "criminal case" precludes reliance by Congress in the impeachment process on Judge Porteous's sworn immunized testimony to the Fifth Circuit Special Investigatory Committee); Motion to Exclude Prior Testimony (arguing that the Sixth Amendment's guarantees for "criminal prosecutions" to confront the witnesses requires that all testimony admitted into evidence be from witnesses providing live testimony at the trial).

[31] See Disposition of Judge G. Thomas Porteous, Jr.'s Motion for Continuance, at 3 (June 21, 2010) ("The Supreme Court has recognized that 'the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge,' and that the impeachment proceeding is independent of, and not akin to, a civil or criminal proceeding.").

[32] See H.R. Rep. No. 101-36, Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87 (hereinafter, "Nixon House Impeachment Report"), 101st Cong., 1st Sess., at 659 (1989) ("The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct.").

violation of criminal law;" instead, the "word focuses on the behavior of a public official, i.e., his demeanor."[33]

Constitutional history reinforces the correctness of the courts' consistent reading of impeachment as a political,[34] non-criminal proceeding subject to a case-specific determination of the federal officer's fitness to hold office. The Founders purposefully broke from the British impeachment practice, which upon conviction imposed criminal penalties, including death, and instead made it a proceeding of a political nature that called for the maximum punishment not to exceed removal and disqualification from office.[35] Any possible doubt after the Constitution's adoption on whether impeachment proceedings were criminal in nature was settled in the early impeachment inquiries, which considered such non-criminal offenses as, for example, the impeachment of Judge John Pickering in 1803 for performing his judicial functions while drunk and for acts of indecency.[36]

As Alexander Hamilton observed at the time of the debates surrounding the adoption of the Constitution, impeachment trials were understood as deliberative sessions for the Senate to decide whether an official had committed an "abuse or violation of some public trust."[37] Justice Story likewise observed, in the early nineteenth century, that "an impeachment is a proceeding of

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[33] Id.

[34] The term "political . . . proceeding," is meant to describe a proceeding that pertains to the state or its government. It is not meant to connote party politics.

[35] See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS, A CONSTITUTIONAL AND HISTORICAL ANALYSIS (Princeton University Press) (1996); see also Alan I. Baron, The Curious Case of Alcee Hastings, 19 NOVA L. REV. 873, 876 (1995).

[36] See Articles of Impeachment of Judge John Pickering, reprinted in IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess., at 131 (1973), as reprinted in, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess., at 1267 (1998).

[37] FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Rossiter, ed. 1961).

a purely political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property; but simply divests him of his political power."[38] These principles are not subject to any legitimate dispute.[39]

B. The Procedural Requirements for Impeachments

The procedural requirements that govern judicial impeachment trials likewise reflect the principle that an impeachment trial is not and should not be treated as a criminal proceeding. Nowhere does the Constitution require the House, which has the "sole Power of Impeachment,"[40] to limit articles of impeachment to acts that are violations of criminal law. Similarly, the Constitution requires the concurrence of two-thirds of the Members present in the Senate to convict in an impeachment trial, but, unlike a criminal case, leaves the burden of proof undefined.[41] Likewise, because the Constitution places impeachment proceedings and criminal proceedings on two separate tracks (see U.S. CONST. art. I, § 3), an impeachment following a criminal trial does not implicate the Fifth Amendment's Double Jeopardy Clause, as numerous

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[38] Joseph Story, Commentaries on the Constitution § 801 (1833).

[39] Indeed, counsel for Judge Porteous has adopted this view on more than one occasion. He has stated that "[t]he judicial impeachment cases . . . reflect controversies that raise fundamental questions of legitimacy and conduct that is viewed as incompatible or demeaning to judicial office." See Turley, supra note 3, at 73-74. He further summarized judicial impeachments as "deal[ing] not only with issues related to the use of judicial power but with conduct that brought disrepute upon the office through personal or (non-judicial) criminal misconduct." Id. at 67-68. On another occasion, he stated that "acts which undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law. . . . [T]he essential nexus . . . may be founding acts which, without directly affecting the governmental processes, undermine that degree of public confidence in the probity of executive and judicial officers that is essential to the effectiveness of government." See Background and History of Impeachment, Hearing Before the House Judiciary Committee Subcommittee on the Constitution, at 28 (Nov. 9, 1998) (Testimony of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School).

[40] U.S. CONST. art. I, § 2, cl. 5.

[41] U.S. CONST. art. I, § 3, cl. 6, cl. 7.

courts and the Senate have recognized. Further, there is no appeal from a conviction in the case of impeachment,[42] and the Constitution expressly denies the President the power to pardon a civil officer who has been impeached.[43] Because the standard for impeachment is not a criminal standard, it is unproductive and misleading to engage in an analysis of whether the Articles of Impeachment state a claim that would establish a violation of federal criminal law.

The House reiterates that while Judge Porteous's conduct may well have violated the criminal laws, in both substantive and procedural respects, an impeachment trial is not a criminal proceeding, and a fundamentally different standard involving a fundamentally different judgment applies. Accordingly, the House can frame the Articles – and the Senate can convict on those Articles – as long as those bodies conclude that the charges are for impeachable misconduct, i.e., conduct that in their view warrants impeachment and removal from office.

ARGUMENT

The approach taken by Judge Porteous in his Motions to Dismiss is consistently to mischaracterize what each Article of Impeachment actually states, and then argue that the "facts" supporting the Articles – according to his interpretation of them –do not prove the "charges" – as he misconstrues them. Judge Porteous also analyzes the facts supporting the Articles by taking each one in isolation, characterizing it benignly, minimizing it, and explaining how a particular action could have been done innocently or mistakenly.

Thus, in considering each of Judge Porteous's five Motions to Dismiss, it is important to note both the tactics which Judge Porteous employs to re-create the narrative of this case and the

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[42] See, e.g., Nixon v. United States, 506 U.S. 224 (1993).

[43] U.S. CONST. art. II, §. 2, cl. 1.

lengths that Judge Porteous goes to distort the factual and legal landscape of this judicial impeachment.

I. ARTICLE I PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE

Article I alleges profound judicial misconduct that warrants the removal of Judge Porteous as a federal judge. Judge Porteous presided over a case in which he failed to disclose a prior corrupt financial relationship with attorneys for one of the parties, and during which he continued to solicit and accept cash and things of value from those attorneys. Article I clearly alleges that Judge Porteous did so even in the face of a motion to recuse by the opposing counsel, in response to which Judge Porteous conducted the recusal hearing so as to conceal material facts and to distort the factual record, thereby misleading the moving party and insulating his actions from appellate review.

After first mischaracterizing the facts supporting Article I, Judge Porteous makes two arguments for the dismissal of this Article. First, he claims that Article I charges the federal offense of "honest services fraud," and that the Article cannot stand in light of the Supreme Court's recent ruling in Skilling v. United States.[44] Article I, however, does not charge a violation of a specific criminal code section, nor does the Constitution require it to do so. The Supreme Court's recent ruling as to what conduct satisfies a criminal statute is wholly irrelevant to an assessment of whether the allegations set forth in Article I constitute an abuse of public trust warranting Judge Porteous's removal from office.

Second, Judge Porteous argues that the conduct involved in Article I, as a factual matter, does not warrant impeachment because the Article alleges, according to Judge Porteous, only the "appearance of impropriety," and not "actual impropriety," and that a Judge cannot be

[44]No. 08-1394, 2010 WL 251858 (June 24, 2010).

impeached solely for the "appearance of impropriety."[45] Judge Porteous ignores the charging language in Article I, which in fact alleges specific misconduct. It will be up to the Senate to determine whether the House has proved the facts alleged in Article I and whether that conduct, if proven, warrants removal. That question cannot be resolved based on the pre-trial record, and certainly not by Judge Porteous's version of the facts.

A. Judge Porteous Mischaracterizes the Facts in Article I.

Three factual examples from the Motion to Dismiss Article I illustrate Judge Porteous's attempts to downplay and recreate evidence supporting Article I. First, Judge Porteous claims that he "did not conceal his relationship with Mr. Amato . . . [because] his long-time friendship with Mr. Amato was well known in the New Orleans legal community." However, what Judge Porteous is accused of concealing at the Liljeberg recusal hearing was not his friendship with Mr. Amato but his corrupt financial relationship with Amato, which included receiving approximately $20,000 in cash payments under the table.

Second, Judge Porteous describes the allegations in Article I as including the fact that at the time he assigned curatorships to Robert Creely, he received "personal gifts from Creely," when, in reality, Article I alleges that Judge Porteous received approximately $20,000 in cash from Creely and the Amato & Creely law firm in connection with the curatorships.[46]

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[45] See Judge Porteous's Motion to Dismiss Article I, at 1.

[46] Judge Porteous's factual representation of the actions taken by Attorney Mole related to the hiring of Judge Porteous's friend, Donald Gardner, in the Liljeberg case is also worth addressing. First, Mr. Mole's actions are irrelevant to an assessment of Judge Porteous's conduct – the only conduct under scrutiny by the House and the Senate. Second, the House would note that Judge Porteous's perceived biases were so deeply apparent to the litigants in the community – accurately as it turned out – that Lifemark, Mole's client, felt the need to "level the playing field" by retaining Gardner as a counterweight to the Liljebergs' retaining of Amato (along with another of Judge Porteous's friends, Leonard Levenson). See To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., Part I, Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary ("Task Force Hearing,

Third, Judge Porteous casually describes his decision in the Liljeberg case as having been "affirmed in part and reversed in part by the Fifth Circuit"[47] – an assertion which is technically true, but is a profound distortion of the substance of the appellate court's decision. In reality, on nearly every significant issue, the Court of Appeals reversed Judge Porteous, characterizing his opinion as "a chimera," "constructed entirely out of whole cloth," "nonsensical," and "absurd."[48]

B. Because Article I Does Not Allege a Violation of a Specific Federal Criminal Statute, the Supreme Court's Decision in Skilling is Irrelevant.

Article I alleges misconduct involving Judge Porteous's hidden financial relationship with attorneys handling a case pending before him. Article I alleges in six paragraphs that Judge Porteous dishonestly presided over the Liljeberg case by concealing his financial relationships with attorneys for one of the parties, making intentionally misleading statements at the recusal

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Part I"), Ser. No. 111-43, 111th Cong., 1st Sess., at 143.(Nov. 18, 2009). If anything, Lifemark's decision to hire Gardner demonstrates the damage that Judge Porteous inflicted on the judicial system – creating an environment where parties believed they had to hire attorneys who were close personal friends of the presiding judge in order to have a chance to succeed in the litigation.

And third, Judge Porteous's attempt to tar Mr. Mole with the decision to hire Mr. Gardner is not supported by the record. The House cites to the transcript from its November 18, 2009 Hearing To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. simply because the allegation against Mr. Mole is so unfair and should not go uncorrected. At that hearing, Mr. Mole clearly testified:

> After we lost the motion to recuse, my client and I discussed that—and my client insisted that we try to find a lawyer who, like Mr. Amato and Mr. Levenson, was a friend with the judge and knew him very well. They were concerned that they would do everything they can to achieve a level playing field.
>
> I resisted doing that. I am not happy with the fact that we did it. But my client insisted, and so we did it.

Task Force Hearing Part I, at 143.

[47] See Judge Porteous's Motion to Dismiss Article I, at 4.

[48] In the Matter of: Liljeberg Enterprises, Inc., 304 F.3d at 428–29, 431–32 (Attachment 6).

hearing, and soliciting and accepting things of value from attorneys while the case was pending. Judge Porteous focuses on a single factual allegation – that Judge Porteous's conduct deprived the public and parties of his "honest services" – to argue that this sentence converts the entire Article into a criminal count based on a violation of Title 18, United States Code, Section 1346. It does nothing of the sort.

The House sets forth Article I in full, below, to illustrate the entire context of the "honest services" language, on which Judge Porteous bases his lead argument for the dismissal of that Article:

> G. Thomas Porteous, Jr., while a Federal judge of the United States District Court for the Eastern District of Louisiana, engaged in a pattern of conduct that is incompatible with the trust and confidence placed in him as a Federal judge, as follows:
>
> Judge Porteous, while presiding as a United States district judge in Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, denied a motion to recuse himself from the case, despite the fact that he had a corrupt financial relationship with the law firm of Amato & Creely, P.C. which had entered the case to represent Liljeberg. In denying the motion to recuse, and in contravention of clear canons of judicial ethics, Judge Porteous failed to disclose that beginning in or about the late 1980s while he was a State court judge in the 24th Judicial District Court in the State of Louisiana, he engaged in a corrupt scheme with attorneys, Jacob Amato, Jr., and Robert Creely, whereby Judge Porteous appointed Amato's law partner as a `curator' in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm. During the period of this scheme, the fees received by Amato & Creely amounted to approximately $40,000, and the amounts paid by Amato & Creely to Judge Porteous amounted to approximately $20,000.
>
> Judge Porteous also made intentionally misleading statements at the recusal hearing intended to minimize the extent of his personal relationship with the two attorneys. In so doing, and in failing to disclose to Lifemark and its counsel the true circumstances of his relationship with the Amato & Creely law firm, Judge Porteous deprived the Fifth Circuit Court of Appeals of critical information for its review of a petition for a writ of mandamus, which sought to overrule Judge Porteous's denial of the recusal motion. <u>His conduct deprived the parties and the public of the right to the honest services of his office</u>.

> Judge Porteous also engaged in corrupt conduct after the Lifemark v. Liljeberg bench trial, and while he had the case under advisement, in that he solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash. Thereafter, and without disclosing his corrupt relationship with the attorneys of Amato & Creely PLC or his receipt from them of cash and other things of value, Judge Porteous ruled in favor of their client, Liljeberg.
>
> By virtue of this corrupt relationship and his conduct as a Federal judge, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.
>
> Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.[49]

Judge Porteous argues that as a result of the single sentence alleging that Judge Porteous's conduct "deprived the parties and the public of the right to the honest services of his office," "[t]he House framed Article I as a broad 'honest services' claim,"[50] and that recent judicial interpretations of the "honest services" statute therefore come into play.

First and foremost, while Judge Porteous's conduct may in fact have been a violation of the criminal law, Article I does not purport to allege a violation of a specific statute, let alone the highly technical offense of "honest services fraud." It is not patterned after the mail fraud or wire fraud statutes (or any fraud statute), and it does not otherwise allege a "scheme or artifice to defraud," or any other language alleging a fraud scheme – language that would be necessary to charge a criminal "honest services" fraud offense.[51] Article I cites to no criminal statute, instead

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[49] H. Res. 1031, 111th Cong., 2d Sess., at 2–4 (2010) (emphasis added) (Attachment 7).

[50] See Judge Porteous's Motion to Dismiss Article I, at 6. He further contends that "Article I would create bizarre new precedent by impeaching a federal judge on the basis of an honest services violation that was recently rejected as unconstitutionally vague by the Supreme Court." Id. at 21.

[51] 18 U.S.C. § 1346 sets forth the basis for "honest services" fraud and provides:

concluding that Judge Porteous's conduct "brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge." Indeed, Article I is written in non-technical language and focuses on Judge Porteous's acts of concealment of financial relationships in the course of presiding over a case. Whether the conduct alleged in Article I also violated criminal laws, or could have resulted in an indictable offense for "honest services fraud," has no bearing on any issue before the Senate; as set forth above, a different standard governs the Senate's decision. Hence, the interpretation of the term "honest services," and the applicability of that term to support a criminal indictment, is irrelevant here.

Judge Porteous's remaining argument related to honest services is that, as a factual matter, because of the vagueness associated with the "honest services" statute, he and federal judges simply have no notice as to how they should behave on the federal bench.[52] However, the House's unanimous decision to impeach was reached without reference to the criminal provision that may reach that conduct.[53] Rather, the description of the objectionable conduct in the Articles specifically gives notice to the judiciary and the public of the behavior by Judge Porteous that informed the House's unanimous conclusions as to what constituted grounds for impeachment.

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

[52] Judge Porteous claims that if Article I were not dismissed, Judges "would be left to guess what conduct might result in their removal." See Judge Porteous's Motion to Dismiss Article I, at 3. He thereby underestimates the integrity of his colleagues.

[53] Not only is the Skilling case irrelevant to these impeachment proceedings, but it would be particularly problematic in separation of powers terms if the Federal judiciary had the power to insulate a Member of the judiciary from impeachment by itself making certain legal rulings.

C. Article I Sets Forth an Impeachable Offense.

Judge Porteous also claims that Article I charges only the "appearance of impropriety," and not "actual impropriety" and argues that dismissal is warranted because the Article is not based on "actual impropriety."[54] Incredibly, Judge Porteous labors to persuade the Senate Committee that soliciting and receiving cash from a lawyer with a pending case is not actual misconduct, that it creates only an "appearance" problem. Plainly, the judge sets a very low bar as to what constitutes actual misconduct. Surely, the Senate is entitled to conclude that a Judge's solicitation and receipt of monies from an attorney with a case pending before him constitutes "actual misconduct" that warrants the Judge's removal from office. The label is unimportant.

Article I alleges that by bringing disrepute to the federal judiciary and undermining its authority and legitimacy, Judge Porteous's conduct warrants impeachment. When Judge Porteous – or any judge – is exposed as having accepted things of value from attorneys appearing before him and then ruling in favor of the client represented by those attorneys, he damages the judicial system and brings the federal courts into disrepute. This is especially so here, where Judge Porteous's ruling for his financial benefactors' client was reversed on the central issues in the litigation, in an opinion that excoriated the judge.[55] Thus, Article I charges that the conduct at issue establishes two grounds for Judge Porteous's removal: first, that it brought his court into "scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary," and second, that it "demonstrated that he is unfit for the office of Federal judge." The terms "actual" and "apparent" impropriety have no relevance to the consideration of this Article or the facts it alleges.

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[54] See Judge Porteous's Motion to Dismiss Article I, at 10.

[55] See In the Matter of Liljeberg Enterprises Inc., 304 F.3d at 428–29, 431–32 (Attachment 6).

Further, as a matter of precedent, it is well established that a judge's conduct involving financial entanglements with parties and litigants is a recognized and appropriate basis for impeachment and removal from office.[56] Other impeachments demonstrate that a "gross betrayal of public trust" is sufficient ground for impeachment. The 1926 impeachment report of Judge George W. English concluded:

> No one reading the record in this case can conclude that this man has lived up to the standards of our judiciary, nor is be [sic] the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.[57]

Article I falls squarely within the principles that emerge from prior impeachments in that it charges Judge Porteous, in substance, with official acts of misconduct and conduct that is incompatible or demeaning to the judicial office he holds, such that he has forfeited his "legitimacy" and should be removed from office.

WHEREFORE, the conduct alleged in Article I unquestionably charges an impeachable offense – one that is not governed by federal criminal standards – and Judge Porteous's Motion to Dismiss Article I should be denied.

II. ARTICLE II PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE

Judge Porteous argues that because this case would be the first time in history that anyone has been impeached for pre-office conduct – i.e., conduct that occurred in an office held

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[56] See e.g., Porteous Impeachment Report, supra note 26, at 15–16 (citing the 1912 impeachment of Circuit Judge Robert W. Archbald, who enriched himself through financial dealings with companies and attorneys with cases before him on the Federal district court and U.S. Commerce Court, and the 1936 impeachment against Judge Halsted L. Ritter, who received a kickback from his former partner).

[57] Turley, supra note 3, at 74–75 (internal citations omitted).

prior to the one from which the official is being impeached – Article II must be dismissed.[58] This argument is unavailing because the Senate may, in its judgment, impeach on the sole or partial basis of pre-office conduct, where such conduct would, in the Senate's judgment, render the officer unfit to hold office.

A. Article II Properly Charges Conduct For Which Removal is Appropriate

Article II describes a corrupt scheme between Judge Porteous and local bail bondsmen, Louis Marcotte and his sister Lori. The Article alleges, in substance, that Judge Porteous solicited and received things of value from the Marcottes in exchange for taking numerous official acts for the Marcottes' financial and personal benefit. This was part of a pervasive corruption scheme in the 24th Judicial District Courthouse located in Gretna, Louisiana. Judge Porteous's affirmative actions on behalf of the Marcottes, while he was both a state and a federal judge, were significant to the Marcottes in expanding their corrupt influence in the 24th Judicial District.[59] Significantly, Judge Porteous intentionally waited until after his Senate confirmation – but before he took the oath of office and ascended to the federal bench – to set aside a conviction of a Marcotte employee (at Louis Marcotte's request), knowing that this highly improper judicial act could bring to light his relationship with the Marcottes and derail his ascension to the federal bench.

Judge Porteous mischaracterizes and attempts to trivialize the allegations in Article II. This impeachment did not arise because of "a handful of lunches." (Nor has the House asserted that having lunch with a corrupt bail bondsman is "on par with treason," as Judge Porteous

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[58] See generally Judge Porteous's Motion to Dismiss Article II.

[59] Ultimately, other judges were convicted of federal felony charges arising from conduct involving corrupt relationships with the Marcottes – conduct that was materially indistinguishable from the conduct of Judge Porteous.

alleges.)[60] Instead Article II has charged that Judge Porteous engaged in a quid pro quo arrangement with Louis Marcotte – a convicted racketeer – similar to conduct for which other state judges were sent to prison. In fact, the proof will establish the Marcottes paid for hundreds of lunches, ongoing car repairs and maintenance, home repairs, and several trips in return for Judge Porteous's official acts in setting bonds and other judicial acts as requested by the Marcottes. The company Judge Porteous keeps is not the impeachable offense; the high crime or misdemeanor is the continuing pattern of corruption: a quid pro quo of official acts in return for economic largess from the Marcottes.

Further, in Article II, the House does not "tangentially allude" to Porteous's conduct on the federal bench.[61] Though much of the quid pro quo conduct set forth in Article II occurred while Judge Porteous was a state judge (and would by itself provide a basis for his impeachment), Article II makes clear that Judge Porteous continued to accept meals from the Marcottes, and continued act to further the activities of Louis and Lori Marcotte – persons whom he knew to be corrupt based on his own interactions with them – while he was a federal judge.

One of the events that was set forth explicitly at the House hearing involved Judge Porteous, as a federal judge, vouching for Louis Marcotte with state Judge Ron Bodenheimer. Bodenheimer has testified that he did not hold the Marcottes in high regard, but that Porteous, as a federal judge, vouched for the Marcottes. Bodenheimer testified this was critical in his decision to form a relationship with the Marcottes – a relationship which became corrupt in ways similar to the Marcottes' relationship with Judge Porteous and was among the charges which

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[60] See Judge Porteous's Motion to Dismiss Article II, at 4.

[61] Id. at 5.

landed Bodenheimer in prison.[62] In addition, as set forth in the House Report, while a federal judge, Judge Porteous was more than willing to lend the prestige of his office to Louis Marcotte to help him forge relationships with other state judges and magistrates, including Judges Kerner, Centanni and Benge, as well as with businessmen who could advance Marcotte's business interests.[63] In short, the Porteous-Marcotte quid pro quo relationship did not come to an end when Judge Porteous took the federal bench. The Marcottes and Judge Porteous continued to confer benefits on each other.

Whatever the hypothetical concerns are that Judge Porteous raises about remote or trivial offenses, the conduct at issue in this case involved: (1) serious misconduct by Judge Porteous, (2) taken in a judicial capacity and thus clearly bearing on his fitness to be a judge, (3) which was affirmatively concealed from the Senate, and (4) which persisted after Judge Porteous took the federal bench. The revelation that a sitting federal judge has engaged in conduct that landed other state judges in prison brings the federal bench in disrepute. The appropriate remedy is for Judge Porteous to be removed from his office.

B. Impeachment Can Be Based on Pre-Federal Bench Conduct.

Judge Porteous's contention that pre-federal bench conduct – no matter how serious – cannot support impeachment, does not survive scrutiny. No reading of the Constitution or any other legal authority supports Judge Porteous's argument.

Pre-federal bench conduct as a basis for impeachment finds support in three distinct places: (1) the Constitution, (2) the impeachment proceedings involving Judge Robert W.

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[62] See Ronald Bodenheimer Grand Jury Testimony, at 10–11, 28–29 (April 22, 2004) (Relevant Excerpts attached as Attachment 8).

[63] See Porteous Impeachment Report, supra note 26, at 80. Marcotte was aware that a bail bondsman was not always held in high regard. It helped him immeasurably in dealing with others when he could bring Judge Porteous to the table on his side.

Archbald, and (3) the history of judges who were either prevented from or dissuaded from ascending to the federal bench because of corrupt pre-federal bench conduct.

1. The Constitution, in Providing for Impeachment for Treason, Bribery and High Crimes or Other Misdemeanors, Provides No Time Limit as to When Impeachable Conduct Must Occur.

Nothing in the text of the Constitution supports Judge Porteous's position that pre-federal bench conduct can never warrant impeachment. As noted in the House Report accompanying the Articles, "the Constitution describes 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,' and certainly does not require that such conduct occur during the tenure of the Federal office from which impeachment is sought.'"[64] Indeed, treason or bribery may have occurred prior to confirmation as a federal judge. The ultimate decision by the Senate – whether the conduct rises to the level of a "High Crime or Misdemeanor" and warrants the judge's removal – does not turn on when that conduct occurred, but instead on whether that conduct so undermines the public trust that the judge must be removed from office.

Additionally, no policy justification exists for a blanket prohibition on the consideration of pre-federal bench conduct as a grounds for impeachment. The logic of Judge Porteous's position is that even if a federal judge were later found to have committed espionage or homicide prior to taking the federal bench, he could not be removed from his lifetime appointment as a federal judge, notwithstanding that proof of such conviction would so clearly demonstrate his

[64] See Porteous Impeachment Report, supra note 26, at 19 (quoting Task Force Hearing, Part IV, at 30 (Written Statement of Professor Michael J. Gerhardt, at 4)). The principles discussed in this Section of the House's Consolidated Opposition were addressed in depth by Professors Michael Gerhardt and Akhil Amar at the Task Force Hearing, Part IV. The written statements of Professors Gerhardt and Amar are attached to this Opposition as Attachments 9 and 10, respectively.

unfitness for the job and would result in incalculable injury to the reputation of the federal judiciary.

Moreover, the three distinguished constitutional scholars who testified before the House Impeachment Task Force were unequivocal in their recognition of pre-federal bench conduct as a basis for impeachment. Each expert witness argued that pre-federal bench conduct can be the basis of impeachment.[65]

Professor Gerhardt explained in his written statement:

> Say, for instance, that the offence was murder—it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a Federal judge. The timing of the murder is of less concern 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.[66]

Professor Amar stated at the hearing:

> Let's take bribery. Imagine now a person who bribes his very way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can't immunize the bribery from impeachment and removal. Had the bribery not occurred, the person never would have been an officer in the first place.[67]

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[65] Judge Porteous's attempts to characterize their testimony to the contrary is simply not supported by a fair reading of their testimony.

[66] See Written Statement of Professor Gerhardt, supra note 64, at 4.

[67] See Task Force Hearing, Part IV, supra note 17, at 17 (Testimony of Professor Amar). As one commentator has explained, impeachment rectifies a fraud in the confirmation process – when it is revealed that the true character of the person holding office is not what the Senate was led to believe at the time of confirmation:

> The thrust of an impeachment trial is that the individual standing before the Senate is not the individual who secured an office by election or appointment. Rather, the later disclosure of misconduct revealed critical information about the individual's virtue or ability to hold public office.

Turley, supra note 3, at 7.

Professor Geyh stated:

> [A] quid pro quo arrangement with bail bondsmen . . . is the kind of corruption that fairly may be characterized as a violation of the public trust. Who cares if it occurred before [Judge Porteous took the Federal bench]?"[68]

In addition, Professor John C. Harrison of the University of Virginia Law School has submitted his opinion on whether the conduct for which civil officers may be impeached, convicted and removed from office includes only actions that took place while the officers hold the office that is the subject of the impeachment. He notes:

> Because impeachment is about the interests of the public, and not primarily about punishing wrongdoing, it is appropriate that a judgement of unfitness may be based on conduct that took place before an office-holder's appointment. Wrongdoing before one enters office can demonstrate serious untrustworthiness just as can wrongdoing while in office, and the ultimate touchstone in impeachment is whether the people can trust the office holder.[69]

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[68] See Task Force Hearing, Part IV, supra note 17, at 36 (Testimony of Professor Geyh). See also Written Statement of Professor Charles Geyh, submitted at the Task Force Hearing, Part IV, (Attachment 11).

[69] See Letter from Professor John C. Harrison to Alan Baron, Special Impeachment Counsel (July 27, 2010) (Attachment 12).

2. The Archbald Conviction on the "Omnibus" Count Supports the Impeachment of Judge Porteous.

The impeachment of Judge Robert W. Archbald raised the issue of prior conduct.[70] There were thirteen Articles of Impeachment brought against Archbald. Six Articles accused him of misconduct on the Commerce Court (where he was then assigned at the time of his impeachment and trial); six accused him of misconduct on the district court – his prior judicial appointment. Article 13, the Article most closely analogous to the Articles of Impeachment against Judge Porteous, set forth allegations that involved his conduct on both courts. On this Article, the Senate convicted Judge Archbald.

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[70]Judge Archbald was, at the time of his impeachment, a Judge on the Third Circuit Court of Appeals assigned to the Commerce Court.

The House carefully considered the propriety of brining pre-Commerce Court charges. The House's reasoning for doing so is particularly apt in considering the conduct of Judge Porteous:

> 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.

See H.R. Rep. No. 946, Impeachment of Robert W. Archbald, Judge of the United States Commerce Court, Report of the Committee on the Judiciary (hereinafter "Archbald Impeachment Report"), reprinted in IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess., at 175 (1973), as reprinted in, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess., at 11311 (1998).

Because debate was closed during the floor vote in the Archbald impeachment, there was no formal debate or discussion about the Senate's jurisdiction to impeach over prior conduct.[71] The Senators were not required to state their reasons for their votes, yet a small minority of Senators did so, and divided equally on the issue of prior conduct with approximately six expressing the view one way and approximately six the other. The vast majority of Senators did not explain their votes. For example, one Senator stated:

> Mr. Owen: Impeachment is the exercise of political power and not the exercise of mere judicial authority under a criminal code. Impeachment is the only mode of removing from office those persons proven to be unfit because of treason or high crime[s] or misdemeanors.
>
> Whether these crimes be committed during the holding of a present office or a preceding office is immaterial if such crimes demonstrate the gross unfitness of such official to hold the great offices and dignities of the people.
>
> A wise public policy forbids the precedent to be set that promotion in office of a criminal precludes his impeachment on the ground of his discovered high crimes and misdemeanors in a previous office from which he has just been promoted.
>
> For these reasons it is my judgment that articles 7, 8, 9, etc., in so far as they charge crimes committed by Robert W. Archbald while United State district judge, comprise impeachable offense and may be alleged against him as judge of the Commerce Court.[72]

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[71] See Proceedings of the U.S. Senate and the House of Representatives in the Trial of Impeachment of Robert W. Archbald, 62d Cong., Sen. Doc. 1140, at 1620-78 (1913).

[72] Id. at 1647. Several other Senators made similar statements. Senator Poindexter stated that:

> [A]lthough the offenses were committed while the respondent was a district judge and before we was appointed circuit judge, yet, since the penalty for impeachable offenses is not only forfeiture of office, but disqualification to hold office thereafter, I am of [the] opinion that the offense charged in these articles, although committed before respondent's appointment as circuit judge, nevertheless disqualify him, on impeachment therefor [sic], from holding office as such circuit judge or as a Judge of the Commerce Court. There is no statute of limitations nor law of limitations in impeachment proceedings.

Though some Senators argued against impeachment on the district court counts, the fact that the Senate ultimately acquitted on those counts means little because the proof on those counts was apparently very weak. One Senator specifically noted that he was voting not guilty on all but one of the district court counts, but that his vote should not be misinterpreted as suggesting that charging prior conduct was improper. Senator Cullom stated:

> I have voted "not guilty" on articles 4, 6, 7, 8, 10, 11 and 12, believing that they do not constitute the offense of high crimes and misdemeanors, and not because the acts were committed while the respondent was a judge of the district court. In my opinion the Senate would have jurisdiction to try respondent if the articles should warrant such action.[73]

But although it is impossible to determine what motivated the votes of most Senators in the Archbald case, since most Senators were silent on the matter, one conclusion is beyond question: the Senate voted to convict Archbald on the one count that most closely resembles the Article against Judge Porteous and alleged conduct both prior to and during his tenure in the current office.

3. Corrupt Pre-Federal Bench Conduct Has Prevented or Dissuaded Judges Throughout History from Ascending to the Federal Bench And Caused Others to Resign Rather than be Impeached

Judge Porteous relies heavily on the fact that there is an absence of direct precedent for impeachment based on pre-office conduct. However, it is hardly surprising that most impeachments have involved conduct during the course of the judicial tenure. As a general matter, persons of dubious integrity are not considered for federal judgeships. Moreover, those

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Id. at 1648. Senator Elihu Root stated: "I have no doubt that respondent is liable to impeachment for acts done while he was a judge of the district court and that the Senate has jurisdiction to try him for such acts." Id. at 1650. Senator Gronna stated: "While Judge Archbald was not at the time of the impeachment holding the identical office which he did when the offense referred to were committed, the office is closely linked to the one he previously held, and the duties he was called on to perform were of the same general nature." Id. at 1653.

[73] Id. at 1663.

individuals who are selected have to survive an FBI background check – a process that is intended to weed out applicants with significant misconduct in their backgrounds. In addition, applicants with derogatory information in their backgrounds are likely to self-select out of the process to avoid an inquiry or examination, which may expose wrongdoing they wish to keep concealed, and to avoid having to answer forms falsely under oath or make false statements in order to secure the position of federal judge.

In two instances where it has been discovered that a federal judge has taken the bench with undiscovered corrupt behavior in his background, the judge has resigned, thus eliminating the need for Congress to consider whether that misconduct warranted impeachment. Further, a consideration of the facts associated with those two instances demonstrates that impeachment would have been warranted, and indeed inevitable, if they had not resigned.

One example of a judge who voluntarily resigned to avoid impeachment is Judge Otto Kerner. After Judge Kerner became a judge on the Seventh Circuit Court of Appeals, he was prosecuted, convicted, and sentenced to jail for his conduct in accepting bribes as the Governor of Illinois, well before he assumed the federal bench. Upon his conviction, Members of Congress and the press called for him to resign or be impeached.[74] Those calls for resignation or impeachment reflect a commonsense recognition that a judge who committed egregious ethical misconduct even before he assumed the bench, in this case involving bribery, must be removed from the bench. The point in time when that conduct occurred was not important. As one author bluntly stated: "[J]udge Otto Kerner, Jr., of the United States Court of Appeals for the Seventh

[74] Although some small portion of the counts of conviction involved post-Federal bench actions (perjury or false statements), the calls for resignation or impeachment did not focus on that conduct.

Circuit resigned before inevitable impeachment after he was convicted for conduct that preceded his service."[75]

Another example is that of Judge Hebert Fogel of the Eastern District of Pennsylvania, who resigned as a way of avoiding scrutiny for pre-federal bench conduct. As described in one law review article:

> [J]udge Hebert Fogel of the Eastern District of Pennsylvania remained in office for more than a year after he was investigated in 1976 by the Justice Department for business irregularities occurring before he ascended to the bench. Judge Fogel invoked the Fifth Amendment when questioned before a grand jury about his role in a questionable government contract deal involving his uncle. The New York Times reported in November of 1976 that "deputy Attorney General Harold R. Tyler, Jr. has let it be known to Judge Fogel that it would be best for the reputation of the federal judiciary if he left the bench voluntarily." Judge Fogel resigned about a year later and returned to private practice."[76]

The suggestion that Judge Fogel, if he had in fact engaged in corrupt government contract deals prior to taking the bench, would henceforth be beyond the reach of impeachment, makes no sense.

Thus, it is a rare situation in which serious pre-federal bench misconduct would come to light, so the lack of direct precedent is easily explicable. Judge Porteous's case constitutes precisely that rare situation.

By concealing critical information, Judge Porteous sneaked through the background investigation process. His pre-federal bench misconduct in Article II only emerged as a result of FBI inquiries into the misconduct of other state judges several years after Judge Porteous had left the state court bench. Unlike Judges Kerner and Fogel, he has not resigned, but claims that no matter how egregious his pre-federal bench conduct, and no matter if his conduct brings the

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[75] See Turley, supra note 3, at 67 (footnote omitted) (emphasis added).

[76] See Emily Field Van Tassel, Resignation and Removals: A History of Federal Judicial Service – and Disservice – 1789–1992, 142 U. PA. L. REV. 333, 385 (1993).

federal courts into disrepute, Congress lacks the power to remove him. Though this is an unusual circumstance, it is not one that is beyond Congress's constitutional impeachment power to address and remedy. And, the fact that the post-federal bench disclosure of pre-federal bench misconduct has seldom occurred has little to do with whether impeachment would be permitted to address it.

4. The Constitution's "Good Behavior" Language Does Not Set Forth a Substantive Standard of Conduct, But Instead Was Intended to Provide for Life Tenure for Federal Judges.

Judge Porteous has argued that he is entitled to hold his judicial office "during good behavior," and, therefore, the conduct which occurred prior to his taking the federal bench cannot constitute a basis for impeachment. By this argument, Judge Porteous fundamentally misreads the "good behavior" clause.

Article III, Section 1, of the Constitution provides:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, … .

This provision means only that federal judges shall have life tenure – unless impeached. It does not set forth a separate standard for behavior, or in any way limit Congress's ability to impeach and remove for high crimes and misdemeanors – no matter when they occurred.

First, it would be incongruous for the Constitution to set forth specific grounds for impeachment in Article I (treason, bribery, and high crimes and misdemeanors), while at the same time providing for a separate and far more vague standard for removal in Article III (failing to engage in "good behavior").

Second, there is no basis in constitutional history or in the plain reading of the Constitution itself that suggests that the "good behavior" clause was intended to limit Congress

in considering when conduct must take place to warrant impeachment. If that were the Framers' intent, then the constitutional definition of impeachable conduct could have provided that such conduct must occur while the judge is in the office from which impeachment is sought. Or, the temporal limitation as to impeachable conduct that Judge Porteous contends is provided by the "good behavior' clause would have been found in Article I (which defined impeachable conduct), and not in Article III (which establishes the judiciary). Judge Porteous's interpretation of the reach of the good behavior clause would not permit impeachment for treason or bribery, which was not disclosed prior to a judge's appointment to the bench.

In explaining why the "good behavior clause" should be understood as meaning "that federal judges shall hold tenure for life unless impeached," [77] Professor Michael Gerhardt stressed two points. He noted that the Framers "included the phrase 'during good behavior' in the Constitution to contrast the unlimited term of federal judges with the fixed terms for the president, vice-president and members of Congress."[78] Second, he noted that the "good behavior" language is a lesser standard of conduct than the grounds for impeachment set forth in Article I, and that the Framers had rejected "maladministration" as a ground for removal because it was so vague. Thus, it would conflict with the structure of the Constitution and the framers' desire for an independent federal judiciary designed to protect citizens from potential overreaching of the federal government if so vague a standard as "good behavior" (in Article III) were read to make it easier to remove federal judges than the "high crimes and misdemeanor" standard in Article I.[79] As Gerhardt concluded: "It defies common sense for the framers to have

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[77] GERHARDT, supra note 35, at 83.

[78] Id.

[79] Id. at 84.

taken great pains to have purposefully designed such an awkward system for remedying judicial misconduct but then implicitly left Congress and the president free to remove judges on identical or more lenient grounds through some other, nonspecified, more efficient devices."[80] Accordingly, no article of impeachment against any judge has ever stated that the allegedly impeachable conduct failed to constitute "good behavior" and thus warranted the judge's removal from office.

WHEREFORE, because there is simply no persuasive authority for the proposition that the Constitutional power to impeach a federal judge cannot be exercised where the misconduct at issue occurred prior to appointment, Judge Porteous's Motion to Dismiss Article II should be denied.

III. ARTICLE III PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE

A. Judge Porteous Misconstrues Article III and Misstates the Facts.

Judge Porteous argues that Article III should be dismissed because, in essence, it alleges nothing more than "errors or inaccuracies," "common problems," and "common mistakes" that any debtor in bankruptcy may experience. He further argues that it should be dismissed because it alleges "private, minor, bankruptcy misconduct." Both these arguments fail, and his motion should be denied.

Judge Porteous's first argument, like his arguments to dismiss other Articles, rests on a mischaracterization of what the Article charges. Article III alleges more than a mere series of errors. To be clear, Article III alleges that Judge Porteous "engaged in a pattern of conduct inconsistent with the trust and confidence placed in him as a federal judge by knowingly and intentionally making material false statements and representations under penalty of perjury

[80] Id. at 85.

related to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case."[81] The conduct that comprised these false statements, misrepresentations and acts is set forth as follows:

> (1) knowingly using a false name and a post office box address to conceal his identity as the debtor in the case;
>
> (2) concealing assets;
>
> (3) concealing preferential payments to certain creditors;
>
> (4) concealing gambling losses and other gambling debts; and
>
> (5) incurring new debts while the case was pending, in violation of the bankruptcy court's order.[82]

The hypothetical situation posed by Judge Porteous – that this conduct could have been committed by some other debtor as a result of innocent error[83] – is a red herring. The issue before the Senate is whether this conduct, when actually committed by Judge Porteous himself, involved his knowing and intentional attempts to dishonestly thwart and evade the bankruptcy laws, including lying under oath in order to do so.

The evidence in the Senate trial will establish the numerous dishonest acts that Judge Porteous committed and argue their significance as to the proof of his intent. At this stage, the House notes, however, that Judge Porteous's dishonesty in his bankruptcy filings – concealing debts and gambling activities – is similar to the dishonesty reflected in his annual financial disclosure statements, which he filed in the years leading up to his bankruptcy,[84] and as reflected in Judge Porteous's conduct in connection with his background check to become a federal judge.

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[81] H. Res. 1031, supra note 49, at 5–6.

[82] Id. at 6.

[83] See Judge Porteous's Motion to Dismiss Article III, at 2.

[84] See Porteous Impeachment Report, supra note 26, at 93–95.

In addition, Judge Porteous's factual assertions are simply inaccurate. For example, Judge Porteous, at the same time he was signing and preparing his bankruptcy schedules, filed for a tax refund in excess of $4,000. When asked about the tax refund at the Fifth Circuit, he falsely blamed his bankruptcy counsel, Mr. Lightfoot and he persists with that explanation in his Motion to Dismiss Article III.[85] On this particular issue, the House Impeachment Task Force Hearing record is telling:

> Ms. KONAR [Impeachment Task Force Counsel]. Did Judge Porteous ever tell you that on March 23rd of 2001, he filed his tax return for the year 2000 and he requested a $4,143 tax refund?
>
> Mr. LIGHTFOOT. No.
>
> Ms. KONAR. Did Judge Porteous ever tell you that on April 13th, 2001, which was just 4 days after his bankruptcy schedules were filed, that he received that $4,143 tax refund into his bank account?
>
> Mr. LIGHTFOOT. No.
>
> Ms. KONAR. Is the information concerning this tax refund that we have just discussed something that Judge Porteous should have disclosed to you?
>
> Mr. LIGHTFOOT. I would expect a positive answer to that. Relative to the term "liquidated," if you filed a tax return, you know exactly what you are entitled to. So if earlier in the year, let's say you are October of 2000, you can't have filed your 2000 return yet, the year is not even over, you don't file it until the following year. So if a tax return has been filed and there is a liquidated amount and it is owed, and you know that it is owed, then it should be in that answer.
>
> Ms. KONAR. What would you have done if you had found out prior to filing Judge Porteous's bankruptcy schedules that he had filed his year 2000 tax refund and that he had claimed a $4,000 tax refund?

[85] See Fifth Circuit Transcript, supra note 23, at 80–84.

> Mr. LIGHTFOOT. I would have amended his schedule to list it, had it been absent, and probably informed the trustee, particularly if the meeting of creditors hadn't been held yet. I would have mentioned it.[86]

In another attempt to explain away one of the many perjurous statements in his bankruptcy filings, Judge Porteous blames his attorney for their scheme to file his initial bankruptcy petition under a false name.[87] The fact that his attorney was a willing participant in this fraudulent filing does not absolve Judge Porteous of responsibility. Even if his attorney was willing to subvert his own legal and ethical obligations, that does not mitigate the wrongfulness of the judge's conduct – particularly coming from someone who must, at times, preside over bankruptcy proceedings.

Whether similar conduct by a private person would warrant a criminal prosecution is a far different issue than whether that same conduct by a federal judge on matters that touch centrally to his duties, would warrant his removal from office.[88] Article III clearly charges that, by his conduct in the bankruptcy proceedings, "Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the federal judiciary, and demonstrated that he is unfit for the office of federal judge."[89]

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[86] See To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., Part III, Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary (hereinafter, "Task Force Hearing, Part III"), Ser. No. 111-44, 111th Cong., 1st Sess., at 46–47 (Dec. 8, 2009). Judge Porteous stresses that he ultimately complied with the repayment plan. This ignores the fact that the repayment plan was procured in bad faith, and the creditors would have received more money had Judge Porteous been honest. By not reporting the tax refund for example, Judge Porteous in effect stole $4,000 from his creditors.

[87] See Judge Porteous's Motion to Dismiss Article III, at 7.

[88] Judge Porteous further complains that Article III fails to set forth all the elements of a criminal offense. As set forth above, the Articles of Impeachment do not purport to allege violations of specific criminal laws and need not do so to sustain a conviction by the Senate.

[89] See H. Res. 1031, supra note 49, at 6.

Finally, Judge Porteous distorts the facts in Article III by claiming that the trustee who oversaw his bankruptcy case "elected not to take action" after the FBI advised the trustee that Judge Porteous had filed his bankruptcy petition using an "incorrect name."[90] Yet, Judge Porteous conveniently fails to note that the letter explaining the bankruptcy trustee's decision not to take action specifically noted that "the FBI has refused to provide the Trustee with any evidence of improprieties by debtor. Since [the trustee] has no evidence to support the suspicions expressed by the FBI agents, he does not intend to take further action related to these allegations."[91] All of these factual arguments by Judge Porteous, in any event, go well beyond the four corners of the Articles of Impeachment and are not properly considered pre-trial.

B. Personal Misconduct is Recognized as an Appropriate Basis for Impeachment.

Judge Porteous also argues Article III alleges only "private, minor, bankruptcy misconduct" that was not the subject of a criminal prosecution. It is clear, however, that "private" conduct can be the basis for impeachment. It is likewise clear that Judge Porteous's definition of "minor" – in substance, conduct that was not the subject of a criminal prosecution – is unsupportable. In this way, he attempts to distinguish this case from that of Judge Claiborne, who was convicted of tax evasion and was thus a convicted felon. But, Judge Porteous's argument flies in the face of the Constitution's text and is inconsistent with the Senate's resolution in prior impeachments.

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[90] See Judge Porteous's Motion to Dismiss Article III, at 8.

[91] See Letter from attorney Michael Adoue to FBI Agent Horner (April 1, 2004). (A copy of the April 1, 2004 Letter from Adoue to Horner is attached to Judge Porteous's Motion to Dismiss Article III as Exhibit 2.)

1. Criminal Prosecution for Personal Misconduct is Not Required to Impeach for that Conduct.

Presumably aware that he cannot prevail on the argument that the Constitution does not allow "personal" conduct to be a basis for impeachment, Judge Porteous attempts to argue that what the Constitution really means is that a judge cannot be impeached for personal misconduct if the Executive Branch failed to prosecute that conduct. Such an argument is contrary to overwhelming precedent that makes it clear that a criminal prosecution is wholly irrelevant to whether a given course of conduct warrants impeachment.

The essence of the argument advanced by Judge Porteous was addressed by the House in connection with the impeachment of Judge George English for a variety of acts for which he was not criminally prosecuted. The Report accompanying the Articles recognized that the fact of indictment and prosecution was not relevant to the exercise by Congress of its Impeachment power in removing a federal judge. The Report noted there may well be circumstances where

> [a] civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and . . . his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution.[92]

Thus, the fact of or lack of federal prosecution is ultimately irrelevant to the issue of whether specified conduct rises to the level of a "high crime or misdemeanor" warranting impeachment. Under Judge Porteous's theory of Constitutional interpretation, Congress can impeach only if the Department of Justice prosecutes. Aside from the fact that most of the impeachments in this country's history have not followed criminal prosecutions, there is no

[92] See Impeachment of George W. English, Report of the Committee on the Judiciary"), reprinted in IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess., at 162 (1973), as reprinted in, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess., at 1298 (1998).

principled basis for Congress – either the House or Senate – to abdicate its constitutionally assigned roles associated with the exercise of the impeachment power and cede them to the Attorney General of the United States.

Indeed, the Senate has spoken clearly that the existence of a federal prosecution – even a federal criminal conviction – does not drive its consideration of whether the conduct alleged in the Articles of Impeachment warrants conviction and removal. Judge Claiborne was ultimately convicted and removed by the Senate for his conduct. The Senate acquitted on the Article which specifically charged the federal conviction as grounds for impeachment. Similarly, the Senate convicted and removed Judge Hastings, even after he was acquitted in his jury trial.

The Report accompanying the Articles of Impeachment of Judge Porteous addressed the relevance of the fact that the Department of Justice did not prosecute Judge Porteous:

> First, the nature of Congress's determination whether to impeach is fundamentally different from DOJ'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 necessarily violate a criminal statute.
>
> Second, Congress has an independent responsibility to review the evidence and cannot rely on DOJ'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 Robert Collins, and did not rely solely on the fact that each of those judges had been criminally convicted, so it is proper for Congress to 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.
>
> * * *
>
> Fifth, the Impeachment Task Force has . . . uncovered new evidence that simply was not considered by the Department, . . . [specifically] the Task

> Force and the Committee had the benefit of the Fifth Circuit hearings which expanded on the evidence available to the DOJ.[93]

The Senate is entitled to conclude that Judge Porteous's dishonest statements and acts in his bankruptcy proceedings demonstrate that he cannot be entrusted with upholding the integrity of federal judicial proceedings, despite the fact that the Department of Justice declined to prosecute.[94] The Senate may likewise conclude that Judge Porteous's continued presence on the federal bench brings the federal judiciary into disrepute, and that conviction is warranted.

2. Congress Has Rejected a Distinction Between Private and Public Conduct in the Impeachment Context.

a. The Judge Claiborne Impeachment.

There is no distinction between public and private conduct when Congress considers impeachable offenses. Judge Porteous's argument, which rests on the "private" nature of the financial misconduct, is fundamentally indistinguishable from the argument that Judge Claiborne raised and that the Senate Committee rejected in his Impeachment. In that case, Articles of Impeachment against Judge Claiborne charged him with filing false tax returns. In his motion to dismiss, Judge Claiborne argued in terms that track Judge Porteous's claims here, namely, that impeachment "was designed to reach those in high places guilty of official delinquencies or maladministration" and that the charges against him were "based on alleged private misconduct, as distinguished from official misconduct."[95] In its response, the House stressed that nothing in

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[93] See Porteous Impeachment Report, supra note 26, at 142–43.

[94] See Complaint of Judicial Misconduct Concerning The Honorable G. Thomas Porteous, Jr., filed by the Department of Justice, at 1 (May 18, 2007). (A copy of the DOJ Complaint is attached to Judge Porteous's Motion to Dismiss Article III as Exhibit 1. It is also marked as HP Exhibit 4 on the House's Exhibit List.)

[95] See [Judge Claiborne's] Motion to Dismiss the Articles of Impeachment on the Grounds They Do Not State Impeachable Offenses at 3, reprinted in Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate,

the text of the Constitution supported the private / public distinction and stated that if the Framers sought impeachment to be limited to "official" conduct, they certainly could have included such a limitation in the Constitution. Moreover, as the House explained in Claiborne:

> A review of the history of the impeachment provisions in the Constitution demonstrates the error in Judge Claiborne's argument. The same narrow view of impeachable offenses expressly was offered and rejected by the Framers of the Constitution.
>
> The Constitutional Convention convened on July 20, 1787, to consider the impeachment provisions. As originally drafted, the impeachment clause provided that the President should be "removable on impeachment and conviction of malpractice or neglect of duty." 1 The Records of the Federal Convention of 1787 69 (M. Farrand ed. 1911) (hereinafter Farrand). The provision was subsequently revised to make the President impeachable for "treason, bribery or corruption." 2 Farrand, supra, at 185-86. On September 8, 1787, Colonel Mason moved to add the phrase "or maladministration" after "bribery." He argued that "maladministration" was already a ground for impeachment in five State constitutions. In response, James Madison objected that "maladministration" was too narrow a standard. Mason soon withdrew his amendment and substituted the phrase "or other high crimes and misdemeanors." The formulation was accepted, along with an amendment to extend the impeachment sanction to the Vice President and all other civil officers. Id., at 552. The Framers thus rejected, at two separate junctures, the concepts of professional "malpractice" or "maladminstration" as the sole basis for the impeachment of federal officials.[96]

At the oral arguments, Judge Claiborne's counsel repeated the arguments he had made in his written motion, arguing, for example: "[O]ur position, of course, is that there is no allegation at this point in time that the behavior of Judge Claiborne in any way was related to misbehavior

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(hereinafter "Claiborne Impeachment Report") S. Hrg. 99-812, 99th Cong., 2d Sess., at 244, 246 (1986). As to whether "non-official" conduct could constitute a basis for impeachment, Judge Claiborne further went on to argue: "[o]ffenses not immediately connected with office, such as murder, burglary, and robbery, are left to the ordinary course of judicial proceedings, while impeachment was historically limited to misconduct in office." Id.

[96] See [The House of Representatives'] Opposition to [Judge Claiborne's] Motion to Dismiss Articles of Impeachment for Failure to State Impeachable Offenses at 3–4, reprinted in Claiborne Impeachment Report, supra note 96, at 443–44.

in his official function as a judge; it was private misbehavior. And we submit that, based on that private conduct, it is not an impeachable offense."[97] In response, House Manager Kastenmeier reiterated: "As has been pointed out, it would be absurd to conclude that a judge who had committed murder, mayhem, rape, or perhaps espionage in his private life, could not be removed from office by the U.S. Senate."

The Senate Impeachment Trial Committee resolved this issue on the merits. After noting that he lacked the authority to dismiss the Article, Chairman Mathias nonetheless ruled:

> There is neither historical nor logical reason to believe that the Framers of the Constitution sought to prohibit the House from impeaching and the Senate from convicting an officer of the United States who had committed treason or bribery or any other high crime or misdemeanor which is a serious offense against the government of the United State and which indicates that the official is unfit to exercise public responsibilities, but which is an offense which is technically unrelated to the officer's particular job responsibilities. [98]

The House urges the Senate Committee to follow the Claiborne Committee's disposition of this issue.

b. The Judge Walter Nixon Impeachment

The Judge Walter Nixon impeachment in 1989 further illustrates the inapplicability of the private conduct versus official conduct distinction and provides additional grounds to reject Judge Porteous's claims. In that case, Judge Nixon had attempted to persuade a local Sheriff to go easy on the prosecution of one of Judge Nixon's business associates, an individual who had provided Judge Nixon with lucrative investment opportunities. Thereafter, when investigated for

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[97] See Proceedings of the Senate Impeachment Trial Committee [Judge Claiborne], Statement of Oscar Goodman, Esq. (counsel for Judge Claiborne) (Sept. 10, 1986), reprinted in Claiborne Impeachment Report, supra note 96, at 77.

[98] See Proceedings of the Senate Impeachment Trial Committee [Judge Claiborne], Statement of Senator Mathias (Sept. 10, 1986), reprinted in Claiborne Impeachment Report, supra note 96, at 113–14.

bribery for having taken things of value from the business associate, Judge Nixon lied to the FBI and the Grand Jury and denied he had spoken to the Sheriff. Ultimately, Judge Nixon was impeached for lying to the FBI and committing perjury before the Grand Jury.

The Judge Nixon Impeachment establishes the propriety of impeachment when it is shown that a federal judge made false statements under oath and took other acts of concealment to interfere with a federal judicial proceeding, even one which had no bearing on any case in his own courtroom. Judge Porteous's false statements and pattern of concealment in the bankruptcy case are therefore well within the Nixon precedent.

WHEREFORE, Article III properly alleges that the conduct of Judge Porteous in his bankruptcy case justifies his conviction and removal from office. Specifically, by his bankruptcy-related misconduct, "Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge." This properly sets forth a compelling basis for Judge Porteous's conviction and removal. Judge Porteous's Motion to Dismiss Article III should be denied.

IV. ARTICLE IV PROPERLY ALLEGES CONDUCT THAT WARRANTS IMPEACHMENT AND REMOVAL FROM OFFICE

In his Motion to Dismiss Article IV, Judge Porteous grossly mischaracterizes what Article IV actually charges. Judge Porteous claims that "Article IV is nothing more than a statement by the House that, in the House's view, Judge Porteous should have been embarrassed by the facts alleged in Articles I and II."[99] He goes on to argue that "[i]f Judge Porteous were convicted on the basis of Article IV, the Senate would be asserting the right to remove a judge because it believes that a judge should have viewed an uncharged and unproven allegation to be

[99] See Judge Porteous's Motion to Dismiss Article IV, at 2.

'embarrassing.'"[100] Reading Judge Porteous's Motion, one would be under the impression that Judge Porteous was asked on several occasions nothing more than to reveal "embarrassing" information. This is a mischaracterization of what occurred.

What Article IV actually alleges is that during his background check to determine his qualifications to be a federal judge, Judge Porteous made a series of materially false statements, as follows: (1) denying under oath on his Supplemental SF-86 that there was anything "in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known;" (2) "falsely [telling] the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion," and (3) representing under oath on a Senate Judiciary Committee Questionnaire that, to the best of his knowledge, he did "'not know of any unfavorable information that may affect [his] nomination.'"[101]

Article IV alleges that these statements were false because, in truth and in fact, as Judge Porteous well-knew, he had engaged in corrupt relationships with attorneys Creely and Amato, and with bail bondsman Louis Marcotte. Contrary to Judge Porteous's description of Article IV, Judge Porteous is not charged with having concealed the "allegation" of improper relationships, he is instead charged with having made false statements to conceal the actual underlying conduct. Judge Porteous knew that such information would have been material to the White House and the Senate, and that he would not have been nominated or confirmed had he been

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[100] Id. at 3.

[101] H. Res. 1031, supra note 49, at 7–8.

truthful about these relationships.[102] As further proof of knowledge that certain information would have been material, Judge Porteous did not set aside the criminal conviction of one of the Marcottes' employees until after his confirmation proceeding, which demonstrates that Judge Porteous understood what the Senate was looking for and which shows his mens rea.[103]

Judge Porteous goes on to argue that the background check questions, as he repeatedly mischaracterizes them, were "vague, ambiguous, . . . nebulous [and] are incapable of being proven false."[104] Notwithstanding Judge Porteous's claims, the information that was sought by

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[102] Because an impeachment proceeding is not a criminal prosecution, analogies to the criteria for Federal indictments are irrelevant. Nonetheless, the House notes that there is at least one recent criminal case where an individual was prosecuted by way of a guilty plea for false statements arising from his having falsely stated to an investigator as part of a security investigation that he had not "engaged in conduct which would . . . make him vulnerable to coercion . . ." See Criminal Information, U.S. v. Keyser, Case No. 1:05-CR-543 (E.D. Va. Dec. 12, 2005):

> Count Three
>
> On or about August 9, 2004, in Arlington, Virginia, in the Eastern District of Virginia, the defendant . . . did knowingly, willfully, and unlawfully make material false, fictitious, and fraudulent statements and representations, and conceal material facts, in a matter within the jurisdiction of an agency within the executive branch of the Government of the United States; to wit, on or about the above date, [defendant] falsely stated to an investigator . . . that he had not engaged in conduct which would may make him vulnerable to coercion, exploitation, or pressure from a foreign government.
>
> (In violation of Title 18, United States Code, Section 1001(a)).

(emphasis added) (Attachment 13). The "vulnerable to coercion, exploitation, or pressure from a foreign government" language is, in material respects, indistinguishable from the "influence, pressure, coerce, or compromise" language at issue in Article IV in this case.

[103] See Porteous Impeachment Report, supra note 26, at 74–75.

[104] See Judge Porteous's Motion to Dismiss Article IV, at 12.

the questions could not be more obvious. As Professor Amar testified before the House Impeachment Task Force:

> [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.
>
> 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.[105]

Judge Porteous notes that Congress has never instituted impeachment proceedings for failing to disclose information.[106] However, the reasons that impeachment is appropriate for Judge Porteous's conduct are manifest. If impeachment were not permitted, then an individual who attained his judicial position by fraud would, in essence, be immune from removal. Judge

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[105] See Task Force Hearing, Part IV, Testimony of Professor Akhil Amar, supra note 64, at 34–35. Professor Amar further noted that these questions did not constitute some sort of "trap" for the unwary: "All he has to do is simply say, I do not wish to be considered for this position." Id. at 42.

[106] Judge Porteous has put together a list of persons who have been reported in the press as having made false statements of one sort or another in the confirmation process. These include a true hodgepodge of fact patterns, including instances of obvious innocent error and misstatements that were corrected prior to confirmation. Notably, none of the cases involved the willful concealment of potentially criminal misconduct by an appointee to become a Federal judge. When applicants did conceal such conduct, as with Cisneros and Kerik, they were in fact subject to criminal prosecution. Moreover, there is a significant difference between appointees to the Executive Branch and appointees to the Federal bench. As a practical matter, Congress has oversight power of the Executive Branch, and the positions at issue are not lifetime appointments. The individuals can be removed – and will inevitably be removed – by the process of elections and the workings of the political process. The Judge Bybee example is particularly inapposite, because there is no contention that Judge Bybee made any false statements to the Senate in connection with his confirmation.

Porteous views Senate confirmations as a game of hide the ball – there is no need to disclose anything you do not expect the Senate to learn of on its own, and, once confirmed, a federal judgeship is a lifetime safe harbor. While that may be the system that Judge Porteous would have the Senate adopt, it is certainly not one contemplated by the Constitution. As the House Report noted:

> For reasons set forth in the discussion of Article II, it is appropriate to consider pre-Federal bench conduct as a basis to impeach. Even though Judge Porteous did not make the statements in a judicial capacity, and even though this conduct did not carry over into his tenure as a Federal judge, the false statements corrupted the judicial appointment and rendered it illegitimate from its inception. As Professor Amar testified before 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.
>
> 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 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." 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.[107]

[107] See Porteous Impeachment Report, supra note 26, at 22–23 (citing Task Force Hearing, Part IV) (footnotes omitted). The obvious propriety of impeachment on this conduct – fraud in the

Finally, Judge Porteous alleges that the Senate was aware of many of the facts that Article IV alleges that he concealed. There is nothing to suggest that the Senate was made aware of the corrupt relationships Judge Porteous had with Creely, Amato, or the Marcottes. It is inconceivable that these facts would not have been material to the Senate as it considered Judge Porteous's candidacy for the federal bench. That is why he lied. As to Judge Porteous's relationships with those in the bail bonds industry, for example, he notes that the FBI background check contained certain anonymous information suggesting that the Judge had corrupt relationships with bondsmen and attorneys. However, Judge Porteous has it backwards and misses the significance of this fact. The existence of these general allegations only increases the significance of Judge Porteous's false statements – under oath or to the FBI – since he was well aware of information that would negatively impact on his confirmation.

Indeed, it was precisely the existence of these allegations that caused the FBI to interview Judge Porteous a second time, and to ask him yet again whether there was anything in his background that "might be the basis of attempted influence, pressure, coercion or compromise, and/or would impact negatively on his character, reputation, judgment or discretion."[108] These allegations compound the materiality of Judge Porteous's denials. Because the second interview followed up on allegations of impropriety, Judge Porteous had no doubt as to the information that was sought by the questions, and the information he was concealing by his answers. Judge Porteous's comments that the curatorships assigned to Creely were a matter of public record obviously omits the important part of that story – namely, that Creely gave Judge Porteous a portion of the money he received from those same curatorships. This relationship – of obvious

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confirmation process – is yet another example of the propriety of impeachment for pre-Federal Bench conduct.

[108] See August 18, 1994 FBI Interview of Judge Porteous, supra note 14, at 2–3.

potential importance to the Senate in determining whether Judge Porteous should be confirmed – was concealed.

WHEREFORE, Article IV properly alleges conduct warranting Judge Porteous's impeachment based on Judge Porteous defrauding the Senate and lying to the FBI in order to obtain the office of federal judge. Judge Porteous's Motion to Dismiss Article IV should be denied.

V. THE ARTICLES OF IMPEACHMENT DO NOT IMPERMISSIBLY AGGREGATE DISCRETE ALLEGATIONS

Judge Porteous claims that the structure of the Articles of Impeachment aggregates a series of discrete allegations, in violation of both Article I, Section 6 and Article II, Section IV of the Constitution. He argues that the Articles of Impeachment as drafted are contrary to the approach used in "prior impeachments."[109] He argues further that the Senate, therefore, should dismiss all of the Articles or, in the alternative, should require voting on each specific factual predicate claim within each Article. Judge Porteous's arguments are wrong on the law and wrong in their characterization of the impeachment Articles and of the history of impeachment convictions by the Senate. There is no basis for granting the relief he seeks, and the motion should be denied.

Regarding Judge Porteous's first argument, he is wrong that the Constitution bars the Senate from considering and convicting a federal official based on an Article of Impeachment with multiple factual predicates. Judge Porteous cites two constitutional provisions, neither of which supports his claim. First, he claims that aggregation would violate the requirement that to convict in an impeachment, the Senate must provide "Concurrence of two-thirds of the members

[109] See Judge Porteous's Motion to Dismiss the Articles of Impeachment as Unconstitutionally Aggregated, at 4.

present."[110] But the House has framed its Articles and the Senate will vote on them up or down. If two-thirds of the Senators present vote to convict, Article I's two-thirds requirement will plainly be satisfied. No more is required. Second, Judge Porteous claims that if the Senate convicts on the Articles as presented, it would "deprive[] Judge Porteous, the public, and the historical record of a clear finding" as to the basis for removal from federal office.[111] This argument is deficient on its face: the basis for the removal from office is precisely the course of conduct set forth in the Articles, which is and will be in the clear historical record, and the contents of which have long been known to Judge Porteous.

Regarding Judge Porteous's second argument, he fails to acknowledge the historical examples of Senate precedent that directly support Articles of Impeachment with multiple factual predicates. In the Judge Nixon Impeachment, Judge Nixon sought to dismiss Article III, which repeated the allegations of the Articles I and II, and, as alleged by Judge Nixon, contained fourteen separate allegations of false statements to the FBI and the federal grand jury. The Senate Committee specifically rejected Judge Nixon's argument that this charge was inappropriate, noting that the Article set forth "an intelligible and adequately discrete charge;" "[t]he House has substantial discretion in determining how to aggregate related alleged acts of misconduct in framing Articles of Impeachment and has historically frequently chosen to aggregate multiple factual allegations in a single impeachment article[;]" and "[t]he House's itemization of the fourteen particular statements . . . serves to give Judge Nixon fair notice of the

[110] Id. at 1.

[111] Id. at 2.

contours of the charge . . . ."[112] Similarly, in the Judge Halstead Ritter Impeachment, Judge Ritter was convicted on an omnibus Article – which, in substance, restated the allegations from the other articles, on all of which he had been acquitted.[113] Judge Porteous does not (and could not) credibly claim that any of the Articles against him are "omnibus" in this sense. These examples, which ultimately supported the conviction and removal of Judge Ritter, confirm just how farfetched Judge Porteous's aggregation theory is.

Regarding his third argument, not only does Judge Porteous misstate the constitutional limits and historical evidence informing the Senate's method of decision as to whether removal is warranted, he badly mischaracterizes the Articles of Impeachment themselves. Each Article describes a course of conduct in pursuit of a unitary end, pursued through a combination of means. Article I describes Judge Porteous's improper conduct while presiding over the Liljeberg case, arising from his concealed corrupt financial relationships with attorneys Creely and Amato; Article II describes Judge Porteous's corrupt relationship with Louis and Lori Marcotte and provides the details of what he received from the Marcottes and what he did for them; Article III describes the numerous dishonest acts and false statements under oath by Judge Porteous to deprive his creditors and the bankruptcy court of the truth surrounding his financial circumstances and Judge Porteous's violations of a bankruptcy court order; and Article IV describes Judge Porteous's false statements during his background check to becoming a federal judge, in which he knowingly concealed his corrupt relationships with attorneys Creely and

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[112] See [Judge Nixon] Impeachment Trial Committee Disposition of Pretrial Motions, First Order, at 4 (July 25, 1989), reprinted in Nixon Senate Impeachment Report, supra note 8, at 322–23.

[113] Impeachment of Halsted L. Ritter, Report of the Committee on the Judiciary, reprinted in IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess., at 188 (1973), as reprinted in, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess., at 1324 (1998).

Amato and with bail bondsmen Louis and Lori Marcotte. Even though each of these separate schemes are comprised of several discrete acts, each Article describes a single coherent scheme.

The Articles against Judge Porteous easily withstand scrutiny under the criteria suggested by Senate precedent: each is intelligible and discrete, each constitutes a proper exercise of the House's discretion in specifying the conduct by Article for which the House has determined impeachment and removal are warranted, and each provides Judge Porteous fair notice of the contours of the charge. The House has properly framed its Articles, and the Senate will vote on them up or down.[114] There is no colorable constitutional violation from this method of impeachment trial, and no remotely credible basis for dismissal of the Articles prior to trial.

WHEREFORE, Judge Porteous's Motion to Dismiss the four Articles of Impeachment or to require a series of separate preliminary votes should be denied.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Judge Porteous's Motions to Dismiss the Articles of Impeachment should be denied.

[114] See H. Res. 1031, supra note 49. The Articles of Impeachment against Judge Porteous are attached to this Consolidated Opposition at Attachment 7. By way of comparison, the House attaches to this Consolidated Opposition the Articles of Impeachment of Judges Archbald and Ritter, respectively (Attachments 14 and 15). Even a cursory review of these Articles reveals how straightforward and narrow the Articles are in this case, as contrasted with Articles from prior judicial impeachments.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

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