S. Hrg. 111–691

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE G. THOMAS PORTEOUS, JR.

HEARINGS

BEFORE THE

SENATE IMPEACHMENT TRIAL COMMITTEE UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

THE ARTICLES OF IMPEACHMENT AGAINST JUDGE G. THOMAS PORTEOUS, JR., A JUDGE IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

November 16, 2010

Volume 2 of 3, Part B

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V. EVIDENTIARY HEARINGS—
SEPTEMBER 13–16 & 21, 2010
iii. Memorandum for the Record
(September 15, 2010)

CLAIRE McCASKILL, MISSOURI, CHAIRMAN
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JAMES E. RISCH, IDAHO

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE

WASHINGTON, DC 20510-6326

MEMORANDUM FOR THE RECORD

Wednesday, September 15, 2010

On September 15, during the Committee's evidentiary hearings, a quorum of the Committee deliberated in closed session on the question of whether the Committee would grant Judge Porteous's motion requesting that the Committee issue subpoenas to Department of Justice attorneys Daniel A. Petalas, Esq. and Peter S. Ainsworth, Esq.

That same afternoon, in a separate closed session, the Committee further deliberated and voted on the issue. It was moved, seconded, and agreed to by ten of the eleven Members present that the Committee deny Judge Porteous's motion to issue subpoenas to Department of Justice attorneys Petalas and Ainsworth.

Chairman McCaskill announced the Committee's decision at the conclusion of the evidentiary hearings on September 15.

Erin P. Johnson

Chief Clerk

V. EVIDENTIARY HEARINGS—SEPTEMBER 13–16 & 21, 2010

iv. The Case of Judge Porteous

if we have time for that one?

MR. TURLEY: My assumption is the second witness would be Judge Bodenheimer.

CHAIRMAN MC CASKILL: Okay.

(Recess.)

(6:00 p.m.)

CHAIRMAN MC CASKILL: Judge Porteous may call his first witness.

MR. SCHWARTZ: We would call Timothy Porteous.

Whereupon,

TIMOTHY A. PORTEOUS

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you. Be seated.

MR. SCHWARTZ: Thank you, Madam Chairman.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Porteous, my name is Daniel Schwartz. I'm one of the attorneys for Judge Porteous. Would you please state your name.

A Timothy A. Porteous.

Q And where do you reside?

A I live in Kenner, Louisiana.

Q Is that near New Orleans?

A Yes, sir.

Q Tell us a little bit about your educational background.

A I went to LSU for college. I went to LSU for law school. After law school I worked for a firm in New Orleans, and presently I'm in-house counsel for a local company.

Q In the New Orleans area?

A Yes, sir.

Q Are you related to Judge Porteous?

A Yes, sir, he's my father.

Q Tell us briefly about your family. Are you married?

A Yes, sir. I'm married to Tricia. We've been married for 11 years. We have two beautiful daughters, Mia Gabrielle, and Annabel Elizabeth, she's 5. And right now, if possible, I can get home, my wife is about 38 weeks pregnant with our third child.

Q We'll try to go through this quickly for you.

A Thank you. She would appreciate it as well.

(Laughter.)

Q Is your mother still alive?

A No, sir, she passed away in December of 2005.

Q At that point, how many years had your parents been married?

A I'll do the math. It was June 28, 1969 that they were married, so 36 years.

Q Tell us a little bit about your mother. What did she -- tell us a little bit about her as a mother.

A She was -- growing up she was my best friend. We used to sit for hours talking. That was one thing I remember and cherish as a teenager growing up, that my mom was my best friend. You know, she just -- she supported me in everything I did.

My dad, he was our coach, or my coach. My mom was my counselor. I always talked to her about anything.

Q Did your -- after you and your -- you have siblings, correct?

A Yes, I have an older brother Michael, he's 39. I'm 37. I have a younger brother, Tommy, who is 35, and then a younger sister, the queen, Katherine, who is 28.

Q I assume that the honoraria was not part of her given name?

A No, sir.

Q Just the way she is treated by the boys in the family?

A Just the way she's treated by us.

Q Very good. Did your mother, after the children grew up, did she have a particular recreational interest?

A Sure. My mom would go to the casino with my grandmother, her mom. She always told us that it was something that I knew my grandmother liked to do, I knew my mom liked to do it, and they certainly liked to do it together. She thought she was participating in an activity, towards the end of my grandmother's life, she didn't actually, I guess, realize it was towards the end of her life that she spent some time together in an activity she enjoyed.

Q How often would she go to the casino?

A Maybe, oh, once or twice a month, at the most, probably. Maybe once every two weeks.

Q And what about your father? Did he go to the casino often?

A I can't testify to often. I do know my father did go to the casino.

Q Did they go together?

A No, not in town. In town, I mean New Orleans. If they were in town, my mom would go with my grandmother.

If they happened to be out of town for a convention or something, they would certainly be together. But other than that, no.

Q Tell us about the circumstances of your mother's death.

A It was December 22, 2005. The night before she passed away, she had gone to a dinner with her girlfriends. My wife was at a dinner with her girlfriends. I had put Mia to bed and Annabel.

As typical that we would do all the time, she came home from her dinner and she and I talked for about an hour, I told her good night, and the next morning --

Q She --

A She never woke up. She had a heart attack and died the next day, yes, sir, day before her 57th birthday.

Q What did she die of?

A I believe a heart attack.

Q And how was she discovered?

A My sister, unfortunately, found her in my

home.

Q Was your mother staying at your home at that point?

A Yes, sir. It was after Katrina, their house was destroyed. My father was living in Houma, Louisiana, where the courthouse was relocated at the time. And because my mom absolutely adored my children, she wanted to be no other place but my house, and she was staying with us. That's where she died.

Q Had the Katrina hurricane had any other impact on your family?

A It had a tremendous impact on us. It separated the entire family. My -- including my wife and I, as far as she was still staying in Baton Rouge at the time with our two children, and I had come back to New Orleans to continue working at the law firm I was at.

My brother was displaced, my older brother was displaced into Texas. My parents were living -- we were all just living separate. And in fact, their family home -- our family home since 1977 was destroyed.

Q Destroyed by the hurricane?

A Yes, sir.

Q And that hurricane was, what, about four months earlier?

A It was -- well, the hurricane hit New Orleans August 29, 2005.

Q And then your mother passed away in December of 2005?

A That's correct.

Q What -- you said that your family home had been destroyed. What happened?

A I was -- I was fortunate enough to go back home just a day or two after Katrina had hit the city. While I had stopped at my house, I always went to my parents' house, so I had seen is relatively -- within a day or two after Katrina hit. A tornado, it happened, it ripped off the roof on the left side of the house, which ended up destroying the entire left side of the house.

Subsequently, because of the destruction to the left side, it ended up destroying the right side as well, so the house had to be completely redone, the entire home.

Q And was that going on at the time your mother died?

A Yes, sir, they were in the process -- I don't know if rebuilding had been done yet, but I

know they were in the process of plans. And I remember the entire family participated in just gutting the entire house, as far as throwing all of -- just the remains out that was left in the house after Katrina, at a couple months.

Q Let me step back to another series of events. Did you become aware that your parents had declared bankruptcy?

A Yes, sir.

Q How did you become aware of that?

A Okay. I'm assuming you realize it's five years before or sometime in the early part of 2000, 2001.

Q Yes.

A My older brother Michael -- someone had told Michael, and I don't know who that person was, that they heard our parents had filed for bankruptcy. So naturally he called my brother and I -- my other brother, Tommy. So he called Tommy and I, and he said have you heard about mom and dad filing bankruptcy? And of course we said no.

So Tommy and I then made a conference call to my dad at his office, and he said why don't you come on in. So Tommy and I went in and talked to my dad. He then told us that --

MR. SCHIFF: Madam Chair, if the witness is going to be asked to recite statements made by Judge Porteous for the truth of the matter, we would object as hearsay.

MR. SCHWARTZ: First of all, this isn't hearsay. This is information that he has heard. So it's testimony --

CHAIRMAN MC CASKILL: It's still hearsay. That makes it hearsay.

MR. TURLEY: Madam Chair, they have been soliciting this very type of testimony all the way through their case-in-chief of things that were stated by others. This is the first time we've been told we're going to follow the hearsay rule at this juncture.

CHAIRMAN MC CASKILL: If this is discussion by Judge Porteous himself, since he would be, I think, loosely considered a party opponent, I think we will allow any of what this witness heard directly from Judge Porteous as part of his testimony.

MR. SCHIFF: Madam Chair, if I could, I believe that that rule applies when it's an admission of a party opponent. Where here it is not -- where it is being offered purportedly for the

truth of the matter, it is not offered by a party opponent. It is offered as hearsay for the truth of the matter.

CHAIRMAN MC CASKILL: Technically you're right, Counselor. But as I've said before, we have not strictly gone by the Rules of Evidence in this hearing on either side. And if this involves things that Judge Porteous said, I think the Senators are going to be able to sort out the source of the information, and we're going to be able to give it appropriate weight and credibility.

So I -- I think it's -- we're going to give broad latitude when it comes to any witnesses, whether it's documents that Judge Porteous executed or whether it's statements that Judge Porteous made.

MR. SCHIFF: And I won't belabor it any further, except to say, Madam Chair, when the -- when the witness is here and able to testify for himself as to these very events, it's all the more, I think, significant to allow this particular hearsay.

MR. TURLEY: Madam Chair, I'll just simply note that the House just relieved Mr. Reynolds and instead brought in Mr. Goyeneche, where this issue was raised, the very same issue that was just raised

by the House. And we appreciate the court's --

CHAIRMAN MC CASKILL: Didn't you just relieve Mr. Reynolds also?

MR. TURLEY: Yes. But we weren't the ones soliciting that testimony. What I'm saying is, I appreciate the --

CHAIRMAN MC CASKILL: Okay. The ruling has been made. We're going to give broad latitude for information concerning statements made by Judge Porteous.

Certainly, this witness is subject to cross-examination, and certainly, I think there is an opportunity for the House team to undermine any credibility you would like to try to do so on cross-examination.

But I think we have to give broad latitude. As I said, the Senators are going to be able to sort out what they're going to give more weight to and what they're not going to give more weight to. Thank you.

MR. SCHWARTZ: Thank you, Madam Chairman.

BY MR. SCHWARTZ:

Q Do you remember where you were in your retelling? I believe you and your brother --

A Tommy and I, we had either been on the

phone or we went to my dad's office. He told us that yes, in fact, mom and dad had in fact filed bankruptcy.

And then in typical fashion, as I would expect, we had a family meeting at my parents' home. I believe our whole family was present. And that's when my mom and dad had told us that they, in fact, had filed bankruptcy and at the advice of their counsel, they had filed under a fictitious name.

I don't -- I think it was right before or right after the Times-Picayune had printed the bankruptcies in the paper.

Q Did they explain to you why they had done that?

A The fictitious name?

Q Yes.

A First and foremost, they had indicated to me -- or indicated to us, I should say, that they were tremendously embarrassed and they were really looking out for the children first and foremost.

Q I'm sorry, what did you say about the children again?

A They were tremendously embarrassed and for us, you know, they could probably handle themselves, but they were more concerned about us, their

children, as they always have been their whole life.

Q From your observation, what impact did these series of events, the bankruptcy, your mother's death, Katrina, have on your father?

A It -- my whole life, my father has been involved in our lives from the get-go. He has -- he was my first coach when I was 7 years old for -- the team happened to be the Washington Redskins. He was my coach throughout the play around ball. He was -- even though he wasn't my coach in high school, he was always at all of my games, brought me all over town, even when I probably wasn't good enough to make the team, he still believed in me.

He supported all four of his children throughout our high school, college careers, law school, whatever endeavors we took on.

After we had -- myself, my wife and I, when we had two children, his grandchildren were the light of his life. There was no other grandchildren on this earth that were more special.

And after Katrina and my mom's passing, he just became isolated, he stayed to himself. He was extremely depressed and just didn't really have a significant role anymore in our lives. Just --

Q To your knowledge, did he seek any

counseling, professional counseling?

A Yes. I certainly can't give you the dates, but I believe it was within a few months, so it would be the early part of 2006 that he sought counseling after my mother had passed away.

Q At some point in that period, did he inform you that he had changed his life in any way?

A During the same time, and I -- I saw it because he just was so depressed, he was living with my wife and I, because his home was still being rebuilt. And I remember the night only because it was my older brother's birthday, but that evening at home, we were sitting out by my back porch, and he told my wife and I, I'm not -- I believe my sister was present, but he told us that he was quitting drinking.

And I was -- I was delighted.

Q To your knowledge, had he stopped gambling at that point?

A I'm sorry, can you repeat that question?

Q To your knowledge, had your father stopped gambling at that point?

A Yes, sir. To my knowledge, I believe that's the case.

Q Do you know when he stopped that?

A I certainly know -- or I believe, I should say, that he had stopped gambling prior to that, prior to Katrina, even.

Q Let me go back to the bankruptcy filing for a minute.

A Yes, sir.

Q Did your parents tell you why they had not disclosed to you earlier about their bankruptcy?

A No, they did not.

Q And what -- after you were informed, what happened? Was there a story in the paper?

A I mean, there's a story in the paper every month about my family, for years. So yeah.

Q Was there a story about the bankruptcy?

A Of course. Yeah, there's a story all the time about the bankruptcy. And there was, of course, a story, which gave all the details of the bankruptcy that was printed in the court documents, is when we really got a full grasp of the bankruptcy proceedings.

Q But there hadn't been a story in the paper before you were informed by your parents?

A No, sir.

Q About the bankruptcy, I mean.

A No, sir.

Q Let me talk about some of your family friends.

A Sure.

Q Do you know two people named Jake Amato and Bob Creely?

A Yes, sir.

Q How do you know them?

A I've known them since as long as I can remember. I can elaborate if you'd like. I have known Jake and Bob forever. I can't even tell you the first time I met them because I was so young. But as a young child, up into my teenage years, I always went fishing with uncle Jake and uncle Bob. It's what we did. We went to Delacroix, we went into DQ, we would stay up and have the greatest times of our lives, laughing, probably hearing stories I shouldn't hear as a young child. And then Jake -- Bob -- Jake never went fishing. Bob taught me to fish, and once we fished, uncle Jake would -- he taught us to cook.

Q Was it just you -- who else was in --

A No, Tommy, my younger brother, also went, obviously along with our father. And Jake's -- one of Jake's sons used to go a lot with us as well.

Q And tell us about Don Gardner. Did you

know Don Gardner?

A Very well. Don Gardner, I really don't remember -- again, Don -- Don is another one, I can't tell you the first time because I was just so young, but I likened Don to a surrogate godfather to our whole family. He's just been the person my family, it seems like they always turned to. When Katherine was born on February 18, 1981, my parents looked to Don to pick us up from school, "us" being the children, because that's just who they turned to. At the time I was only 8, Tommy was 6, Michael was 10.

Q How about Lenny Levenson? Did you know him?

A I do. He's one of the coolest guys I've ever met. Really just the neatest guy, you know. I've always -- hey, it's always been hey, Lenny. I just loved hearing his stories. Family vacations with him.

I remember one year my brother got Green Eggs and Ham from the Levensons, and I remember that they were on a trip one year, and the adults were all in a room, and I say the adults, my parents, the Levensons and some other people, and my brother read Green Eggs and Ham to their son in the bedroom for

hours, just so the parents could have their time. So they remembered that when he graduated, I believe it was high school, I'm not exactly sure, but I just remember that.

Q Now, at some point along that relationship, your father became a judge; is that correct?

A State or federal?

Q Any kind of a judge.

A He became a state judge in 1984 and federal judge in 1994, yes, sir.

Q And Mr. Levenson and Mr. Gardner, Mr. Amato and Mr. Creely, they remained lawyers who sometimes appeared before him?

A Yes, sir. They have always been lawyers, but I have never -- except in our professional careers, never looked at them as lawyers. Have never -- it's never been a lawyer/judge relationship with us, ever. Still never think of them -- excuse me, I've never thought of them as that because I consider them more like family, hence why I consider Don Gardner like a surrogate godfather, uncle Jake and uncle Bob. It's never been anything but a best friend, family relationship.

Q Did your relationship change when your

father became either a state or federal judge?

A No, absolutely not. I wouldn't have thought it would.

Q Now, at some point, you had a bachelor party?

A I did.

Q Where was that bachelor party?

A Las Vegas.

Q Who came to the bachelor party?

A About 30 guys.

Q Did they include some of the people I just mentioned?

A Oh, yes, sir. And it was my father, uncles, family friends, my friends from college, high school, brothers.

Q Do you know who paid for the bachelor party?

A I did not. It was my bachelor party. I remember staying in my friend's room, and I could have offered them all the money in the world, they wouldn't have taken it from me.

Q At some point, you had a big dinner?

A Yes, sir.

Q And everybody -- everybody came who was --

A I believe just about every single person

in the bachelor party went to that dinner.

Q Okay. And who paid for that?

A It's actually kind of a strange story, but once the dinner was over, really one of my closest friends had grabbed the bill. And I couldn't even believe he was taking the bill. And he started adding up the total, and he came up with a total, whatever it happened to be, and he said okay, everybody, this is your portion.

And then people just started throwing money up left and right. Everybody was paying.

Q Was Bob Creely there at the bachelor party?

A Yes, sir.

Q Was Don Gardner?

A Yes, sir.

Q Were they there because they were lawyers who sometimes appeared before your father?

A No, no.

Q Why were they there?

A I will -- they were there because of me and my family and our relationships. And I would have expected them to be there.

Q After that dinner, did you all go to a strip joint?

A Yes, sir.

Q And did your friends buy you a lap dance?

A They did.

Q This was a bachelor party?

A This was a bachelor party.

Q Your wife knows about this?

A She absolutely knows about it, and knew about it, I think, the next day. She was asking what we did, and I said we went to dinner and went to a strip club. She probably made a lewd comment. She knew that it was a bachelor party and they would buy me lap dances, yeah.

Q Was your dad at the strip joint?

A Yes, sir.

Q And you saw him there?

A Uh-huh.

Q Did he get a lap dance?

A Not to my knowledge.

Q At some point, you had an externship here in Washington; is that correct?

A I did.

Q Do you remember when that was?

A I believe it was the summer of 1994, with Senator Breaux.

Q How were your expenses paid at that?

A Other than receiving a small payment for the time that I was here, some people had sponsored my trip.

Q And what people were those?

A I know for a fact, only because I remember the conversation my dad had had, that he came home and said Bob and uncle Jake gave you some money, and they said to have a great time and enjoy the experience.

Q To your understanding, that was money given to you?

A It was given to me.

Q And did you ever think that was done to have influence over your dad?

A No, absolutely not. I didn't think --

Q Why was it done?

A I mean, I -- no disrespect for my father, I thought it was done out of love for me. And I still believe to this day that it was done out of love for me.

Q Now, I know, and you've clearly expressed it here, that you have a great fondness for your father.

A Uh-huh.

Q Does that fondness in any way affect or

limit the truthfulness of what you've just testified to?

A Not at all.

MR. SCHWARTZ: Thank you.

CHAIRMAN MC CASKILL: Would anyone want to cross Mr. Porteous?

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Mr. Porteous, I'll be brief in my questions. I know this is probably not a very pleasant experience for you, and I'll try to keep it short.

You've described the relationship that you and your father, and indeed your whole family, had with Mr. Amato and Mr. Creely as being a very close relationship?

A Yes, sir.

Q In fact, you considered Mr. Amato and Mr. Creely like uncles, like family really?

A Yes, sir.

Q You saw them quite frequently?

A I can't say I saw them frequently, but we definitely fished a lot as -- when I was young, 8, 9, 10, 11 years old, 12 years old. So it wasn't -- I didn't see them on a daily or weekly basis, no,

sir.

Q But these were some of your father's very closest friends?

A Yes, sir.

Q If someone represented that the relationship they had with your father was no different than any other lawyer in Gretna, that wouldn't be right, would it?

A No.

Q Because the kind of friendship that your father had with uncle Bob and uncle Jake was really quite unique, wasn't it?

A Actually, with all due respect, my dad was friends with everybody from the time that I can remember, before he was a state judge, and that's going back to '84. Always had an open door policy, and that's one thing I remember as a kid, running around the courthouse, or even when he worked in the DA's office. You know, he was friends with everybody.

He was certainly close with Bob and Jake. He was close with Don and close with Lenny. But he was close with just about everybody. Everybody loved him.

Q Everybody may have loved him, but I take

it, Mr. Porteous, that you didn't call every lawyer in Gretna uncle this and uncle that, did you?

A No, sir. I called Mike Eskajay's father, he's one of my dad's closest friends, and I've known his son since I was 5, and I called him dad. We just have a tightness that I truly mean what I say, that we are all just a big family down there. And we think of each other as family.

I've never thought of -- I've never looked at my dad as a judge, and anybody that we have talked about, say, as attorneys, because that's not how we grew up. We didn't grow up thinking oh, he's an attorney, he's a judge, we just look at each other as best friends and family.

Q And Mr. Amato and Mr. Creely were really like family to you?

A Yes, sir.

Q Did your father discuss much of his work with you?

A We never talked about work.

Q Did you know about any cases that your father had pending before him?

A No, sir. Sorry about interrupting you, Congressman. No, sir, we -- when my father walked in the door, and something I emulate today. When he

walked through that door, it was family time and family time only. We never discussed work.

Q So you wouldn't have known about any very large litigation pending in his court?

A At what -- no, sir, the answer is no.

Q And you wouldn't have known whether Mr. Amato had -- was representing one of the parties in that very large litigation?

A No, sir.

Q Or Mr. Gardner, for that matter?

A No, sir.

Q You wouldn't have known whether Mr. Amato stood to earn a lot of money from how your father decided the case?

A It wouldn't have mattered.

Q But you would not have known about that; right?

A No, sir.

Q So you wouldn't have known whether that was going on at the time of the Vegas trip?

A Wouldn't have mattered.

Q You mentioned that your father told you that he had some money for you from uncle Bob and uncle Jake for your externship; is that right?

A Yes, sir.

Q And you considered that as them giving you the money?

A I know it was given to me.

Q Well, they didn't actually give it to you, did they?

A No.

Q Were you aware that the judge's secretary called a variety of lawyers to ask them to be sponsors of your externship?

A No, sir.

Q Were you aware that's how the money came about?

A I never asked about it. If it was told that it was given by Jake or Bob, I would have -- I would have assumed that it was given to me to enjoy my time and have a great time in D.C. I wouldn't have thought anything else of it.

I certainly would have never thought that it was done because my dad was a judge and they were attorneys. It never would have crossed my mind. It doesn't cross my mind today.

Q And your father never told you that he had asked his secretary to call a bunch of people and ask them to be sponsors, did he?

A No, sir.

MR. SCHIFF: No further questions.

CHAIRMAN MC CASKILL: I assume no redirect?

MR. TURLEY: No, no redirect.

CHAIRMAN MC CASKILL: Any questions from the Senators?

SENATOR KLOBUCHAR: I have just one question, Mr. Porteous.

EXAMINATION

BY SENATOR KLOBUCHAR:

Q First of all, sorry for the loss of your mother.

A Thank you.

Q I know, as was mentioned, this must be very hard. I just had one question. Did Mr. Amato and Mr. Creely, did they come over to your house when you were growing up, if you were that close with them, did they come over for dinner?

A We -- well, not dinner, but it's not often that we ever really had anybody over for dinner.

But whenever we had parties, Bob would certainly come. That may not have been Jake's thing, but Bob would certainly come over for a party.

SENATOR KLOBUCHAR: All right, thank you.

CHAIRMAN MC CASKILL: Okay. It is 6:36. You may be released.

THE WITNESS: Thank you, Senator.

CHAIRMAN MC CASKILL: We have no other questions of you.

(Witness excused.)

CHAIRMAN MC CASKILL: Call your next witness.

MR. TURLEY: The Porteous team would like to call Judge Bodenheimer.

CHAIRMAN MC CASKILL: This will be the last witness for the day. For my colleagues and for all the parties and the lawyers. We'll call it a day as soon as we finish with this witness.

The House has eight hours and 39 minutes remaining, Judge Porteous has 10 hours and 36 minutes remaining.

Judge, I will need you to stand.

Whereupon,

RONALD D. BODENHEIMER

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Judge, would you state your full name, please.

A Judge Ronald D. Bodenheimer.

Q Okay. Thank you.

I know it's been a long day, you've been out there all day, and we certainly appreciate --

A Two days, Counselor.

Q Two days. I'm doubly thankful, and I'm sure you're quite tired.

Can you tell me where you currently reside?

A Yeah. Metairie, Louisiana.

Q That's outside New Orleans?

A It's in Jefferson Parish, Louisiana, suburb of New Orleans, yes, sir.

Q How long have you lived in that area?

A My whole life. I was born in New Orleans in mid city and I moved to Jefferson Parish and lived there ever since. The difference is about four or five miles. I'm not a world traveller.

Q And how long did you serve on the courts when you were a judge?

A I was a prosecutor for about 20 years or so, and I was a judge for about three years.

Q Okay. And were you a judge in Gretna?

A Yes, sir.

Q Now, could you give me an idea about being a lawyer and a judge in an area like Gretna? Is this a small legal community?

A In -- in the prosecution on the criminal side of the law, yeah, it's a small community, where pretty much everybody knows everybody, yes.

Q When you say everybody knows everybody, was it common for lawyers and judges to grow up together?

A Yeah, to give an example, attorney by the name of Martin Reagan and I both started out, he was a young defense attorney, I was then prosecutor, and we went all the way up for the whole 20 years, we graduated from the smaller cases to the armed robberies to the homicides.

Q And so was it, in fact, common for judges to have lawyers in their courtroom that went to school with them or grew up with them?

A No, that wasn't uncommon at all.

Q Judge, what would happen if judges started to recuse themselves every time a friend or an acquaintance was arguing in their court in Gretna?

A It would be a problem in Gretna. It would -- there are some parishes in Louisiana it

would come to an outright halt.

Q Now, I know you've stated that you trusted Judge Porteous. Can you tell me why you trusted Judge Porteous?

A Judge Porteous was -- when I was -- when I was a young prosecutor, he had a little bit more of experience. And you turn -- you tend to follow the older prosecutors to learn from them.

And I've actually attended some of his trials when he was a DA in Jefferson Parish and I was a DA in New Orleans to watch him. And everybody had a lot of respect for him. He was very good in what he did, very successful in his prosecutions. And I just grew to admire him.

Plus, he and I both went to, I guess you'd call them, brother schools. He went to Cor Jesu, I went to Aloysius, they merged into Brother Martin. So we had a lot in common.

Q I see. And you mentioned that he was a prosecutor in these criminal cases. Was he better known for handling criminal cases as someone who had a lot of experience in that area?

A Yes.

Q Now, I know that in the past, the government has asked you about a statement that the

judge made to you soon after, I believe, you became a judge.

A Couple of statements, yes, sir.

Q And what year was that when you became a judge, do you recall?

A '99, I believe.

Q All right. And you recall saying something about the judge telling you that you could trust the Marcottes? Do you recall a statement like that?

A Yes, sir.

Q How did you take that statement? Was that simply a piece of friendly advice, or how did you take it?

A I took it -- Judge Porteous knew, and it was well known, that I had prosecuted bondsmen when I was a DA in New Orleans, and I never had a great relationship with bondsmen in general.

And I think it was perceived that I didn't like them. I didn't particularly like them or dislike them, but there was a perception that I disliked them.

I know that Mr. Marcotte had that perception that I disliked him because he was a bondsman. So Judge Porteous, you know, talked to me

and told me that, you know, I know you don't like bondsmen a whole lot, Ronny, but you can trust Marcotte. If he tells you something about a case, he won't lie to you. If he tells you the guy is a first offender or a fourth offender, whatever, you can take that to the bank, he'll tell you the truth.

Q Now, when you become a judge in Gretna, particularly with any type of criminal docket, can you function as a judge without dealing with bonds?

A No, you have to -- you have to -- it's one of our necessary evils, yes.

Q And were the Marcottes the dominant bonding company in Gretna?

A Oh, very much so. 90 -- I wouldn't -- 90, 95 percent, would be my guess.

Q So if you were going to do bonds, you're going to have to do them with the Marcottes, as a practical matter?

A That's correct.

Q I'm going to return to that in a second. But I want to get to a couple of more things. Now, it's my understanding that eventually you had a plea agreement dealing with the Marcottes; is that correct?

A With the federal government dealing with

the Marcotte case, that's correct, yes, sir.

Q And you left the bench during that period as well?

A Yes, sir.

Q Okay. But you were never accused of setting a bond too high or too low for the Marcottes, were you?

A I don't think so, no.

Q And did Judge Porteous ever tell you to do what the Marcottes asked?

A Not -- no. All he ever told me about the Marcottes was that he knew that I didn't really like Marcotte that much. I guess I should have added, Marcotte at that time was -- and I hate to sound like I'm prejudiced because of somebody's hair, my not having any, but he had that ponytail. And the rumor was, or the story of him, was that he was fooling with drugs.

And so I kind of stayed away from him intentionally because of that. He kind of looked like -- that Steven Seagal kind of ponytail and he walked through the thing. And the rumor was that he was doing drugs, so I stayed away from him.

And all Judge Porteous told me was that if the guy comes to you and gives you information about

a bond, you can trust him.

Q The committee will have to take judicial notice of what a Seagal ponytail looks like. I won't get into that.

But as a -- as a judge, you just stated that, you know, you had to deal with bonds, and in Gretna, you had to deal with the Marcottes, correct?

A Yes, sir.

Q Okay. Now, was Judge Porteous the type of judge that tended to take new judges under his wing and help them sort of get started?

A I don't know so much about new judges, because by the time I became a new judge, he was already gone. But I do know that even as a prosecutor, I was fairly experienced when I got there. And even then he took me under his wing to teach me some of the nuances that I might have had in New Orleans that didn't apply in Jefferson Parish or that were not as effective in Jefferson Parish. There is a difference.

Q I want to get to another statement that I'm sure you are familiar with, because it's been cited a great deal in this case, about never having to buy lunch. Do you recall that statement?

A Yes, sir.

Q All right.

A Yes.

Q Now, that statement is oft repeated by the House. Was Judge Porteous serious about that statement? Or how was that statement meant when he told you?

A Counselor, I mean, I can't tell you what was in his mind per se. But the statement that he made about -- the statements that I can recall are that you might as well forget your name because you'll be known as judge for the rest of your life. You'll never have to, you know, buy lunch again, and there was something that -- apparently that I said that I don't recall saying about you better -- they're going to be kissing your butt a lot.

You know, Porteous has a wit, and in those particular statements, obviously, never -- I obviously didn't go home and wash my butt because he said so. I thought it was a funny statement that he was making, yes.

Q He said that, he said this where? Where were you when he made that comment?

A We were at the -- to my recollection, we were at the same party, it was a function at, I think, a space called The Balcony. It was not a

fundraiser per se, but it was some sort of congratulatory party for a group of elected officials, a brother who was the assessor, a daughter -- or sister who was a judge. And they were having a thing for the Chehardies. And it was at that particular function.

The thing with Marcotte I took more serious, because that's something that he and I were talking about alone, and when he said that to me, it was more serious. The other stuff was said in front of other people.

Q So, you know, I want to make sure I understand this, because it's hard to get the idea from -- when it's quoted.

This was, you said, at a party. Now, did he pull you aside and say, you know, Ron, you'll never buy lunch again? Or was this in front of other people?

A This was in front of other people. It was said as a quip.

Q Did he say it in a low voice in front of those people?

A No. He said it for everybody to hear.

Q Did other people laugh?

A Uh-huh, yeah.

Q And the remark about kissing your derriere, was that also a laugh line?

A Yes.

Q And was this typical of Judge Porteous?

A Yes.

Q Now, did Judge Porteous ever make any statement to you about the Marcottes other than that earlier quip I mentioned to you?

A Not that I can recall. I mean, I'm sure that we had conversations when he was a judge and I was a DA about different -- you know, there's gossip in the courthouse all the time about all kinds of different things, and I'm sure we've probably talked about him before. But I can't recall any conversations.

Q As a federal judge, did he ever speak to you about the Marcottes?

A No, sir. No, sir.

Q Now, prior to the judge mentioning the Marcottes to you, did -- hadn't you already set a few bonds or split or reduced bonds, or had you not?

A I wouldn't call it in the time frame -- I think I was so new at that time, I'm not even sure I had -- there was a period of time between the election and the time you actually begin to sit.

And I'm not sure if I was even sitting yet when this party was. I have to check the dates. I really don't recall that.

Q After he made that short comment to you, did you feel pressured to do bonds with the Marcottes?

A It didn't take long before you felt pressured to do bonds because of a federal court decree that said if you didn't do the bonds, they were going to release them with no bonds. So you did have pressure.

And since Marcotte was doing the lion's share of the bonds, you did have to deal with him. But I didn't feel pressure from what I was told by Judge Porteous, no.

Q All right. So let's break that up because that seems a pretty significant point, that the statement itself, you didn't feel any pressure to do bonds with the Marcottes, it was the realities of Gretna?

A Yeah, right. What I took from Judge Porteous was him telling me, Ronny, listen, I know you don't like Marcotte, but I'm telling you, I've dealt with him in the past, he's not going to lie to you about bond information. That's what I took it

to mean.

Q And the reality of Gretna you described as this court order, can you tell the committee what the reality was like in Gretna, in terms of overcrowding and how that affected your job as a judge?

A Yeah, we were under a court order, I can't give you the exact specifics as to how many, but the jail was always full. So pretty much every time you arrested one guy, another guy got out.

So we had -- we actually came up with a system called the code 6, meaning that 6 percent of the people commit 90 percent of the crime. And we had a scale of 1 to 20. And the scale was whether or not it was a victim -- victim crime or victimless crime, whether or not it was a crime of violence, whether a weapon was used, whether the guy had prior felony convictions, and you rated them. And the higher they were, the more dangerous they were perceived.

And the jail was under orders to start releasing the ones, and then when there was no more, the 2s, 3s, 4s, 5s, all the way up to 17s and 19s. Sometimes there were people as bad as multiple burglars or armed robbers that were released

strictly on overcrowding. It happened, because there was a lot of people behind them who were murderers or charged with murder or whatever, so you just had to release them.

Q And did many judges view bonds as a way of dealing with that problem of people that were committing new crimes or disappearing?

A When I was a prosecutor, and I wasn't privy to them, but there were a lot of times, like when I went looking for my supervisor, I'd be told he's in a meeting with the judges and the sheriff's office trying to do something about the overcrowding situation.

So I know they had a lot of meetings about that. And eventually, you know, this concept of split bonds became, you know, popular. And to my knowledge, all of -- there were 16 judges. All of them used this split bond concept.

Q And did many judges talk about the value of bonds and getting people to come back to court and not disappearing?

A Uh-huh, yes.

Q And in your experience as a prosecutor and a judge, was it much more likely that you would see someone again if they were released under a bond as

opposed to their own recognizance?

A Yeah, if they were released under a bond, even small bond, Bail Bonds Unlimited, which was Marcotte's company, had a group of bail -- you know, bail bounty guys that were on salary, and they would go look for somebody if, in fact, the bond was about to be forfeited.

If you released them for overcrowding, with all due respect, nobody looked for them, law enforcement would just wait for them to run a red light or commit another crime and get arrested and then the open attachment would be found and they would bring them back in, but nobody actively sought them.

Q Now, Judge, I wanted to get an idea of this. So the -- in Gretna at that time, you had judges who were watching a large number of people mandatorily released, and then they would not come back to their courtroom; correct?

A Oh, yeah. It was common when you were calling your docket that a good -- a fair percentage would not show up, and the majorities of those that did not show up were ones who had been released because of overcrowding.

Q And is it true, then, as you mentioned

earlier, you sort of alluded to it, that judges would talk about bonds as a way of guaranteeing the return?

A There was a bunch of different ideas that were bandied about over the time that I was there. But eventually, you know, the bonds and the split bonds were seen as the best solution.

Q And if they were seen as the best solution and you didn't use the Marcottes, how much of a solution would that be if you couldn't use -- if you didn't work with the Marcottes to issue bonds?

A Very little. You know, Marcotte was not the only bond company for which bonds were split. They were split for the other companies too. But Louis Marcotte, you know, for better or worse, was very, very aggressive of having his people catch the people going in, while they were in, and coming out of jail. He just -- he was always on top of it.

He went and got a jail sheet, I mean, every hour on the hour and started calling the people to see if he could work their bond. That was his forte.

Q Now, you mentioned split bonds. And for people that aren't familiar with bonds, a split bond can seem sinister. Can you explain what a split

bond is?

A Yes, a split bond -- there's several different kinds of bonds in Louisiana. There's cash or commercial, this is a bonding company. There's property bonds. There are cash bonds. There are personal surety bonds and there are personal bonds.

And a split bond means one or more, a combination of one or more of those five.

Generally, it's a commercial bond with a personal surety or a commercial bond with a personal bond undertaking.

Q So sometimes if someone couldn't afford a bond, for example, you could have like a mother come in and say I'm going to put my house up for part -- to support part of the bond?

A Yeah. But see, like it was different. In New Orleans, if you put your house up, you had to jump through a lot of hoops. You had to go to the recorder of mortgages and recorder of conveyances and see how much the house was appraised at by the assessor, how much was still owed on it, what was its equity, and you had to have certificates for all of this stuff.

In Jefferson, if you had a house and it was just more informal, if you had a house, you'd

ask the mama, how much did you pay for this house, how much do you still owe on it, okay, I'm going to give you credit for this much equity in that particular house.

Q And did most judges split bonds in Gretna?

A All of them. All 16 of them did.

Q As a practical matter, didn't you sort of have to split bonds in that environment?

A You never had to, but one, it was more effective, and two, this is my own personal opinion and that there were political reasons to split, rather than -- than to reduce.

If a guy had a $50,000 bond and you reduced it and he got out and committed some, you know, high profile crime, then you would have the media going after the judge, why did you reduce the bond. If they split it, they couldn't go after the judge, because you could say I didn't reduce anything, the bond was 50,000, I made him put up 50,000, I didn't do anything. So I think there were political reasons to do it too.

Q All judges chose to split bonds for their own political issue, status?

A All 16 of them, Counselor.

Q Isn't it true, Judge, sometimes a bond is

set artificially high when a case first comes in the system but then a judge decides that the bond was too high and they could -- they could do a split bond to make it more fair?

A I think that that happens, but I don't think it's -- I just would not agree that it's set artificially high to begin with. Somebody may set it high because that was their opinion, and it might be out of line and you'd have to adjust it. Just like somebody might set it too low and you'd have to adjust it.

I don't think there was any order for doing that, but I do think that sometimes in the beginning, they were set too high or too low, sometimes because of a lack of information about the particular crime.

Q And sometimes was it set too high because the original crime was more serious than what the person ultimately was held over for?

A Well, sure. Sometimes -- like you might get an aggravated arson, which means a fire where human life was endangered, and then when you finally get the police report in, you find out that the guy set fire to his own trash can in front of his house so he could light fireworks for New Year's. Well,

then you'd realize, wait, this is not aggravated arson, so instead of a $100,000 bond, I'm going to reduce this to 10,000 because of these new facts.

Q Now, was Judge Porteous often publicly talking about the value of bonds with lawyers and judges?

A Yes.

Q And did he believe that in that environment you just described, that bonds were important to deal with those problems?

A Yes.

Q Was he the only one that had that view?

A I don't think he was the only one, but if I had to define it, I think Porteous was the lead judge to find the solution to the overcrowding and the bond problem.

Q Judge, I know that you entered the bench later. I'm going to ask you about what your recollection was in term of the bond traffic. But Gretna had a fairly high traffic level of bonds, didn't it, through the courthouse?

A You mean people getting arrested and needing bonds? Yes.

Q In fact, isn't it true that for prosecutors over in New Orleans, a lot of them

actually wanted to go to Gretna because it had a bigger criminal docket, you could get more experience over there?

A Oh no.

Q No?

A No, you got a whole lot more experience in New Orleans.

Q Oh, really?

A No, New Orleans had a higher crime rate. New Orleans Criminal District Court the judges did, because I worked there for six years, they did nothing but criminal cases every day. They never did a civil case. They never did a domestic case. That's all they did, was murder, rapes and robberies and five days a week, or as the kids say, 24/7.

In Jefferson Parish, you probably spent about 40 to 50 percent of your time on criminal, and the other 40 or 50 percent on domestic and civil.

Q Okay.

A So no, they wanted to come to Jefferson for a break, not because it was more experience. You got more experience in New Orleans.

Q Oh, is that right?

A Yes, sir.

Q Let me try to understand another

difference in between Gretna and New Orleans. In Gretna, wasn't there a magistrate who was appointed by rotation for part of that -- the period that Judge Porteous was on the court, that there was often a magistrate judge who was picked, you know, by rotation?

A Yeah, it was called the duty judge, yes.

Q And that was for one week at a time?

A Yes.

Q Now, is it true that some judges just didn't like that duty?

A Yes, that would be a fair statement. Most of the judges didn't like that duty.

Q Not just a fair statement but an understatement?

A Understatement. I don't think any of them liked it. There were some who did it, some who were diligent about doing it, and some who just didn't do it.

Q When you say "didn't do it," they just weren't available when people needed the magistrate judge?

A You had a magistrate phone, which was supposed to be with you 24 hours when you were on duty, 24 hours for every day that you were on duty.

It was given to the sheriff's office to call you for bonds, it was also given to the sheriff's office to call you for search warrants or arrest warrants. And it was not uncommon for some judge, and I hope you aren't going to ask me names, but some judges wouldn't answer that phone, not even if another judge called, they wouldn't answer the home phone, they wouldn't answer the magistrate phone, they wouldn't answer anything, and they just basically disappeared when it was their duty week.

Q I won't ask names.

A So a detective would have to find another judge who was willing to do it when it wasn't his duty day.

Q And I won't ask you to name them, but did some judges just have that reputation that when they were the magistrate judge, you pretty much knew you weren't going to be able to get that judge?

A Yes.

Q And did all the businesses stop in Gretna, just waited for that week to end until a new judge came, or did the bondsmen go and find a judge who would sign?

A Bondsman would go find a judge who wouldn't mind signing something on his or her

nonduty day.

Q Practically, could you stop for a week? In Gretna could you stop issuing bonds while that judge was the designated judge?

A No. Business went on, as usual. You know, it had to be done.

Q I'm going to show you a demonstrative, because I'm like to get your understanding of how many bonds were often signed in Gretna. First I'd like to ask you a question, would you be surprised to know, for example, in 1986, that indeed in one year, there was an estimated 3200 bonds that went through Gretna?

A In a whole year, 3200? That wouldn't surprise me at all.

Q In fact, you seem to think that the number would be higher, is that what I'm getting?

A I would have thought it would have been higher, yeah.

Q Now, I don't know about you, but I wouldn't be able to see this from there. But there's a screen right there, if --

A I can actually see it better from here.

Q You're a better man than I, I must say. If you take a look here, this is a demonstrative of

the bonds signed by Judge Porteous in his last month as a state judge. And this is October 1994.

A Right.

Q In fact, if you take a look, down in the 28th of October, you'll see a notation that says, "Judge Porteous sworn in to federal bench."

Do you see that?

A Yes.

Q Now, I'm going to represent to you that in that last month, Judge Porteous signed 29 bonds total for the entire month. Would you view that as a high number of bonds?

A No, very low.

Q And it's very low because most judges would have a greater traffic of bonds in Gretna because of these problems you described?

A It would depend on whether that judge was on duty or not. But there would be -- there would be an opportunity to sign a lot more bonds than that, yes.

Q So when you look at 29 bonds in one month, you would view that as a relatively light to average month, at best?

A You know, in my experience, that would have been a light month.

Q Now, when you were talking about split bonds, and I appreciate you sort of explaining how that worked, was it -- is it clear in your view, then, split bonds served a public purpose?

A It served a public purpose in -- if you factor in the fact -- the court order -- yeah, the federal judge's order that we had to either release somebody or we couldn't bring somebody else into the jail.

When you factor in the overcrowding, then the split bonds is definitely a policy for good, because other than that, you've got to stop making arrests.

As it was, the sheriff's office would have to come to us and give us a heads up that they were doing like a narcotics roundup or a prostitution sting or whatever, they would have to give us a heads up so they could start looking to see who was going to be released so we can make room for the new arrestees.

Q I see. And you were describing that those new arrestees often resulted in new releasees, right, when you had an arrestee in an overcrowded system, it often produced a releasee?

A Right. I would venture to say -- the

numbers were astronomical of the people who were released for overcrowding. It was astronomical.

Q And you said earlier that they got more and more dangerous as overcrowding got more serious?

A Well, it's not as it got more and more serious. But when the overcrowding was its worst and you had to start releasing people, after you released your 1s through 5s, you started releasing your 5 through 10s, you started releasing some people that probably should have been kept in jail. You started releasing some bad folks.

Q Now, during your time as a district attorney, I guess as an assistant district attorney.

A Right.

Q Did you have occasion to work in Judge Porteous's courtroom?

A I was -- I was assigned to his court as the DA assigned to his court I'm guessing about 18 months, maybe two years. And then I became a supervisor, and I had supervisory duties over his court and the DA -- the assistant DA who worked in his court. And I was also a special prosecutor. The last 10 years or so, I did pretty much all high-profile and homicide cases. And if one of my homicide cases fell to his court, then I would go

into that court and prosecute that case.

Q And in that time, as a prosecutor, had you ever known Judge Porteous to improperly set a bond?

A To do what?

Q To improperly set a bond.

A No, Counselor. But I'll be honest with you, the DA who is in his court is not really involved in the day-to-day operations of setting the bonds. That's usually done in the morning by the magistrate before we ever get there.

Q Fine enough.

A Now, if a defense attorney would file a motion to reduce a bond, we might get involved. Or if the police came to us and said, hey, this guy got a low bond and he's a bad apple, would you -- we'd file a motion to increase it.

But that was a rare event.

Q Judge, let me ask you about that. You said sometimes as a prosecutor, you could get involved in the bond.

A Right.

Q I expect that's not a lot of times. But as a prosecutor, would there be some cases where you didn't want to see someone bonded out?

A Uh-huh, yeah.

Q And when you had those cases, would you just make that view known to the judge, like Judge Porteous?

A You'd file a motion to increase the bond. And then it would go to a hearing. The defendant and his attorney would be notified, and then you'd put on your evidence as to why the bond should be increased.

Q And did -- did judges normally follow the advice of the prosecutors if they opposed a bond, they generally wouldn't issue the bond? I mean, if there was opposition?

A No, in state court, unless it was a homicide, you had to give a bond. The only -- the only -- excuse me. The only charge that you could hold with no bond was first-degree murder. Even second-degree murder, you had to give them a bond.

Our job as prosecutors was to make that bond so high that for all practical purposes, the defendant couldn't get out of jail and it had the same effect of no bond. But you had to give them the bond.

Q That's an interesting point, Judge. So for some offenses, you had to give a bond?

A Almost all, except first-degree murder.

Q So you couldn't deal with those cases without dealing with a bondsman, in the sense of a bond being part of the case?

A Well, you'd have to set the bond and then it would be up to the defendant to try to get a bondsman to make that particular bond. But he had to have a bond in everything from second-degree murder on down.

Q Now, let's talk about Louis Marcotte. I want to do one follow-up. Putting aside the ponytail, did you ever know Marcotte to actually lie to you about a bond?

A No. It was true, every -- whatever he told me about a particular defendant, and I would check, I believe I would say I would check every time. The information he gave me, I would call the jail and verify it, and I never, ever caught him in a lie.

Q But you would just go ahead and you'd check for your own satisfaction?

A Well, of course. Of course.

Q And by the way, when bondsmen lie about bonds, what happens to them as bondsmen in a small, you know, courthouse like Gretna?

A I'll turn into one of those judges that

can't be found by him. I'm not going to deal with him again.

Q So for bondsmen, it's very, very important to not -- to sort of get it right so that judges would be more receptive to the next bond; right?

A Correct.

Q Because isn't that called burning a judge, that if you burn a judge on a bond, he's probably -- he's probably not going to give you a new bond?

A Exactly. And he's going to tell the other judges that he's close to what you did. So you can have problems if you lie to a judge.

Q Now, I'm going to ask one follow-up question about being a federal judge. You know, from the time he became a federal judge, did Judge Porteous ever use his office to pressure you to work with the Marcottes or to issue any bonds?

A No, no. The only time I saw -- I never saw Judge Porteous again when he became a federal judge, except when he was lecturing at state functions. And he -- you know, he and I and a few other guys would usually sit outside for most of the lectures because we had been around so long, they were trying to lecture to maybe the newer prosecutors, and was stuff we had been through so

many times, we'd usually sit out in the front and either tell jokes, war stories and drink coffee.

Q Let me ask you about another thing, let's get off the bonds for a second, and thank you very much for that.

I want to ask you about curatorships, because that's another thing most people don't deal with a lot.

A Right.

Q But did judges in Gretna deal with curatorships a lot?

A I wouldn't say a lot, but there are -- anybody whose house is going to be foreclosed on and sold has to -- you have to be found. And since the majority of them when they lose their house, they leave, you have to appoint a curator to look for them. So it's a fair number.

Q And when you say fair, was it a routine matter to deal with curatorships, I don't know what the numbers are, but most judges had to deal with curatorships?

A You did some every month. My best guess was you probably averaged between five and 10 a month.

Q I see. Was it also common in Gretna for

judges to give curatorships to people they know and close friends?

A It was -- that was one -- one way to do it. Some of the judges had a wheel with all of the attorneys that they wanted to give curators, some of the judges only give them to a select few people.

Q Was it only because they were friends or did some judges just want to give these curatorships to people that they knew would take care of them?

A I think it was a little bit of both. I seen -- in fact, in my court, I gave one to an attorney who was going through a bad period to try to let that attorney make a few dollars to get his practice -- and he never did what he was supposed to do, it came time to sell the house, it wasn't done, I had to yank it back and give it to an attorney I knew would handle it to get it done.

So if the attorney neglected what you appointed him to do in a curatorship, while it was a routine, mundane thing, if they didn't do what they were supposed to do, it could have some serious consequences for the creditors.

Q And, in fact, you assigned curatorships to your former partner, did you not?

A A lot of them. Not all, but a lot of

them, yes.

Q To be fair, most curatorships were not that complex, it didn't take Einstein to deal legally with a curatorship?

A Most of them -- most of them were mundane, but you still had to go through and cross the T's and dot the I's.

Q Now, you talked to us about Gretna, people growing up together in Gretna with judges and lawyers. Was it also common for lawyers to drop off gifts with judges?

A During Christmas or some other special time. Like I had a child while I was a judge, and a lot of lawyers came down with, you know, booties and little baby stuff and stuff like that, or during Christmas we got a lot of presents, yes.

Q And did all the judges tend to get, you know, those types of gifts?

A Yeah, whatever -- when a lawyer gave a gift, he would send, you know, 16 bottles of Jack Daniels to 16 judges or 16, you know, boxes of candy, whatever it was. Most of them sent it to all of them.

I don't think there was any attorneys that said well, I'm going to send it to this judge I

like, this one I don't. You sent it to all of them.

Q In fact, wasn't the common practice to send it to all judges so nobody would be insulted; right? You didn't say I'm going to go with these 14 and leave these two out?

A I would think that was true, yes.

Q Okay. And the Marcottes commonly gave gifts to judges?

A Yes.

Q Did you ever go on a trip with the Marcottes?

A Yes.

Q And do you recall who else attended that trip?

A I can think of two of them offhand. One was at the Beau Rivage. I don't -- there was a couple of other judges there. To be honest with you, I can't recall who it is now. And there was one that was a fishing trip, and that was -- I was there, there was a judge from St. Bernard, the sheriff from Jefferson Parish and the sheriff from St. Bernard, were all there.

Q Was the Jefferson Parish sheriff Harry Lee?

A Harry Lee, yes, sir.

Q And once again, in terms of that community, was it common for lawyers to go out to lunch with judges?

A It was very common.

Q And was it common for them to buy lunch for judges?

A It was very common, yes.

Q Just lunch or sometimes dinners?

A Mostly lunch but sometimes dinners, especially if you worked late.

Q What percentage of those meals do you think lawyers bought for the judges?

A When it was judges and lawyers together?

Q Yeah.

A I'm guessing probably about 100 percent.

Q So can you remember a case where a judge actually bought a meal when they were having a meal with lawyers?

A Yeah, I mean, I -- I can tell you that once or twice when myself and my law partner went to lunch with the Marcottes, on a couple of occasions, you know, we demanded to pay because he paid so much.

But it might have been one in 50 that we would pay.

Q Were you familiar with a restaurant called the Courthouse Cafe? Used to be called Whiteside.

A Yeah. I know it as Whitesides. I don't know it has Courthouse Cafe. Whitesides, sure.

Q In fact, at the Whiteside Cafe, was there a table that was set aside for lawyers and judges to eat together because it was so regular?

A Correct.

Q I just want to ask another question. You had talked about Judge Porteous and his reputation. How was he viewed generally as a state judge?

A He was viewed in a very good light. I've probably practiced in front of well over 30 or 40 judges, and in my opinion, he was probably one of the smartest judges I was ever in front of, you know, for legal proceedings and Rules of Evidence and stuff like that.

Q And have you ever known him to do anything immoral or inappropriate?

A I never saw him do anything I thought was inappropriate, no, sir.

MR. TURLEY: Okay. Judge Bodenheimer, thank you for your time, and I can pass the witness.

CHAIRMAN MC CASKILL: Senator Whitehouse.

SENATOR WHITEHOUSE: May I ask a question

of counsel? You have offered this witness to the Senate committee as a credible witness, I understand?

MR. TURLEY: For the knowledge that I questioned him on, yes, Senator.

SENATOR WHITEHOUSE: To explain how the bail bonds process at the Gretna courthouse was on the up and up?

MR. TURLEY: No, actually, the principal reason, Senator, was because he is cited for two critical quotes, which I dealt with at the beginning of the testimony.

SENATOR WHITEHOUSE: But you did ask him about the process at the Gretna courthouse related to bail bonds.

MR. TURLEY: Yes, sir, after -- I acknowledged that he had a plea agreement with the Marcottes. That plea agreement did not deal with all of the areas that I went into. The principal reason why we are offering him is to deal with the two quotations that are used -- most often by the House.

SENATOR WHITEHOUSE: And you offered him to offer his views on people's immoral or inappropriate behavior? That was one of your last

questions?

MR. TURLEY: Yes, that was a question, yes.

SENATOR WHITEHOUSE: Is there anything else you should bring out about this witness before this panel?

MR. TURLEY: Besides the fact that I brought out he had a plea agreement with the Marcottes, and we've previously mentioned in this case -- I'm sorry, Judge Bodenheimer is already in the record as to that problem with the Marcottes. I raised it early on so that the committee understood.

The reason that I introduced him was to deal with those two statements that are often put into the record, without context. While he was here, some of the questions I asked him about were not part of his plea agreement.

He is one of the -- you know, he was able to share some information, and while he's here -- he's been here two days, and I decided to ask him those questions as well.

SENATOR WHITEHOUSE: Madam Chairman, I apologize for the interruption but I'm -- well, never mind.

SENATOR RISCH: As long as we're going

down this line, what does that mean, a plea agreement with the Marcottes?

CHAIRMAN MC CASKILL: It wasn't a plea agreement with the Marcottes. It was a plea agreement with the prosecutor.

SENATOR RISCH: That's what I understand. Mr. Turley keeps talking about a plea agreement with the Marcottes.

CHAIRMAN MC CASKILL: It wasn't with the Marcottes. It was with -- it was with --

MR. TURLEY: Yes, the case with Judge Bodenheimer is discussed in the record. I should have said involving the Marcottes. Obviously, the Marcottes do not issue plea agreements. But the case involving Judge Bodenheimer is discussed in the record at length.

SENATOR RISCH: Was he convicted?

MR. TURLEY: It was a plea agreement so he is convicted, yes.

SENATOR RISCH: A conflicted felon?

MR. TURLEY: Yes, that's why we brought out the plea agreement. I want to note, Senator, there's no -- you know, Judge Bodenheimer is one of the people that is featured most in the record.

We felt that the committee should hear

from Judge Bodenheimer. We understand -- we understood that the House was going to ask him questions about his case. We didn't want to hide Judge Bodenheimer. We wanted to present him as a witness and to get this out.

But more importantly, he is the source for the comments made by the House that is often cited by the House, and we wanted to give that context.

We understand that the House is going to ask questions about his case, but we saw no reason to hide that. We want the committee to hear from Judge Bodenheimer. And if you have questions about -- about his involvement with the Marcottes, we have no problem with your asking it.

Madam Chair, you had said that you want a full record. Judge Bodenheimer is one of the most cited names in that record. And so we want to present him today, and you can ask him any questions that you obviously want.

VICE CHAIRMAN HATCH: Counselor -- Counselor?

MR. TURLEY: Yes.

VICE CHAIRMAN HATCH: Senator Hatch. We all knew that, and I think you've done an excellent job of presenting what you think are issues that you

believe are in favor of the -- you know, of Judge Porteous.

So I have no problem with you bringing Judge Bodenheimer here, and he's been a particularly straightforward witness.

All of us on this panel will take into consideration all these things, and you had every right to do this. So I just wanted to make that clear so that the judge realizes that we're paying very strict attention to this matter, as we should. And we can weigh the testimony throughout the trial.

So I would just compliment you on the excellent job you've done. I expect the House to do an excellent job as well, as they have.

So I just wanted to make that point that you have every right to do this, and that you did a good job in doing that.

MR. TURLEY: Well, thank you, Vice Chair. And I would also just simply point out for the benefit of the committee, the House called ex-felons involved in the record, Wallace, Duhon, for example. And these are names that are also prominent in the record. I credit them for calling -- calling those individuals. They were asked about other issues besides their involvement.

We felt that you should hear from Judge Bodenheimer because you're going to be hearing a lot about Judge Bodenheimer. You already have.

VICE CHAIRMAN HATCH: You have every right to do that. You should not presume from my comments that they're favorable or unfavorable.

MR. TURLEY: Thank you, sir.

VICE CHAIRMAN HATCH: I'm weighing all these matters, will look at them as carefully as I can, and you have a right to represent your client the best way you possibly can.

MR. TURLEY: Thank you, Senator.

CHAIRMAN MC CASKILL: Cross-examination.

CROSS-EXAMINATION

BY MR. DUBESTER:

Q Mr. Bodenheimer, I'd like to ask you to look at the screen and see if you can recognize the document that is in front of you. And this is House Exhibit 88(d). Do you see that in front of you?

A Yes, sir.

Q And what do you recognize it as?

A That was one of the counts of the indictment to which I pled guilty.

Q Okay. Actually, sir, just to lead you a little bit, did you plead guilty to three felony

counts in a superseding bill of information filed in or about March of 2003?

A Yes, sir, this one has six. I believe I've pled guilty to three, yes, sir.

Q Okay. Well, and is this the superseding bill of information to which you pleaded guilty, if you can recognize it?

A Appears to be, yes, sir.

Q And right now, we just see the front page is the caption. That's in front of you; is that correct?

A And count 1.

MR. DUBESTER: Your Honor, I move House Exhibit 88(d) into evidence.

MR. TURLEY: No objection.

CHAIRMAN MC CASKILL: Will be received.

(House Exhibit 88(d) received.)

BY MR. DUBESTER:

Q I'd like to go to page 2 and to count 3 and ask if you can identify this count as a count to which you pleaded guilty relating to your conduct relating to the Marcottes.

A It appears to be, yes, sir.

Q I'm going to just read out loud some of the pertinent charging language so we're all on the

same page as to exactly what the charge was. Count 3 alleges -- why don't you read along with me to make sure I'm reading it correctly and then I'll ask you if I have.

A All right.

Q "From a time unknown but prior to April 1991 and continuing through thereabout June 2002 in the Eastern District of Louisiana and elsewhere the defendant Ronald D. Bodenheimer did knowingly and intentionally combine, conspire, confederate and agree with other persons known and unknown to the grand jury to knowingly and willfully devise and intend to devise a" -- "a scheme and artifice to defraud the citizens of the State of Louisiana by depriving them of Ronald D. Bodenheimer's honest and faithful services as a judge handling bail bonds in criminal cases pending in the 24th Judicial District of the State of Louisiana, performed free from deceit, bias, self-dealing and concealment in violation of Title XVIII, United States Code, Sections 1341 and 1346."

Did I read that correctly?

A Yes, sir.

Q And you see that there are two code cites referenced and that may be why there are multiple

code cites listed on the front of the page that we saw; correct?

A Okay.

Q Let me read into the record the overt acts. I'm going to start off with overt act 1 and ask you to read along with me. 1, "throughout the period of the conspiracy, Bodenheimer regularly set, reduced and split bonds underwritten by a Jefferson Parish bail bonding company in criminal cases pending before him and other judges, irrespective of whether he was scheduled for magistrate duty. A significant factor in Bodenheimer's decisionmaking was to accommodate the interest of the bonding company. Bodenheimer routinely set the bonds at a level requested by the bail bonding company in a manner which would tend to maximize the company's profits, that is by securing the maximum amount of premium money available from the criminal defendant and his family."

Did I read that correctly?

A Yes, sir.

Q Okay. Paragraph 2 involves an allegation involving the use of the mails, so I'll skip that and go on to paragraph 3. "Throughout the period of the conspiracy, the bail bonding company routinely

provided things of value to Bodenheimer which were paid for, among other ways, through the use of credit cards and payment for the credit card bills was made through the mails." This is all in violation of Title XVIII, United States Code section 371.

Is that the charge to which you pleaded guilty?

A Yes, sir.

Q And the bail bonding company we all know is the Marcottes; right?

A Sure.

Q And they just were not identified in a document because you pleaded guilty before they pleaded guilty; is that correct? Is that your understanding?

A Yes, yes, sir.

Q Okay. Now, in connection with your guilty plea, did you sign a factual statement which set forth the factual basis for your plea? Do you recall signing such a document?

A It's been like eight or nine years. I'm sure I did, but I don't recall the document. I haven't seen it since.

Q Okay. Let me show you on the screen House

Exhibit 245. Do you see a document entitled factual basis in a case captioned United States V. Ronald Bodenheimer?

A Right.

MR. DUBESTER: I'd move House Exhibit 245 into evidence.

CHAIRMAN MC CASKILL: Any objection?

MR. TURLEY: No objection.

CHAIRMAN MC CASKILL: It will be admitted.

(House Exhibit 245 received.)

BY MR. DUBESTER:

Q I'd like to go to actually page 10, which starts with count 3. I'd like to read this to you and see if this is the factual basis to which you pleaded.

"If this case were to proceed to trial, the government would prove that Defendant Ronald D. Bodenheimer, a Louisiana district court judge, conspired with the owners and employees of a Jefferson Parish bail bonding company and others known and unknown to devise and intend to devise a scheme and artifice to defraud and to deprive the citizens of the State of Louisiana of Bodenheimer's honest and faithful services free from deceit, bias, self-dealing and concealment. Bodenheimer did so by

using his position as a judge to enrich himself by setting, reducing and splitting bonds in various criminal matters pending before him, as well as other judges, on terms most advantageous to the bail bonding company, in exchange for things of value, including meals, trips to resorts, campaign contributions, home improvements and other things of values."

Then we go on to some of the specifications. At the bottom it starts with the -- some prefatory language that you're under surveillance, and going on to page 11 of paragraph 1, it further alleges or the statement further provides that "This surveillance confirmed that Bodenheimer regularly set, reduced and split bonds in criminal cases pending before him and other judges, irrespective of whether he was scheduled for magistrate duty. The bonds were routinely set at a level requested by the bail bonding company which would tend to maximize their profit by securing the maximum amount of premium money available from the criminal defendant and his family. Bodenheimer made himself available to handle bonding matters for the bail bonding company on a 24/7 basis."

Then it goes on to talk a little bit about

the use of the mails.

Going on to paragraph 2, the factual basis now reads, "the bail bonding company routinely purchased lunches, drinks and dinners for Bodenheimer, and in 1999, paid for a trip to the Beau Rivage casino for Bodenheimer and his wife." It further states these were paid by credit card and the use of the mails.

Paragraph 3 states, "the bail bonding company arranged for home improvements to be made at Bodenheimer's residence in return for the advantageous handling of bond matters."

I'd like to go on to the final page here and ask if you see your signature on the top of page 12.

A Yes, sir.

Q And -- are those the facts to which you admitted to support your plea of guilty?

A I didn't write it. Those are the facts. They're not all accurate. If you go back to part 1 it says --

Q One sec, sir. Sir.

A Let me finish, sir. You asked the question. It says on or before April of 1999. I wasn't a judge before April of 1999. So the date

would have to be wrong.

I didn't write these facts. I signed it.

Q Okay. With the exception of the date, you acknowledge that you took meals, trip and home repairs from the Marcottes; is that correct? That's right in there?

A Yes.

Q And you acknowledge that that was -- in any event, you signed this statement of fact -- for the factual basis.

A Correct.

Q And you understood this was going to be a court document; is that correct?

A Correct.

Q Now, Mr. Bodenheimer, were you sentenced to prison on this count, among other counts, that you pleaded guilt to?

A Yes, sir, yes, sir.

Q And let me show you -- what prison sentence did you receive?

A 46 months, if I'm not mistaken.

Q I'd like to show you House Exhibit 88(h). And do you recognize this as the document which sets forth formally what your prison sentence is for the three counts?

A Yes, sir.

Q And going to the fine print in the middle of the page, it indicates, does it not, that the defendant is hereby committed to the custody of the bureau of prisons to be imprisoned for a term of 46 months as to counts 1, 2 and 3, to be served concurrently? That was your sentence; correct?

A Yes, sir.

Q So your sentence on count 3, in addition to counts 1 and 2, which did not involve the Marcottes, was 46 months; correct?

A I'm sorry, which --

Q Your sentence on count 3 was 46 months?

A Right.

Q Did you serve that sentence?

A Yes.

Q Okay. Now, I have a couple additional questions. Now, when Judge Porteous was confirmed as a federal district court judge, did he tell you that if he got -- if he could get confirmed, anyone can get confirmed?

A No, he didn't tell me that, but that was said in the courthouse. People would say that, yes.

Q Sir, were you interviewed by the FBI on an occasion with your -- after you pleaded guilty, were

you interviewed by the FBI?

A Yes.

Q On several occasions?

A Many occasions.

Q Okay. If the FBI -- strike that.

And there were several agents in the courtroom -- there were agents present when you were being interviewed; is that correct?

A Yes, yes.

Q And obviously, I'm reading from a write-up of that interview. And that write-up of that interview notes that you stated in that interview, "when Porteous was confirmed as a federal district court judge, he told Bodenheimer that if he could get confirmed, anyone can get confirmed."

A Counselor, if I said it, it may well have been true. I don't recall him telling me that. I do recall people saying that in the hallways of the courthouse, but I don't recall Judge Porteous telling me that. He may have. I just don't recall it. It's been eight years.

Q Well, a moment ago, sir, you were talking about Judge Porteous's reputation, talking about all the stellar things about his reputation. And -- but now you're saying that people in the hallway were

saying if he can get confirmed, anyone can get confirmed.

A Uh-huh.

Q Is that correct?

A That's correct. I remember that being said in the hallway, yes.

Q Okay. So his reputation for legal matters was fine, but his reputation for personal matters or matters of integrity or matters of lifestyle was shaky; correct?

A That's what they said. They said if Porteous can get confirmed, anybody can get confirmed. I didn't ask what they meant by that.

Q Now, you also, a moment ago -- and one of the matters -- strike that.

Mr. Turley asked you a few moments ago about Judge Porteous's reputation.

A Uh-huh.

Q You knew that Porteous had set aside the conviction to Aubrey Wallace as a favor to the Marcottes, and didn't you tell the FBI that?

A I only found out about the Aubrey case in the news. I don't recall telling them that I knew about it when it happened. I never heard of Aubrey Wallace until the news, that I can recall.

Q Didn't you tell the FBI, yes or no, words to the effect that Porteous basically reopened the case for no legitimate reason, to help Wallace and Louis Marcotte? Did you tell the FBI that?

A I don't recall saying that, no, sir.

Q Do you dispute that you told that to the FBI in an interview?

A Let me repeat myself. I don't recall saying that. I don't dispute saying it. I don't recall saying it.

Q Do you recall telling the FBI that you've seen Judge Porteous on the bench after he had been drinking at lunch?

A Yes.

Q Now, after --

A Let me rephrase that. That's not really true. I don't recall telling them that, but yes, I've seen him go to lunch, have a drink and go back on the bench, yes, sir, that is true. I don't recall saying that, but yes, that is true.

Q Did -- after Judge Porteous said nice things about the Marcottes to you, did you after that start going out to eat with Marcotte and Porteous, including Marcotte's girlfriend and your wife, and from there on have continued meals or

dinners or socialize with Louis Marcotte?

A Later on down the road, yes, sir.

Q Did you overhear Marcotte and Porteous having discussions about how to counter criticism waged against Porteous for splitting bonds?

A I don't recall, but I wouldn't deny that I said that. I don't recall it at this particular point, though.

Q Do you recall that Porteous was criticized for letting people out of jail for less than the value of the bond, Marcotte and Porteous discussed defending the split bond by stating it avoided prison overcrowding matters, Porteous and Marcotte maintained a split bond was still a valid bond?

Do you -- is that a fair assessment of your recollection?

A All of that is true. I just don't recall saying it. But all of that is true.

Q Okay. Now, a couple just loose ends at this point. Again, you recall Mr. Turley asking you questions about puffing up Judge's -- Judge Porteous's reputation as a great judge and so forth. Didn't Judge Porteous have a reputation -- hadn't you -- let me start that question over.

Hadn't you heard -- did you state to the

FBI in your interview the following concerning -- which goes right -- concerning Porteous's reputation? And I'm reading, "Bodenheimer would describe Porteous as corrupt because any time certain lawyers were in Porteous's court, a verdict in that lawyer's favor was assured, which constituted corruption in Bodenheimer's mind. Bodenheimer had heard that type of corruption had continued in Porteous's federal courtroom with Gardner and Levenson and with Amato & Creely to a lesser extent. Bodenheimer heard about a big case Gardner had won in Porteous's court about one year ago."

Did you tell the FBI that?

A I -- I could not have told them that I saw any corruption in Judge Porteous's federal court. I have never set foot in Judge Porteous's federal court. I've never seen him try a case in federal court.

Q But hadn't you heard that -- rumors or people saying that --

A Yes, sir, if you let me finish, yes, I heard that.

Q Right.

A But your statement was didn't I tell the

FBI that that happened. I couldn't have. I was never in his court. But yes, I heard those things.

Q And the essence of the rumors that you had heard was that Porteous would steer or direct big --

MR. TURLEY: I need to make an objection. I believe counsel is asking for the essence of a rumor, for the witness to testify to.

CHAIRMAN MC CASKILL: I'll sustain that objection.

BY MR. DUBESTER:

Q Well, I want to just make sure that you understand that I'm saying this is what you've heard, not what you saw firsthand. Just so we're clear about that.

A Sure.

Q Did you tell the FBI, and I'm quoting, "Bodenheimer would describe Porteous as corrupt because any time certain lawyers were in Porteous's court, a verdict in that lawyer's favor was assured, which constituted corruption in Bodenheimer's mind. Bodenheimer had heard that type of corruption" to continue -- "continued in Porteous's federal courtroom" -- did you say that to the FBI?

A I already answered that I heard that, yes, but I had never been in his courtroom in federal

court.

MR. DUBESTER: I have no other questions of Mr. Bodenheimer.

MR. TURLEY: We do.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Thank you, Judge Bodenheimer. That was very useful examination by the House, and we would now like to follow up on it.

A Yes, sir.

Q Judge Bodenheimer, that was a pretty extensive plea agreement that the House just took you through, wasn't it?

A Yes, sir.

Q There's a lot of allegations there; right?

A Yes, sir.

Q Judge Bodenheimer, who asked you to Washington to testify? Was it the defense or the House?

A It was the House. I call it the government.

Q So you were scheduled to testify as a House witness?

A Yes, sir.

Q What were you told was the purpose of your

testimony?

A You want me to tell you what --

Q Yeah. What were you told? It's not privileged. What were you told was the purpose of your testimony for the House?

A I was -- I told them as a guy who had handled cases, I didn't see what I offered to the government, why was I coming. And I was told something to the effect of that the strength of my testimony was to bolster Louis Marcotte, because they, meaning the House attorneys, had no faith in his credibility by itself, they wanted me to bolster it.

Q And who told you that?

MR. SCHIFF: Objection, Madam Chair. I don't think that's accurate, and --

MR. TURLEY: Excuse me, I'm asking a witness a factual question of nonprivileged nature. The government just on cross-examination trashed this witness because of his past criminal history.

We are responding by asking him who --

CHAIRMAN MC CASKILL: Who trashed, the House managers?

MR. TURLEY: No, it's not privileged. Does the government have an evidentiary objection?

CHAIRMAN MC CASKILL: What is the basis of your objection, relevance?

MR. SCHIFF: Yes.

CHAIRMAN MC CASKILL: I don't -- the hour is late --

MR. TURLEY: May I respond?

CHAIRMAN MC CASKILL: Okay. Let me -- the hour is late, everyone is tired. We've a long day. I think this committee can understand why this witness was put on the stand, without either party telling us why. Both sides had a reason, that there was something that they could elicit that was helpful to their case. There are things you elicited that were helpful to your case, there were things that the House elicited that were helpful to their case.

I don't think anything is going to be gained, this is not a trial, nothing is going to be gained by you trying to get to the motives of the other side's lawyers or investigators as to why they're offering this witness.

We can see why they offered this witness. You can see -- we can see why you wanted this witness. And I don't -- we're not a jury here. We've watched all of this, and we understand exactly

why Judge Bodenheimer is here.

So I think you ought to limit your redirect to whatever was covered on cross-examination that would be appropriate and not get into what the motives of any of the lawyers are as to why they're asking witnesses to testify. I don't think it's relevant, and I -- I would ask you to rephrase the question.

MR. TURLEY: Madam Chair, if I can respond to the objection that was made. We did not raise these issues on direct.

CHAIRMAN MC CASKILL: No, no, no, let me interrupt you.

MR. TURLEY: For the record?

CHAIRMAN MC CASKILL: Let me interrupt you, Counselor. You can have a chance to make a record. You put this witness on as a character witness. I listened to you do it.

Once you put a witness on as a character witness, you open the door to that witness's character. You had the right to go through and go through his plea agreement and explain before the House had an opportunity, you could have done that. You kind of decided to gloss over it, and they came back and hammered you on it.

MR. TURLEY: Yes.

CHAIRMAN MC CASKILL: That is what happens in an adversarial proceeding.

MR. TURLEY: We expected them to hammer us on it. Can I explain?

CHAIRMAN MC CASKILL: You opened this door.

MR. TURLEY: Yes.

CHAIRMAN MC CASKILL: He testified as to the judge's character. His character is now an issue. That's a very basic rule of jurisprudence.

MR. TURLEY: Right. That's exactly right. Can we explain? Can we get on the record to put our position on it?

CHAIRMAN MC CASKILL: You may.

MR. TURLEY: We most certainly opened the door, and the House walked through it. We opened the door and put this man on the stand, a man who was called by the House. The House came back, and this was a concern from Senator Whitehouse as well, and said how dare you put this guy on the stand, look at his credibility, look at his character, and look what he pled to.

That allows us, because they challenged his credibility, it allows us to ask who called him

and why. And that's all I'm asking.

CHAIRMAN MC CASKILL: No, it does not. It does not. You put the witness on the stand.

MR. TURLEY: Right.

CHAIRMAN MC CASKILL: I'm not going to get into preparation for this trial as to what the various parties talked to witnesses about outside of this room. I'm not going to do it. It's not relevant. It's wasting our time.

MR. TURLEY: All right.

CHAIRMAN MC CASKILL: It's not helpful. It's not helpful to you. It's not helpful to Judge Porteous. I think this witness had some valuable information to Judge Porteous. I think he added some information that is helpful to the record. I think also the House had every right to impeach his credibility, and they have done that.

MR. TURLEY: We expected them to impeach. That's what we expected.

CHAIRMAN MC CASKILL: So move on.

MR. TURLEY: We can't respond to the impeachment?

CHAIRMAN MC CASKILL: Absolutely you can respond to it, but not getting into the motives of the lawyers who have asked -- originally asked this

witness to appear. You cannot get into the lawyers' motives.

BY MR. TURLEY:

Q Judge Bodenheimer, I'm not allowed to ask you why the House called you. You were called as a House witness, however, and then canceled, were you not?

A I was told that they were not going to call me, I was released. And in fact, I almost made it out the building before you told me to stay, you wanted me.

Q And then -- and you say we put you on our witness list?

A Yes.

Q I'd like to ask you now -- we can't talk about what the prosecutors told you about why you were being called. Let me at least respond to some of the questions about Wrinkled Robe.

A Okay.

Q It was a pretty big indictment that Mr. Dubester took you through.

A Right.

Q Was that all part of the Wrinkled Robe investigation?

A That's what they called it, yes, sir.

Q Yeah. Did you overlap with Judge Porteous when he was a state judge?

A What do you mean by overlap?

Q Was he a state judge when you were a state judge?

A No.

Q Was it your understanding, as someone who was involved in that Wrinkled Robe investigation, whether they also looked at Judge Porteous?

A That the federal government looked at him? Sure.

Q Investigated him?

A Yes, sir.

Q Did they talk to you about Judge Porteous?

A Obviously. It was in some of the -- I think they call them 302s they just mentioned to you, sure.

Q How many interviews do you think you've had about Judge Porteous with the FBI, the House, all these other people?

A 30, 40.

Q Was Judge Porteous ever charged in Wrinkled Robe?

A No, sir.

Q By the way, are you testifying under

immunity today?

A No, sir.

Q And you understand you're testifying under oath; correct?

A Yes, sir.

Q My understanding is that we're not allowed to go any further than that, so we will --

CHAIRMAN MC CASKILL: Let's make the record clear. You can something as far as you'd like -- you can go as far as you'd like as long as you're not bringing in irrelevant materials such as who said what to who about preparing for this case.

You can ask the witness any question you'd like, Counselor. I'm not limiting your redirect, other than it's late and I want to try to keep you on track.

But if you have more questions to ask this witness, you are more than welcome to do that.

MR. TURLEY: The only questions I have are about how this witness was intended to be used. It was not relevant until the Government came back and challenged his credibility. In a court of law, we would be allowed to ask him of how he was intended to be used, and we were not allowed to ask that, and I understand. And that's all the questions that we

have.

CHAIRMAN MC CASKILL: Okay. That's terrific.

Do the members of the panel have questions?

VICE CHAIRMAN HATCH: Well, if I can just make a comment, as I said, I think both sides have done an excellent job here.

CHAIRMAN MC CASKILL: I agree.

VICE CHAIRMAN HATCH: And you can -- we can deduce from what we've heard whatever we determine. And that's all I care to say about it.

THE WITNESS: Senator, I've been out here for like two days, and I left my father, who is 93 years old, 93 in November, who I care for. May I make a statement to the Senate?

CHAIRMAN MC CASKILL: Sure.

THE WITNESS: And I understand, I did what I did, the indictment says what it says, and I was convicted of three felonies and I went to prison for 46 months.

Prior to that, I was a prosecutor for 22 -- for 20 years. I had more people, as a prosecutor, on death row than any prosecutor in Louisiana.

In those 20 years, I was never once accused of any impropriety. I was voted the outstanding prosecutor in the state of Louisiana on two, maybe three different occasions, and I was voted the outstanding judge in Louisiana all three years that I sat.

I made mistakes, and I paid for my mistakes. But don't think it goes back through my whole career. My career before that was unblemished and it was unblemished for a reason. Okay? Thank you.

CHAIRMAN MC CASKILL: Do any senators have questions?

Senator Risch?

EXAMINATION

BY SENATOR RISCH:

Q Briefly. Mr. Bodenheimer, what was the gap in time between the time that Judge Porteous took the federal bench and you took the state bench? What was the gap?

A I think -- well, when was he sworn in, can you tell me that, Senator? When was he sworn in as a federal judge?

MR. TURLEY: I can represent it was 1994.

THE WITNESS: And I took the bench in

1999, five years later.

BY SENATOR RISCH:

Q And we've heard about the social relationship, the going to lunch, traveling and what have you, between Judge Porteous and the Marcottes while he was on the state bench, and then his secretary testified that it tapered off after he went to the federal bench. And then we heard from you that your relationship picked up with the Marcottes, you would go to lunch with them and go on these trips and things.

Who was taking care of the Marcottes between the time he left the bench and the time that you took the bench?

A I have no idea.

SENATOR RISCH: Thank you.

CHAIRMAN MC CASKILL: Anyone else have questions? I have a question.

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q You have a bunch of Senators up here who spent time as prosecutors.

A Yes, sir -- yes, ma'am.

Q I certainly respect your time as a prosecutor.

A Thank you.

Q But I have to ask you this question.

A I don't mind.

Q The indictment involved more than just the allegations of you taking things of value from the Marcottes. It also involved you pleading guilty to a conspiracy to actually plant drugs on someone you disagreed with in order to cause them harm.

A That's what the indictment -- but actually, if you look at the charge, it was conspiracy to distribute. The factual basis didn't talk about planting drugs and all that kind of stuff, but --

Q Was there or was there not a videotaped -- excuse me, a taped conversation where it was very clear that you wanted to do harm to someone who was complaining about your business?

A That is true.

Q And involving planting drugs on them so they would get in trouble with a prosecutor?

A Yes, ma'am, it is true, I got angry and I did something stupid. But before that plan could be carried out, I told them stop, do not do it. I backed out.

Q I wanted to be clear.

A Yes.

CHAIRMAN MC CASKILL: Thank you. And I think --

SENATOR RISCH: Madam Chairman, which I take one more short run at this?

EXAMINATION

BY SENATOR RISCH:

Q I find what you said troubling, but the one that troubles me worse is that you pled guilty to these poor people that got arrested, and I understand they got arrested, but they were people of humble means that you conspired to raise the cost to them of getting their family out of jail.

I find that particularly troubling.

A Never did that. We never raised it so that they couldn't get out of jail. One of the factors in state court that you have to consider on setting bonds is the person's ability to make a bond. So very often, the attorneys or the bail bondsman would come to us and say this person can make a 5000, 10,000, 15,000. That was something that by law we were supposed to consider.

If they could make a 15,000, then we would make them make the 15,000.

I never, ever said he can make a 15, well,

make him make a 25. It never worked that way.

Q I hear what you're saying. And I understand the process. And it appears to me the bail bandsmen came to you, they had already interviewed the family, they knew what they could get out of the family. And according to the indictment, you and the bail bondsman conspired to see that the family would have to pay the maximum you could possibly soak out of them. That's what I get out of this. Am I wrong?

A But that's what the statute says. I'm to consider what the -- what the person can put up as a bond. If it's a shoplifting for a guy who is on SSI, the bond is going to be low. If it's a shoplifting for a millionaire, the bond is going to be high.

I'm supposed to consider the wherewithal of the defendant to place a bond. It's what the statute says.

CHAIRMAN MC CASKILL: I think we're done. Everyone has done a great job so far. Let me just announce to all of you, we're on schedule.

MR. TURLEY: I'm sorry, Madam Chair, we don't know about Petalas and whether we will be hearing from him.

CHAIRMAN MC CASKILL: The committee voted and he will not be subpoenaed.

MR. TURLEY: So he will not appear as one of our witnesses?

CHAIRMAN MC CASKILL: He will not appear. And the vote was 11 -- excuse me, I can't say what the vote was. The lawyers behind me just told me I can't tell you what the vote was. But there was a decision by the committee not to issue those subpoenas -- that subpoena.

We will be here at 8:00 in the morning, from 8:00 to 9:30. We'll break at 9:30 until 11:00, because too many committee members that have to go to committees where they must vote on a business session of those committees.

We are on schedule, and if you have any changes in your witness list tomorrow, Mr. Turley, if you would let us know before you leave tonight so we can make adjustments to the schedule.

And I want to really thank you for your patience today. This has been a very long day, and we've gotten an awful lot done, and I want to thank the members of the committee and all of the lawyers and parties for being as of good cheer as you've been and working as hard as you are. You both are

doing a very good job.

MR. SCHIFF: Madam Chair, may I ask if -- counsel certainly has every right to, but if the witnesses are going to be called in the order, at least the first few witnesses, just so we'll know who to prepare for in the morning, if counsel knows?

MR. TURLEY: I'll simply note that this is information that the House declined to give us previously. But we would certainly be able to send them an e-mail as to the first couple of witnesses. We'll try to resolve that so that the House knows.

CHAIRMAN MC CASKILL: Let me just read the witness list I have for the record. I have Pardo, Barliant, Beaulieu, Ciolino, Griffin, Barnett and Levenson.

MR. TURLEY: The Senate --

CHAIRMAN MC CASKILL: And Gardner, excuse me. We have to do Gardner tomorrow.

MR. TURLEY: Yes.

CHAIRMAN MC CASKILL: We have to do Gardner tomorrow. So that's the list I've got for tomorrow. Ambitious, but we'll do our best.

(Whereupon, at 7:54 p.m., the proceedings were adjourned, to be reconvened at 8:00 a.m., on Thursday, September 16, 2010.)

C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
CHARLES GARDNER GEYH				
by Mr. Turley		833		
by Mr. Baron			854	
by Chair McCaskill	860			
by Vice Chair Hatch	863			
by Senator Udall	865			
RHONDA F. DANOS				
by Mr. Schiff	868		895	
by Mr. Schwartz		881		
by Senator Shaheen	898			
by Senator Whitehouse	899			
BOBBY PHILIP HAMIL, JR.				
by Mr. Damelin	902		955	
by Mr. Meitl		932		
DE WAYNE G. HORNER				
by Mr. Dubester	959		1056	
by Mr. O'Connor		1019		1064
by Senator Risch	1066			
by Senator Barrasso	1067			

-- continued --

C O N T E N T S (Continued)

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
CLAUDE C. LIGHTFOOT				
by Mr. Goodlatte	1071		1167	
by Mr. O'Connor		1101		
by Senator Shaheen	1178			
by Senator Whitehouse	1180			
by Senator Risch	1181			
DUNCAN W. KEIR				
by Ms. Konar	1182			
by Mr. Walsh		1202		
TIMOTHY A. PORTEOUS				
by Mr. Schwartz	1224			
by Mr. Schiff		1246		
by Senator Klobuchar	1251			
RONALD D. BODENHEIMER				
by Mr. Turley	1252		1310	
by Mr. Dubester		1294		
by Senator Risch	1320/1323			
by Chair McCaskill	1321			

-- continued --

E X H I B I T S

NUMBER DESCRIPTION	RECEIVED
Exhibit 69(i)	914
Exhibit 69(b), Pages 297 through 301	920
HP Exhibit 69(b)	924
Exhibit 69(b), Pages PORT492, PORT493 and PORT494	929
House Exhibit 337	1002
House Exhibit 4	1024
Porteous Exhibits 1003, 1004 and 1005	1032
House Exhibit 6(b)	1037
Porteous Exhibit 1108	1052
Porteous Exhibit 1109	1054
House Exhibit 5	1058
Porteous Exhibit 1100(b)	1127
Porteous Exhibit 1064	1128
Porteous Exhibit 1100(c)	1129
House Exhibit 128	1131
Porteous Exhibit 1100(d)	1133
Porteous Exhibit 1100(z)	1153
House Exhibit 343	1158
House Exhibits 125, 126, 127, 133, 141, 145, 148, 339 and 340	1177
House Exhibit 88(d)	1295
House Exhibit 245	1299

United States Senate

Impeachment Trial Committee

Impeachment of Judge G. Thomas Porteous, Jr., U.S. District Judge For the Eastern District of Louisiana

Volume IV

Thursday, September 16, 2010

Dirksen Senate Office Building

Washington, D.C.

APPEARANCES:

SENATE IMPEACHMENT TRIAL COMMITTEE:

Senator Claire McCaskill (D-MO) - Chairman

Senator Orrin Hatch (R-UT) - Vice Chairman

Senator John Barrasso (R-WY)

Senator James DeMint (R-SC)

Senator Michael Johanns (R-IA)

Senator Edward Kaufman (D-DE)

Senator Amy Klobuchar (D-MN)

Senator James E. Risch (R-ID)

Senator Jeanne Shaheen (D-NH)

Senator Thomas Udall (D-NM)

Senator Sheldon Whitehouse (D-RI)

Senator Roger Wicker (R-MS)

SENATE LEGAL COUNSEL:

Morgan Frankel, Senate Legal Counsel

Pat Bryan, Senate Legal Counsel

Thomas Caballero, Assistant Senate Legal Counsel

Grant Vinik, Assistant Senate Legal Counsel

-- continued --

APPEARANCES (Continued):

HOUSE OF REPRESENTATIVES MANAGERS:

Representative Adam B. Schiff (D-CA)

Representative Robert W. Goodlatte (R-VA)

Representative Zoe Lofgren (D-CA)

Representative Henry C. Johnson (D-GA)

Representative James Sensenbrenner, Jr. (R-WI)

HOUSE OF REPRESENTATIVES IMPEACHMENT COUNSEL:

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Mark Dubester, Special Impeachment Counsel

Harold Damelin, Special Impeachment Counsel

Kirsten Konar, Special Impeachment Counsel

RESPONDENT: Judge G. Thomas Porteous, Jr.

RESPONDENT'S COUNSEL:

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Keith Aurzada, Esq.

P.J. Meitl, Esq.

Daniel O'Connor, Esq.

Brian Walsh, Esq.

Daniel Schwartz, Esq.

P R O C E E D I N G S (8:11 a.m.)

CHAIRMAN MC CASKILL: We are ready to proceed with Judge Porteous's case.

Mr. Turley?

MR. TURLEY: Thank you, Madam Chair. Could we raise a housekeeping issue? You asked me to confirm at the outset of our witnesses. We're going to proceed as we were in order.

As you know, the Senate committee asked us to take Judge Bodenheimer out of order. He was a House witness. We put him second. And there's another witness, Mr. Gardner, that we were also asked to take, it was another House witness. We'll be taking him today as well.

But we won't be able to move him up like Judge Bodenheimer, because we've got bankruptcy people that have to catch flights. So we'll try to get through the bankruptcy people and then do Mr. Gardner, and they will all be done today.

CHAIRMAN MC CASKILL: Okay. Could you tell me, are all of the people on your list, with the exception of Gardner, bankruptcy people today?

MR. TURLEY: No, no.

CHAIRMAN MC CASKILL: So how many

Gardner?

MR. TURLEY: That we're still trying to confirm. I know that we're going to proceed with -- we're going to have Professor Pardo, we're going to have Barliant, and then Beaulieu. We're sure -- they're all here and waiting.

Then we'll be able to confirm -- but we're trying to stay in the order that we gave the committee.

CHAIRMAN MC CASKILL: So perhaps Gardner would go after Beaulieu?

MR. TURLEY: We're not sure yet. We have to --

CHAIRMAN MC CASKILL: Okay. All right.

MR. TURLEY: One other issue, with the indulgence of the chair, we do have an issue we wanted to raise on the record. As you know, last night the committee informed us that we were -- we were planning to try to call Mr. Petalas, who is a Department of Justice attorney. We were informed the committee has decided not to subpoena him. We understand that.

What we would like to get on the record and that we're very, very thankful to the committee's efforts to get material from the Justice

Department, and we've had glimpses of how difficult that is. We want to thank you for that, and I know you've been personally involved in that.

We only have, as you know, two days left for our testimony. The problem we're facing is, with Petalas out, we are fairly confident that there's material related to the investigation at the Department of Justice.

The reason this issue has come up again is that in Mr. Bodenheimer's testimony, he mentions that he was interviewed maybe 30 to 40 times. And as you know, he's a critical player in this Wrinkled Robe matter, which we raised in the opening statement.

We don't have 302s for nearly that number, and we also found out a witness today is going to say that that witness was also interviewed many more times than we thought.

So what we would like to ask the committee to consider is to re-approach the Department of Justice and see if they would be willing to give us the memoranda related to the decision not to prosecute Judge Porteous and specifically raise the fact that we have new testimony from witnesses indicating that there were a lot more interviews

than we've seen.

If they were willing to give us some of that, we could probably work it into Tuesday and actually get it into the record. So we are raising that with the committee and asking if you can help us, we would greatly appreciate it.

CHAIRMAN MC CASKILL: Well, we will -- we have and we will continue to try to get as much information as possible. Everyone can remember the testimony, it was my recollection that Judge Bodenheimer said he'd been interviewed 30 to 40 times about this. But that would include the House, that would include any -- I'm sure that he had times he was interviewed for judicial discipline, either his case or Judge Porteous's case.

So I don't -- I don't know that we're looking for 30 or 40 302s.

MR. TURLEY: Yes, I actually think you're right, Madam Chair. We're probably not looking for 30 or 40. But one of the things we were concerned about is in his testimony, he directly contradicted those two big statements we were raising that had been cited a lot.

And once again, it makes us wonder what material is still there, because he directly

contradicts the meaning of those statements.

CHAIRMAN MC CASKILL: Well, we will -- we will be happy to take another round at the Justice Department.

MR. TURLEY: I appreciate it.

CHAIRMAN MC CASKILL: They are adamant that they have provided all of the information that is relevant to this proceeding. But we will take another round. I will personally make another phone call and inquire and make sure that there is -- I'm happy to do that.

We have done it before and we'll do it again, and we'll see if there's anything else that we will wrangle out of them.

MR. TURLEY: Thank you.

CHAIRMAN MC CASKILL: They have, in fact -- even though I'm very disappointed how difficult it was to get the information we got, they did produce a significant amount of information. It was very late in the process, but I think we were able to get much more than they originally intended on giving us.

MR. TURLEY: We do know your staff turned that over immediately as soon as your staff got it. We are still trying to get the memo. We got only

the letter, but we're trying to get the memo from the Department of Justice.

CHAIRMAN MC CASKILL: I don't think they're going to give you the memo. I'll just tell you, I think they believe that invades a number of different privileges they have, which is the nub of the matter, whether or not we have the right to invade their deliberative process as it relates to a decision to prosecute.

MR. TURLEY: We appreciate your efforts in that regard.

CHAIRMAN MC CASKILL: Thank you.

MR. SCHIFF: Madam Chair, I just wanted to express the House view that the two statements that counsel is referring to, that once he was a judge no one -- he would never have to pay for his lunch again and the other more profane comment, in contradiction to what Mr. Turley said, those statements were not contradicted by Mr. --

CHAIRMAN MC CASKILL: Bodenheimer.

MR. SCHIFF: Thank you, by Mr. Bodenheimer. In fact, he corroborated and said that's exactly what he said. Now, he gave a different slant to it, but there was no contradiction that the statements were made.

CHAIRMAN MC CASKILL: Okay. Now we've both had a little argument this morning.

MR. TURLEY: To get us started without coffee.

CHAIRMAN MC CASKILL: To get us started we have a little argument outside the evidence. But we will start with the witness, please.

And let me on our end, housekeeping, we will take the witness Pardo. We will take a morning break at 9:30. And we will break until 11:00, because we have a vote at 10:45, and most of the members of the committee have committee work they have to do in a business session, both in Judiciary Committee and Foreign Affairs.

We will then come back at 11:00, and we will hopefully be on the next witness. If not, we'll finish Pardo.

We will then have to take a vote break at noon. Now, this is important for everyone who is here, and for those who are not here, to spread the word.

We actually have the opportunity to work after the vote before lunch, and I think that is maybe the biggest challenge, is to get everyone back here at 12:15 and stay until 1:00. Right?

Especially for my colleagues that could have an excuse to leave at 12:30 if they didn't know that we don't really start talking in caucus until 1:00; right?

So 12:15 to 1:00 we would come back and work. Then we would break for lunch until 2:00 or 2:15 probably, more likely. And then we would continue. And it is our intention to stop at 6:00 today. So that's why I'm anxious to make sure we get Mr. Gardner in.

For the record, this was a little bit of a mess. Mr. Gardner, I think is a judge, isn't he? No?

MR. TURLEY: No, Madam Chair.

CHAIRMAN MC CASKILL: Mr. Gardner had an accident and was saying that he couldn't come. And so we agreed to have him come next week. In the meantime, evidently, that was not communicated to him, and he got on an airplane.

MR. TURLEY: Right.

CHAIRMAN MC CASKILL: So he is here, and he's cranky. And we don't want to spend the money to fly him back again and then come back again next week.

So I think it would be much better for

us -- and I didn't mean that in a pejorative way, that he's cranky. I was trying to be humorous. Probably on the record it won't look so humorous.

But I think it's important that we get to him today so that we either don't have to pay for a hotel room through the whole weekend or not paying the round trip flight.

MR. TURLEY: We actually left a message and didn't reach him before he got on the plane. We will get to him today and we promise that.

CHAIRMAN MC CASKILL: Okay.

MR. TURLEY: At the time the defense will call Professor Rafael Pardo.

CHAIRMAN MC CASKILL: While the witness is coming, I would ask the members also to begin to look at their calendars as -- if we finish this trial, the staff will have some time to work on a report.

We are going to have to come back and vote on that report prior to when we reconvene. And I'm going to need everyone to look at their calendars and decide whether they would like to come back to vote on the report on -- late in the week, after the election, which would be the Thursday or Friday after the election, or whether they would prefer to

come the Monday after the election, which I believe might be Veteran's Day.

No, which day is Veteran's Day? Wednesday is Veteran's Day. So the Monday is not Veteran's Day.

So if you all would check and begin to give us feedback. If you would prefer to fly back, it will be a couple hours, the committee meeting.

You will have the report ahead of time to review and give input to the staff. You're not going to have to come and read the report and do something at that committee meeting. You will have plenty of time ahead of time, at least a week, to have the report and look at it.

But we are going to have to come back, just this committee, for a meeting prior to the Senate reconvening on the 15th of November, so everyone can start working with their schedulers on that.

I'll need you to stand, sir. And I apologize, Professor, I do not know what your first name is.

THE WITNESS: It's Rafael.

CHAIRMAN MC CASKILL: Rafael Pardo; right?

RAFAEL PARDO

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Your time as we begin the day, Judge Porteous has nine hours and 53 minutes, and the House has eight hours and 21 minutes.

DIRECT EXAMINATION

BY MR. WALSH:

Q Good morning, Professor Pardo.

A Good morning.

Q Could we call up Porteous Exhibit 1097 on the screen, please.

Is Exhibit 1097 your CV, Professor Pardo?

A Yes, it is.

MR. WALSH: Madam Chair, we would offer 1097 at this time.

CHAIRMAN MC CASKILL: Objection?

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

(Porteous Exhibit 1097 received.)

BY MR. WALSH:

Q Professor, you have a bachelor's degree from Yale?

A I do.

Q Law degree from New York University?

A I do.

Q Were you a member of the law review?

A Yes, I was.

Q Following graduation, did you clerk for a bankruptcy judge in New York City?

A I did.

Q Did you work for a major law firm in New York practicing in bankruptcy?

A Yes.

Q You began your academic career as a professor at Tulane; is that right?

A That's correct.

Q When you were living in New Orleans, did you have occasion to meet Judge Porteous?

A I did not.

Q When is the first time you met Judge Porteous?

A Yesterday.

Q After your time at Tulane, you moved to Seattle University, where you received tenure; is that correct?

A That is correct.

Q And just this past summer you moved across town to the University of Washington; is that right?

A That's also correct.

Q You are a full professor with tenure?

A I am.

Q What are the principal areas in which you teach?

A I teach bankruptcy, commercial law courses, which focus on the Uniform Commercial Code. I've predominantly taught Articles III and IV of the Uniform Commercial Code, so negotiable instruments, bank collections and deposits. I've taught contracts.

Q If we could look at page 2 of your CV. It continues onto the third page, but starting on page 2, is that a list of your publications?

A Yes, it is.

Q Do all of the articles listed in your CV relate in some way to bankruptcy or financial restructuring or debtor/creditor issues?

A They do.

Q You're a member of the editorial board of the American Bankruptcy Law Journal?

A Yes, I'm one of the two academic members.

Q In addition to teaching and researching, do you have occasion to provide legal advice to consumers?

A I do. I volunteer for the King County Bar

Association Debt Clinic, which provides advice to individuals who are considering filing for bankruptcy or have begun the process of filing for bankruptcy on their own.

Q Have you testified before Congress before?

A I have, about a year ago I testified before the House Judiciary Committee's subcommittee on commercial and administrative law regarding bankruptcy issues and the discharge of student loans.

Q Are you being compensated for your testimony today?

A I'm not. I'm only -- my expenses are being reimbursed by my institution, and I would also add that I'm here in my individual capacity, and I don't represent the views of my institution.

MR. WALSH: We would tender Professor Pardo as an expert in matters of bankruptcy law at this time.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: He will be considered an expert by the panel.

BY MR. WALSH:

Q Professor Pardo, what sorts of information did you review to prepare for your testimony here

today?

A I predominantly reviewed the materials relating to Judge Porteous's Chapter 13 bankruptcy filing, including the docket, the schedules, the petition, the notice of the commencement of the case, transcripts of the creditors meeting. I also reviewed documents relating to proceedings leading up to his impeachment and testimony provided by various participants.

And I referred to the House committee -- the House Judiciary Committee's report accompanying the articles of impeachment.

Q Were you present in the courtroom yesterday when Judge Keir described the effect of the delivery of a negotiable instrument on an underlying obligation?

A I was.

Q In your view, did he accurately state the law on that issue?

A He did not.

Q Did you hear Mr. Lightfoot state that a marker is a promise to pay?

A I did.

Q Was that an accurate statement, in your view?

A It was not.

Q Several people in this proceeding have described Judge Porteous's use of markers as gambling on credit. Is that an accurate statement, in your view?

A It is not.

Q Legally speaking, is there any difference between buying gambling chips with a marker and buying potato chips with a check?

A There is not.

Q I want to ask you about a few specific differences between Chapter 7 and Chapter 13. I'm going to try and skip over issues that other witnesses have covered already so we can move this along.

But let me ask you about the King County Debt Clinic that you referred to a moment ago.

In your work with the clinic, do you advise consumers about the relative benefits of Chapter 7 versus Chapter 13 for their particular financial situations?

A I do.

Q What sort of situations would a consumer be better off choosing Chapter 13 over Chapter 7?

A There are a couple of instances. A lot of

those instances relate to the debtors wanting to retain certain assets and whether that's to keep the home, which there are means to do so in Chapter 13. But in Chapter 7, it would be very difficult, if not impossible, to keep your home.

Sometimes to restructure debts owed to secured creditors, such as a secured creditor who has a lien on your car and to restructure that debt.

There's also the possibility of using Chapter 13 to manage difficult types of debt, such as tax debt. There are a variety of reasons why an individual would consider 13 or 7.

Q Let's talk about the two chapters again. Let's talk about the discharge in the two chapters. What are the sorts of things that could cause a debtor in a Chapter 7 case to have a discharge denied, that is no debts are discharged?

A Well, as an initial matter, the Bankruptcy Code is very specific that the court must grant the debtor a discharge, unless one of the enumerated statutory grounds exist for denial of discharge. So absent one of those exceptions, the court has no discretion to deny a discharge.

So some of the grounds for denying discharge include knowingly and fraudulently making

a false oath, an account in a Chapter 7 case. So here I think it's important to note that if one knowingly makes a false oath or account in a Chapter 7 case, that is not the basis for denial of discharge.

Another ground is refusing to obey a lawful order of the court in the debtor's bankruptcy case. So those are a couple of examples that would be the basis for denial of discharge.

Q Okay. Do those provisions for denial of discharge apply in a Chapter 13 case?

A They do not. The only basis to deny a discharge in Chapter 13 is if the debtor does not complete all payments under the plan.

Q Okay. Now, let's take the situation where a debtor has gotten a discharge but it might be revoked. What are the bases on which a Chapter 7 debtor's discharge could be revoked after it's been granted?

A So there are a variety of grounds. One is if the fraud was -- the discharge was obtained through fraud by the debtor and the creditor only learned of the fraud after discharge was granted.

Another possibility is that the debtor acquired estate property and knowingly and

fraudulently kept that estate property and didn't turn it over.

And then the third possibility is at the time that Judge Porteous filed, the bankruptcy laws then in effect, if a debtor failed to follow a lawful order of a court in the debtor's case.

Q What are the grounds for revoking a discharge in a Chapter 13 case?

A So in Chapter 13, the only basis for revoking a discharge is if that discharge was obtained through fraud.

Q And what's the period of time in a Chapter 13 case that someone could try to revoke a discharge?

A One year after the grant of discharge.

Q Now, the differences you've just talked about between discharges in Chapter 7 and Chapter 13, were those developed by the courts or enacted by Congress?

A They were enacted by Congress. And I think here it's very important to note that the system, as it's structured, is not a strict liability system regarding what the effects of nondisclosure are.

That is, there is a range of responses

that both the courts and participants in the bankruptcy system can use to address nondisclosures.

And I think it's important to note that Congress made a meaningful and intentional policy choice to say we will not deny a discharge, for example, to a Chapter 7 debtor who knowingly makes a false oath or account.

And likewise, Congress made the knowing and intentional choice to say we will not deny a Chapter 13 debtor a discharge if they knowingly and fraudulently make a false oath or account in a case.

That's not to say that Congress condones such nondisclosures or false fraudulent and knowing statements, but it reflects the fact that Congress thinks we need to let bankruptcy courts be nimble and have the ability to deal with a variety of scenarios and determine what is the appropriate response.

Q What's the underlying policy justification for making it somewhat easier to get a discharge in Chapter 13 than it is in Chapter 7?

A Well, much of this relates to the differences in repayments under the two chapters. So in Chapter 7, one turns over one's assets to a trustee, they get liquidated, and those assets are

used to pay creditor claims.

The reality is that anywhere from 95 to 97 percent of all consumer Chapter 7 cases are no-asset cases, there are no distributions made to general unsecured creditors.

On the other hand, debtors who have future income might be able to repay their creditors, but that future income cannot be received in Chapter 13.

So Congress as a policy choice has used an incentive approach or a carrot, if you will, to try and attract debtors to Chapter 13 by giving them certain added benefits, and one of these benefits would be limited grounds for denial of discharge, mainly not completing your plan.

And the hope is that by attracting more debtors to Chapter 13, you will increase creditor repayments through the use of future income.

Q Professor Pardo, let's look at the year 2001, when Judge Porteous and his wife filed their Chapter 13 case. About how many debtors filed under Chapter 7 in 2001?

A Approximately a million or more than a million, but slightly more than a million.

Q About how many debtors filed under Chapter 13 in 2001?

A Approximately 400,000.

Q All right. Let's talk about notice in a Chapter 13 case. The first step in a bankruptcy case, of course, is to file a bankruptcy petition. We've heard a lot about that during this proceeding already.

But I want to ask, does the petition get sent to creditors?

A It does not.

Q How do creditors get notice of a bankruptcy filing?

A Creditors get notice of a bankruptcy filing from -- at the time of Judge Porteous's filing, through the clerk's office, there would be a notice of commencement of the case, as well as notice regarding the 341 meeting, that is the meeting of creditors.

Q And could we pull up House Exhibit 128 on the screen, please. I believe it's already in evidence.

Is Exhibit 128 an example of a notice of commencement of a bankruptcy case?

A Yes, it is.

Q And, in fact, it's the one in Judge Porteous's bankruptcy case; right?

I want to walk through very quickly with you the sorts of information that are included here that are provided to creditors. So, for example, it tells creditors it's Chapter 13 rather than some other chapter; right?

A That's correct.

Q And it has the debtors' names and Social Security numbers; right?

A Yes.

Q Tells them what date the case was commenced?

A That's correct.

Q Tells the creditors when they have to file a claim, if they choose to file a claim?

A That's correct.

Q Tells them when the 341 meeting or initial meeting of creditors is held; right?

A That's correct.

Q Tells them when the confirmation hearing on the plan will be held; right?

A Yes.

Q It's got a few data points about the plan. We heard some testimony about that yesterday; right?

A Yes, that's correct.

Q It tells them who the trustee is and who

the debtor's counsel is; right?

A That's correct.

Q Okay. If a debtor omits a creditor from the debtor's schedules, liabilities, what's the significance of that for the debt that's owed to that creditor?

A The debt will not be discharged. And the reason for this is the notion of constitutional due process and fair notice. And not having received notice of the commencement of a case, the debt would not be discharged in Chapter 13.

Q You talked about the possibility that a debtor would fail to make all the payments under the plan; right?

A That's correct.

Q Are there studies about the frequency with which that happens in Chapter 13 cases?

A Yes, there are.

Q What do those studies show?

A They show a range of figures, but most of them show that more than 50 percent of Chapter 13 cases fail, and the numbers are really closer to anywhere from two-thirds to three-quarters fail.

Q Okay. Let's go into a little more detail about what it takes to confirm a Chapter 13 plan,

then. There are a number of statutory requirements; right?

A That's correct.

Q Okay. Could we pull up the demonstrative on the requirements. We've heard a lot about best interest of creditors in some of yesterday's testimony and how assets can be relevant in a Chapter 13 case. So I want to ask if we could go to page 5 of the demonstrative.

Is the statutory language that's on the screen here, is that what bankruptcy practitioners commonly refer to as the best interest of creditors test?

A That's correct.

Q And why is that an appropriate name for statutory language that does not even use the word "best interests"?

A Well, the basic idea behind the best interest test is that if a debtor chooses to file for Chapter 13, the creditors should be no worse off than they would have been had the debtor filed for Chapter 7.

So that intuition makes sense. You want to have Chapter 7 be the baseline. And so what the test looks to ascertain is whether the creditors

would have received as much as they would have in a Chapter 7 case.

Q We have another demonstrative I'd like to pull up, and we have a hard copy of this one as well.

So could you tell us, Professor Pardo, in general terms, what's being shown by the chart that we have on screen now?

A So the chart is looking to illustrate both -- not only the net amount that was paid to Judge Porteous's general unsecured creditors in his Chapter 13 case, but also various outcomes that would have occurred under a best interest test, both under Judge Porteous's -- one condition the second bar shows what would have been paid according to Judge Porteous's schedules, and the third bar on the right indicates if all of the amounts that are alleged that ought to have been disclosed and if somehow they would have made it into the case. And it's to show what would have been paid.

And then both of these amounts can be compared to the amount that was actually paid to figure out whether or not the disclosure of these assets in any way would have affected an analysis of the best interest test.

Q Okay. And so the bar on the left are the actual payments under the actual Chapter 13 case that we're talking about; right?

A Right. And I believe that that was $52,567.

Q Okay. The middle bar is a calculation of the best interest test based on what was actually disclosed in this case; correct?

A Right. So that would be the equity in his home, as well as his Bank One account, as stated in schedule B. And I believe it's $25,017.

Q Okay. And the chart on the right is -- the bar on the right is the one we're going to talk a little bit about in a second, the hypothetical analysis, what other things had been disclosed, how would the best interest test come out?

A That's right. I believe those amounts total $33,677.

Q Let's break down on the right. Light blue, largest piece by far is the home equity.

A That's correct.

Q How do you calculate home equity in a scenario like this, if we can go to the third page of the demonstrative?

A Well, again, recall that the test is

figuring out what the creditors would have received in Chapter 7. So you have to -- you have to determine how this asset would have been administered in the Chapter 7 case, if the asset were going to be liquidated, to then figure out what amounts would be available for distribution to the unsecured creditors.

So you'd begin with the value of the asset that's to be liquidated. So here we assume, in the exhibit, it's being assumed that the value of the home is $235,110. This was the value -- the current market value listed in schedule A.

And moreover, this was the value that was fixed in the confirmation order by the court.

I should note that this valuation standard is one that is -- that works against Judge Porteous in the sense that current market value is a higher valuation than what one would obtain in a liquidation value. So this hypothetical assumes a scenario that is actually not favorable to Judge Porteous. It's an inflated amount. But we can work with that.

Q Okay. And what are the deductions that you take from the value?

A Well, sir, to administer this asset,

before the trustee can make any distributions to general unsecured creditors, the bankruptcy code in Chapter 7 requires that the trustee first dispose of any interests in property held by a creditor, and such interests can include a lien.

First the trustee would have to account for the first mortgage, subsequently the second mortgage. And then before any distributions are made to unsecured creditors, the debtor is entitled to claim an exemption to which he or she is entitled under either -- under state law or the Bankruptcy Code, whichever might be applicable.

And then once that detection has been made, of course, the trustee is then going to proceed to try and liquidate the asset. The trustee will incur costs associated with this. And so presumably, there would be a real estate commission, and to the person tasked with selling the home.

And then there would be the costs to the trustee for administering the asset, and statutorily under the Bankruptcy Code, there is a rate according to which percentage of fees that are granted to Chapter 7 trustees based on the amount distributed to creditors.

So all of these amounts have to be

accounted for. The trustee will be paid for his costs, any administrative costs will be paid before unsecured creditors. So that would leave roughly $24,900 from the liquidation of the home, assuming a high market value.

Q And that amount is the same in the middle bar and the right bar on the demonstrative; correct?

A That is correct. They would not change.

Q We can go back to the first page that's the same one we have on the easel here.

So on the bar on the right, let's go bottom to top and talk about the assets quickly.

A Yes.

Q We've done home equity. The next two bars are financial accounts; correct?

A That's correct.

Q And how did you determine what balances to include for purposes of this chart?

A So we can begin, for example -- we'll work from bottom to top, if that works.

And so I believe that the one above the blue bar, the home equity, I believe that's the Fidelity account.

Q Right.

A For, if I'm looking at this correctly, it

was roughly $283 or -- in gross.

And then after that, the yellow is the Bank One checking account. For there the assumption is that it would have been the $2200 that's being argued that should have been disclosed, giving the account balance on March 27.

The next one is the tax refund, which was $4100 and maybe $4137 gross.

Then there's the $1500 Treasure Chest payment for redeeming the marker, $1500. And then finally the alleged Fleet preference, which was $1088 in gross.

And I should note, the amounts represented are not the actual gross amounts but they are net amounts. What have been deducted is -- again, the test is what would unsecured creditors have received in a Chapter 7 case.

And as I mentioned before, the trustee is entitled to compensation for administering assets and making distributions. And so those gross amounts have been reduced by the percentage that would have been paid by the trustee.

That said, into this exhibit are not factored in any other costs that the trustee would have incurred in connection with, for example,

recovering a preference or trying -- making sure that the tax refund was recovered. So none of those costs are included.

Of course, if you included those costs, it would reduce the amounts further.

Q Okay. Now, let's back up a step or two. When we're talking about the preferences, let's go to basic principles for a minute.

Is there anything wrong with the debtors making payments to a creditor within the 90 days before a bankruptcy filing?

A There is nothing technically wrong. These are legally -- legal debts due in owing when the debtor pays a creditor prebankruptcy. It's just that once there's a bankruptcy filing, hindsight tells us, well, given the purpose of equality of distribution, it would have negative economic effect on creditors as a whole, so we have to recover it.

But it's only hindsight that tells us that it shouldn't have happened.

Q Does a trustee need to show fraudulent intent or other bad behavior by the debtor or creditor to recover preference?

A None at all. The focus of preference is merely on economic effect.

Q Now, for purposes of the hypothetical we've been assuming these are preferences, so let's go away from the hypothetical for just a moment.

A Sure.

Q In your opinion, was the payment that was made to the Treasure Chest Casino a recoverable preferential transfer?

A Which payment are you referring to?

Q I'm sorry, redeeming the marker.

A Redeeming the marker. Well, in my view, there are strong arguments to suggest that it was not a preference. And you could take one of two views as to why it would not constitute a preference.

The first is that one of the elements to prove a voidable preference is that it be a transfer to the creditor on account of an antecedent debt. Now, one could take the view what was occurring here was Judge Porteous was purchasing back a marker, which is a negotiable instrument, which is property.

So one could start off with the view this is just the repurchase of property.

Now, the argument against that might be, well, no, really it isn't a transfer on account of an antecedent debt, because there is a contingent

liability on the market, there's no actual liability, there's a contingent liability, in the sense that if that marker were at some point to be dishonored, then Judge Porteous would have been liable on the instrument. So that might be the response that no, what's happening here is because there's a payment on a contingent liability.

If one chooses to take that view, again, the requirement that has to be proved for a preference is that the payment is on account of an antecedent debt. So that requires you to figure out when the transfer occurred and to establish that the debt existed before the transfer.

And for purposes of defining antecedent debt for the preference provision, the Federal Circuits are split as to when a debt is deemed to arise for preference purposes. And some circuits take the view that a debt does not arise until it is -- until the debtor first becomes legally bound to pay, legally bound to pay.

And so at the time that the marker -- the Treasure Chest was in possession of the marker, at that point in time, Judge Porteous had no legal obligation to pay the marker.

And so under the view that a debt does not

arise for preference purposes until there's actually a legal obligation to pay, there wouldn't have been an antecedent debt.

So instead what you would have had is a simultaneous exchange of property for a simultaneous debt.

Q Is it fair to say that the law, particularly in 2001, was in a state of some uncertainty about how you would treat the redemption of the Treasure Chest markers?

A I'm sorry, could you repeat the question?

Q Is it fair to say in 2001 the law was in somewhat a state of uncertainty as to how the payment to Treasure Chest would be treated for preference purposes?

A Yes.

Q How about the payment made by Judge Porteous's secretary to Fleet on the credit card? In your view, was that a voidable preferential transfer?

A Again, one of the key elements to proving a voidable preference is that it be a transfer of an interest of the debtor in property. So the payment that was made did not come from any of Judge Porteous's property, it came from the account of the

third party. So you have no transfer of interest of the debtor's property at that point, so it wouldn't satisfy the first element of the preference.

Q So nevertheless, going back to the hypothetical, nevertheless you've included these amounts in the chart for purposes of analysis in the best interest of creditors test; correct?

A I have.

Q So recognizing that we talked about a number of assumptions, when you put all the pieces together in the hypothetical Chapter 7 on the right, what do you calculate to be the recover in that hypothetical Chapter 7 case?

A It would have been $33,677.

Q That's still about $19,000 less than the creditors actually get in the actual Chapter 13 case; correct?

A That's correct. And so the best interest test, again, it looks to ascertain that creditors are no worse off in Chapter 13 than they would have been in Chapter 7. The requirement of this, of course, is that you have to pay more than they would have gotten in a Chapter 7 because of the time value of money.

There is the confirmation requirement, the

language of that requirement specifies that you have to discount the future payments back to present value.

If you -- and so one way to think about it is that you basically, as the debtor, have to pay interest on the amount that the creditors would have received in Chapter 7. And so even under the scenario on the third bar chart, the $33,167, that would, in essence, be as if Judge Porteous had paid 16 percent interest.

And at around the time of his bankruptcy filing, the prime rate was 6 and three quarter percentage points. So this would have been almost 10 percentage points above prime.

And I can't imagine that any bankruptcy court would have denied confirmation, saying that insufficient interest was being paid to the general unsecured creditors.

Q Professor Pardo, let's go to the disposable income test now.

If we could put back up the confirmation requirements demonstrative on page 9 in particular.

So here we're talking about Section 1325(b) of the Bankruptcy Code, but there's an initial question, when does Section 1325(b) come

into play?

A So the projected disposable income requirement only gets triggered if a trustee or unsecured creditor objects to plan confirmation.

Q If nobody objects, the judge never has to get to this; right?

A Right. If there's no objection to plan confirmation, there's no requirement to project your disposable income.

Q Can you give a one-sentence summary of what the disposable income test requires?

A It essentially requires that any excess income above the amounts you need for reasonably necessary expenses to live be devoted, at the time of Judge Porteous's bankruptcy filing, for a three-year period, beginning once payment started under the plan.

Q Can we go to the next page, please? And disposable income is defined in the Bankruptcy Code as we're seeing on the screen now; right?

A That's correct. Which means you start out with whatever the debtor's income is, and courts generally begin with net income, and from that then they deduct reasonably necessary expenses. Then that gives you disposable income.

Then that disposable income has to be projected.

Q As a practical matter, how do trustees and judges and debtors calculate disposable income in a bankruptcy case? What do they look at?

A So back in 2000, their basic approach was you start off with the net amount listed in schedule I, you deduct from that the amount from schedule J for expenses and multiply that by 3.

Q Do trustees examine the projected expenses the debtors include on schedule J?

A Absolutely.

Q Could we pull up Porteous Exhibit 1100(g), please.

Can you tell us what this document is, Professor Pardo?

A This was the Chapter 13 trustee's objection to plan confirmation.

Q In Judge Porteous's case?

A That's correct.

MR. WALSH: Madam Chair, we'd offer 1100(g) at this time.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Will be received.

(Porteous Exhibit 1100(g) received.)

BY MR. WALSH:

Q The trustee objected to confirmation. Can you tell us what happened to Judge Porteous's expenses on schedule J after the trustee objected, in terms of dollar amounts?

A They were reduced.

Q And what was the effect of that in terms of payments to the creditors under the plan?

A The effect is that the reduction expenses increased the amount of disposable income, which in turn increased the distribution to general unsecured creditors.

Q When we're talking about projected disposable income, do the debtor's assets on hand on the date of the bankruptcy filing count as projected disposable income, and they have to be paid over to the creditors?

A They do not.

Q Chapter 13 is forward-looking rather than Chapter 7, which is somewhat backward-looking. Is that a rough approximation?

A That's correct.

Q Let's talk about the tax refund we've heard about in these proceedings for the year 2000. In your view, was the 2000 tax refund disposable

income that would be paid over to the creditors in Judge Porteous's case?

A It wasn't. And if you'll just indulge me for a moment to show by way of example why it would not be.

On -- if Judge Porteous had instead filed for Chapter 7, there is no doubt that that 2000 tax refund would have been property of his bankruptcy estate, meaning then that it would have been available for liquidation for the benefit of creditors as an asset. It was a claim -- his tax refund at the time he filed would have been a claim against the IRS for the amounts due in owing, and the trustee would have been entitled to administer that claim for the benefit of creditors.

Had Judge Porteous made any attempt to, say, this tax refund is not part of the estate because it's earnings, and earnings are excluded, future earnings are excluded from the estate in Chapter 7, that argument would not have worked.

And so in Chapter 7, it would have been an asset liquidated. He, in fact, filed for Chapter 13. One of the mandatory requirements of Chapter 13 under 1322(a)(1) is that the debtor devote a portion or all future earnings, whatever may be needed, to

complete the plan.

So debtors, as a matter of law, are required to turn over some portion of their income. Now, one of the things a Chapter 13 debtor may do is liquidate property, but they need not do so.

There can be no requirement to force a debtor to liquidate an asset. And so this 2000 tax refund would not have been part of his disposable income.

Q Okay. Let's -- let's talk about another income issue we've heard about, the committee has heard about also, and that's the FICA withholding limit.

Professor Pardo, is it fair to say that somebody involved in this process probably should have identified this as an issue?

A Absolutely.

Q In your view, is it reasonable to have expected Judge Porteous to appreciate and understand the significance of that issue in a Chapter 13 case?

A No. From my understanding and from what I've reviewed the record, there was never any discussion between his attorney, Mr. Lightfoot, regarding on schedule I, there is a statement at the bottom regarding whether any increases in income are

anticipated. So there was no discussion about that.

And so without that sort of prompting from the attorney, there just -- once the pay stub was given, there would be no reason to continue the conversation absent some more direction from his attorney.

Q Okay. Can we pull up Porteous Exhibit 1108, please. I believe this is already in evidence.

The trustee in Judge Porteous's case became aware of the issue as a result of an interview with the government that we heard about in yesterday's testimony; is that right?

A That's correct.

Q And he concluded that addressing it wouldn't substantially increase the percentage paid to unsecured creditors, and he declined to take further action; is that right?

A That's right. And I think, you know, the significance of this is note that a trustee has financial incentive to some extent to pursue added distributions and added income, insofar as not only is it the trustee's duty to represent the interests of general unsecured creditors, but moreover, if you talk about financial incentives, the trustee --

Chapter 13 trustee's fee is based on a percentage of total distributions made under the plan.

So if he had recovered extra amounts, it would have also inured to his pecuniary benefit.

Q Okay. We heard some testimony yesterday about Judge Porteous's bank accounts after the bankruptcy filing.

A Yes.

Q And in particular, there was a discussion about the fact that Judge Porteous used the Fidelity account after the bankruptcy, even though it wasn't included on his schedule B.

Does the code, Bankruptcy Code, say anything about where a debtor can bank?

A It does not.

Q Was Judge Porteous required to keep his cash after bankruptcy filing only in bank accounts that were listed on schedule B?

A No, he was not.

Q If Judge Porteous had, a week after filing for bankruptcy, closed both the Bank One account and the Fidelity account and opened an account at Bank of America, he could have put all his cash into the Bank of America account; correct?

A That's correct.

Q Do trustees regularly receive and review bank statements from Chapter 13 debtors after their bankruptcy filing?

A To my knowledge, they don't.

Q If Judge Porteous had included the Fidelity bank account on his schedule B and this $283 balance, would that have had any effect on where he kept cash post petition?

A It would not have.

Q There have also been some discussions about the fact that Judge Porteous withdrew funds from his IRA after his bankruptcy filing. Is there anything wrong with that?

A No.

Q Do creditors have any claim to funds that are held in a valid IRA?

A No. Again, the Bankruptcy Code is very clear that once a confirmation order is entered, all property that has not been spoken for in the plan as being distributed vests back in the debtor, free and clear of any creditor claims.

Q And the IRA would have been exempt in the first place?

A That's correct.

Q We've also heard a lot of discussion about

incurring additional debt after the bankruptcy filing.

You've heard some testimony that Mr. Beaulieu, the trustee, gave a pamphlet to the Porteouses at or before the initial meeting of creditors; right?

A Yes.

Q And could we pull up House Exhibit 148, page 4, please. And let's look at the language about incurring debt, see if we can blow that up. There we go.

Does the Bankruptcy Code include any ban on borrowing money or buying anything on credit without permission of the bankruptcy court in Chapter 13?

A It doesn't. And furthermore, if you look at what a plan may provide under 1322(b), it provides that a debtor may provide for a payment to post-petition creditors through the plan, if they receive approval. But that suggests that the option exists to deal with those post-petition creditors outside of the plan.

Q Okay. We've also seen some language from the confirmation order that was entered by Judge Greendyke in this case, and we'll pull up Porteous

Exhibit 1100(p). Can we highlight -- we'll identify that as the confirmation order. Can we pull up the language down there at the bottom. There you go.

Does the Bankruptcy Code include a ban on a debtor's incurring debt without the trustee's approval?

A It does not.

Q Let's talk about the language that we have on screen now in the confirmation order. If you interpret that language literally, what sort of activities might Judge Porteous or his late wife have engaged in that technically would violate that order?

A If we give this, the first sentence of the fourth paragraph of the order, its literal meaning, if Judge Porteous sat down for lunch, had a sandwich, he would have incurred debt.

If Judge Porteous decided he needed an oil change and he took it into the garage, he would incur a debt once the oil had been changed.

Any time Judge Porteous was turning on the lights in his house, he was incurring a debt to his utility company.

Q When we're thinking about these sorts of things that people do every day, is the analysis any

different if someone pays with cash or with a check?

A No. If -- the payment form has nothing to do with whether a debt has been incurred or not.

Q If I were to go to Macy's this afternoon and purchase $200 worth of clothing and give them a personal check, can Macy's turn around tomorrow and sue me?

A No, they can't. And here I think some explanation is required as to why they can't sue you.

So if you pay with a check, a check is a negotiable instrument. And Article III of the Uniform Commercial Code governs negotiable instruments. And UCC Article III has been enacted in Louisiana.

And what it says is that when a check is taken for a payment obligation, the effect of taking the instrument or the check for a payment obligation is to suspend the obligation.

Moreover, and when they -- when you pay Macy's on the check, you make that check payable to Macy's, you are the drawer on the check, and so you will be liable on the check itself, the instrument, based on your obligation as a drawer, only if -- only if and only when -- your bank dishonors that

check.

So if you gave a check to Macy's for clothing and you -- Macy's suddenly decided, you know what, we don't want this check, we're going to turn around and we are going to sue you for the underlying payment obligation, they couldn't do that because it's been suspended under the Uniform Commercial Code.

And if they tried to sue you on the check, they couldn't. They couldn't sue you on the check until they presented it and it was dishonored.

Q Okay. Does the nature of what's being purchased affect the analysis?

A It doesn't. So, for example, let's say you had gone to the grocery store and purchased potato chips with a check. The analysis wouldn't change.

Q All right. Let's look at an example of a marker. Could we pull up House Exhibit 301(b) and look at page 5.

So this is one of the markers that's at issue in this case. Professor Pardo, legally speaking, what is this marker?

A Well, under Louisiana law, a marker is considered to be a check, and a check is defined

under Article III of the Uniform Commercial Code as a negotiable instrument. A negotiable instrument is either a promise to pay or an order to pay.

If it's a promise, it's considered a note, and so therefore, a debt instrument. If it is an order to pay, it is not a debt instrument.

And a check -- and if a negotiable instrument is an order, it is a draft, and a check is a type of draft. It's a draft that is payable on demand and that is drawn on a bank.

And so this is a check which is not a debt instrument, but it's a -- nonetheless a negotiable instrument under the UCC.

Q Does the fact that a casino might agree not to present a marker for a period of time cause it to be something other than a check?

A No, it does not.

Q So I gave you a Macy's hypothetical a minute ago. Let me give you a different hypothetical now.

Let's say I go to a casino and identify myself, they know who I am. I sign a marker for $500, and they push $500 of chips over to me.

Have I incurred a debt?

A Well, any payment obligation that there

might be for those casino chips has been suspended. And so it's been suspended, so at that point, once the check has been taken, there is no debt for which you could be sued at that moment in time.

Q How come the underlying payment obligation that you referred to for me to purchase the chips, how come that's not a debt in violation of the confirmation order in Judge Porteous's case?

A Well, again, if we go back to -- again, we could go back to the view that you have to take a literal interpretation of the confirmation order. And I think taking that literal interpretation would lead to an absurd result.

The idea is that there ought to be some flexibility in the way in which one pays for things.

And so when you end up with a contemporaneous exchange of a check in this case for casino chips, it's no different than all the other examples we've worked through.

Q All right. One of the themes that we've heard in these proceedings and in the House proceedings as well is that Judge Porteous was a federal judge, he supervised bankruptcy judges, he was sophisticated, he should have known better.

So let's talk about that for a moment.

Who appoints federal bankruptcy judges?

A The Federal Circuit court judges.

Q And technically, district judges have original jurisdiction over bankruptcy cases and bankruptcy proceedings; right?

A Well, technically, that's correct. But as a matter of practice, every federal judicial district in the country has a standing order that automatically refers all bankruptcy cases from the district court to the bankruptcy court. And those orders further say that all cases shall be filed in the bankruptcy court.

Q Okay. And can you tell the committee some circumstances where bankruptcy issues might come before a federal district judge?

A Sir, one possibility is that the case that was referred to the bankruptcy court is withdrawn back to the district court. That almost never happens.

Another possibility is bankruptcy judges are only authorized to enter final orders in what are core proceedings. If it's a noncore proceeding, they can only make recommendations, similar to a magistrate judge. So at that point, the district court judge would have to review the findings.

Noncore proceedings are also extremely rare.

Another possibility is district court judges sit as appellate judges in bankruptcy cases, and the first level of appellate review in the bankruptcy system is generally to the district court, unless there's a -- the appeal occurs in a circuit that has a bankruptcy appellate panel.

Q Have you looked into bankruptcy-related cases that came before Judge Porteous and his colleagues in the Eastern District of Louisiana?

A Yes. So I've looked both at the general statistics regarding appeals in Louisiana, as well as Judge Porteous's bankruptcy appellate opinions. I'll start with sort of the broad picture.

Beginning for -- beginning in fiscal year 2007, the administrative office of the United States Court started reporting in statistical tables and its report on the judicial business of the United States the number of bankruptcy appeals filed in each federal judicial district.

If you look anywhere from fiscal year 2007 through 2009, there were, on average, 35 appeals, bankruptcy appeals, filed per year in the Eastern District of Louisiana.

Statutorily, they are currently authorized

12 federal district court judges for the Eastern District of Louisiana. So that averages to basically three bankruptcy appeals per year. So there just isn't a frequency there with which one can become an expert in bankruptcy.

And, you know, Judge Porteous's record, at least what's -- what can be obtained from Westlaw database, which contains published and unpublished opinions, if you do a search for all of his bankruptcy appellate opinions, there were only seven opinions during his entire tenure on the federal bench. Four of those were business cases, and three of those were consumer cases.

Q And did any of those seven cases relate to disclosure issues or incurrence of debt post petition by a debtor?

A They did not.

Q Let's turn to Porteous Exhibit 1067, page 2 in particular. And Professor Pardo, is that an article that you coauthored that was published in the Vanderbilt Law Review?

A Yes, it is.

Q That was published in 2008?

A Yes, it was.

MR. WALSH: We would offer 1067 at this

time, Madam Chair.

CHAIRMAN MC CASKILL: Objection?

MR. SCHIFF: I apologize, Madam Chair, I was discussing a matter with counsel.

MR. WALSH: I'm sorry, we offered 1067.

CHAIRMAN MC CASKILL: And I think this is something -- is this published?

MR. SCHIFF: No objection, Madam Chair, published editorial -- Law Review article.

CHAIRMAN MC CASKILL: That's fine.

(Porteous Exhibit 1067 received.)

BY MR. WALSH:

Q Tell us briefly what you and your coauthor concluded in this article.

A The idea here was to investigate the quality of appellate review and to do so by looking at bankruptcy appeal. As I just mentioned, there are some circuits that have bankruptcy appellate panels, which are three-judge panels of bankruptcy judges who are experts in their field.

And our thought was that you could -- our hypothesis was that the bankruptcy experts will provide a better quality of appellate review than the federal district court judges.

And there's a whole lot of anecdotal

evidence about this. So we sought to test this empirically. And there are two measures we used for quality of appellate review.

One is reversal by the circuit court. Right, if the circuit court says you got the appeal wrong, then that goes to, you know, the decisionmaking and whether it was good or not.

And then the other was citations by other courts to federal bankruptcy appellate -- federal bankruptcy appeals opinions, whether by district courts or bankruptcy appellate panels.

And we found statistically significant evidence that the district court judges get reversed far more often than the bankruptcy appellate panels and, moreover, that the district court judges get cited much, much less than the bankruptcy appellate panels, also suggesting that it's the experts who really know it and the generalist judges don't really get this stuff.

Q All right. When you -- I'm changing gears here. When you interview clients in the King County Debt Clinic, what do you typically observe about the state of their financial records?

A Often their financial records are in complete disarray. There are some times that I feel

that, you know, I'd need some sort of degree in forensic accounting to make sense of what they bring in. Nothing is organized in any coherent manner. There are a lot of gaps.

I thankfully am someone who never suffers from headaches, but the one time I get headaches is every time I come out of the King County Debt Clinic. And it's because it's just incredibly stressful to try and sort of piece together the financial picture based on the records that debtors keep.

Q Let's pull up, if we could, Exhibit 1070, Porteous Exhibit 1070, and page 1 in particular.

Professor Pardo, are we looking at an article published by Judge Rhodes, a bankruptcy judge, published in the American Bankruptcy Law Journal in 1999?

A Yes.

MR. WALSH: We would offer 1070 at this time, Madam Chair.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

(Porteous Exhibit 1070 received.)

BY MR. WALSH:

Q Tell the committee generally what Judge

Rhodes did in his study that's published here.

A So Judge Rhodes, as a bankruptcy judge for the Eastern District of Michigan, had this sinking suspicion, based on his observations and experience in his courtroom, that there were a lot of problems with disclosures made or disclosures that weren't made in the papers filed by consumer debtors.

And he sought to test his intuition by doing an empirical study of filings in his court.

And he found that in 99 percent of the cases, there was at least one error. The average number of errors in the schedules and the statement of financial affairs for the average case was 3.4 errors, and 26 percent of the cases had more than -- five or more errors.

Q And can we zoom in on the end of the paragraph at the end of the first page there, and can you summarize for us what conclusions Judge Rhodes drew from his study that he performed?

A I mean, three main conclusions, that there is widespread lack of care and understanding as debtors and their attorneys fill out the disclosure, try and comply with the disclosure requirements. The official bankruptcy form don't communicate in any sort of meaningful way what the nature of the

disclosure requirements are.

And last but not least, the requirements are unrealistic and have the unfortunate effect of ensnaring individuals who are engaged in what otherwise would apparently be innocent behavior.

Q Are errors in bankruptcy cases limited to debtors' mistakes?

A Absolutely not.

Q Let's turn to Exhibit 1068, Porteous 1068. Page 1 of that exhibit, please.

Professor Pardo, are we looking at an article published by Professor Katherine Porter in the Texas Law Review in 2008?

A Yes.

MR. WALSH: We would offer 1068, Madam Chair.

MR. SCHIFF: No objection.

CHAIRMAN MC CASKILL: Will be received.

(Porteous Exhibit 1068 received.)

BY MR. WALSH:

Q Tell us, generally speaking, what was Professor Porter investigating in this analysis?

A Professor Porter here wanted to empirically investigate what -- whether mortgagees in bankruptcy were properly documenting their

claims, mortgage claims, against debtors in bankruptcy. And specifically in Chapter 13 bankruptcy.

So she looked at 1700 Chapter 13 cases.

The bankruptcy rules require you, as a creditor, to file a proof of claim. And moreover, that proof of claim generally has to be accompanied with three disclosures. One is an itemization of charges. The second is, if the claim is based on a writing, a copy of that writing, so in the case of the mortgage, the actual note itself.

And if the claim is secured, evidence of the security interest. So in that case it would be the mortgage.

And so she wanted to see are mortgagees complying with these disclosure requirements? Do the proofs of claim have the three required disclosures?

And she found out in slightly more than 52 percent of the cases, at least one of the items was missing.

Q Now, we've heard already in these proceedings that when debtors file their schedules, they have to list the amount that they believe they owe to each creditor; right?

A That's correct.

Q As we've heard a number of times, that's done under penalty of perjury; right?

A That's correct.

Q When a creditor files a proof of claim, is it supposed to list the amount that it believes it's owed by the debtor?

A Absolutely.

Q Is that done subject to the federal statutes governing bankruptcy fraud?

A It is. The creditor could be subjected to criminal prosecution for submitting a fraudulent claim or, moreover, and not as harsh penalty, but by submitting this signed statement, you're also subject to court sanctions if, for whatever reason, the claim is not supported by the evidence.

Q Okay. What did Professor Porter find about the correspondence between these two items? What debtors say they owe and what creditors say they are owed?

A So a debtor would list their mortgage in schedule A -- I'm sorry, in schedule D, the secured claims. And she was comparing the amounts reported by the debtors, compared to what was listed in the proof of claim.

She found that in approximately only 5 percent of the time did the two match up.

And moreover, if -- she found that in those 95 percent of the cases where they didn't match up, in 70 percent of the cases or maybe a little bit more, that the creditor was asking for more than what the debtor had scheduled. And the median amount was something like in excess of $3000 more.

Q So in 95 percent of the cases that she reviewed, is it fair to say somebody was making an inaccurate statement that could be subject to criminal prosecution or court sanctions?

A That's correct.

Q Professor Pardo, are you here to tell the Senate that errors in bankruptcy cases are a good thing?

A I'm not.

Q What's the point of this portion of your testimony?

A I think it's very important for the committee members to realize that, number one, the system wants to encourage complete and accurate and meaningful disclosures, and that nondisclosures are generally not a good thing.

But at the same time, the system has been designed in such a way to recognize that there is a spectrum of conduct regarding nondisclosures, errors and omissions. And Congress has given the courts, as well as participants in the bankruptcy system, those tasked with administering the system, many tools in their toolkit to deal with these sorts of errors and omissions.

I've heard a lot of testimony, including from Judge Keir, that if we don't have perfect bankruptcy filings, if we have errors and omissions, the whole system will grind to a halt.

I contend otherwise. I say that if we focus -- if we take this all-or-nothing approach to what the effect ought to be of an error or omission, that is when the system will grind to a halt.

We can't let, in the bankruptcy system, we can't let perfection be the enemy of the good. And bankruptcy represents -- you know, it's the eleventh hour, financial distress, creditors are going to have losses, and we want to try and ameliorate that situation. And we want to give -- we've given again the participants in the bankruptcy system various tools in their toolkit to address these issues.

MR. WALSH: Thank you, Professor Pardo.

No further questions at this time.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good morning, Professor Pardo.

A Good morning.

Q My name is Alan Baron. I'm here as special impeachment counsel for the House of Representatives.

I want to make sure of something you said earlier. You said, I believe, the only basis for denying a discharge in a Chapter 13 proceeding is if you don't complete the plan.

Am I correct?

A That's correct. And I should also -- I should clarify that there is something -- there is a Chapter 13 hardship discharge, where the debtor fails to complete all the payments, and the court might still choose to grant the discharge in that case.

The hardship discharge isn't applicable here. But a hardship discharge could be denied if -- as long -- if, for example, the debtor was responsible for the circumstances that led to the failed plan, and if the plan could not be modified.

So there is another discharge in Chapter 13.

Q Okay. But that's -- let's put that on the side.

A Sure.

Q Subject to that, am I correct that the only basis for denying a discharge in a Chapter 13 proceeding is not completing the plan?

A That is correct.

Q So that if the debtor lies throughout his petition, throughout his schedules, but he does complete the plan, in your view, then, your testimony is discharge should, indeed must, be granted?

A That's correct. And what the creditors would do if -- if the lying and deceit came to light before plan confirmation and -- or even after confirmation but before discharge, they could move to convert or dismiss the case.

And if they learned of it after the discharge, they could seek to revoke the discharge on the basis that the discharge was obtained through fraud.

Q Well, then okay, it sounds like you're modifying it.

A I'm not. Denial -- denial of discharge and revocation of discharge are two completely distinct legal -- and I testified that -- about both concepts.

Q Well, do you understand that the Senate has convened and this proceeding is an impeachment trial, and it's not sitting at some sort of appellate court to decide whether the discharge in a bankruptcy was properly granted? Do you understand this is an impeachment trial as to whether Judge Porteous should continue to hold the office, a lifetime appointment as United States District judge? Do you understand that?

A I understand that this is an impeachment trial, yes.

Q So that a lie that might not prevent a discharge in bankruptcy, would you concede that that might be a relevant factor in an impeachment trial?

A No, I am not ready to concede that. I'm not an expert on impeachment matters.

Q But it wouldn't impede a discharge in bankruptcy subject to the qualifications you gave?

A Right. In the same way that making a knowingly false statement or oath in a Chapter 7 case wouldn't be the basis for denying a discharge.

Q Now, you've testified that a marker doesn't create a form of debt; is that correct?

A That -- you're putting words in my mouth.

Q Then I'm -- I asked you if I was correct. If I'm wrong, correct me.

A It creates a contingent debt.

Q Contingent debt.

A A contingent debt.

Q Okay. When the casino -- a person gets markers by getting a line of credit from a casino, isn't that where it starts? That's the process when it starts?

A I think that that's an inaccuracy to say that there's a line of credit.

Q You can borrow up to a certain amount?

A There's no borrowing.

Q Oh, no borrowing, in your view?

A There's no borrowing.

Q Have you talked to casinos about that?

A What casinos do is they're doing a credit check to decide if they're going to take checks from you, which are not debt instruments, to decide what do we think is our comfortable level of risk here, how many checks do we want to take from the debtor.

In other words, what do we think is the

solvency of the bank account. In the same way that a landlord checks my credit before I take out a lease. My landlord is not giving me a line of credit.

Q So when the casino at the cage -- I've never done this, but I assume there is a cage where they push $1000 worth of chips in the gambler's direction, there's no debt created, no extension of credit has been created. Is that your testimony?

A Well, first of all, I'd begin by saying there's no casino that would ever push $1000 of chips towards you before you paid and gave the money, is my sense, just as a layperson. And from my limited experience in having gone to casinos.

But moreover, so -- and technically, if you want to be technical about it, when you push the marker, at that point you're a creditor of the casino, because they have purportedly agreed to give you value in exchange for the payment --

Q The marker.

A The payment was given. So you are a creditor of the casino until the point that they then give you value back.

Q In your view, the marker is not -- is not a form of credit and it doesn't create a debt.

A I said that it creates a contingent debt, and that contingent debt is the obligation of the drawer, in the event that the check is dishonored. In the event that the check is dishonored.

Q Can we put up Exhibit Number 5, please. I want to be sure I'm accurate in characterizing this. This is the majority report in the Fifth Circuit dealing with the issue of whether a marker is an extension of credit. Is that up on the board? Okay.

Do you see that?

A Yes, I do.

Q Impermissible debts. "Porteous was explicitly warned by the Chapter 13 trustee, S.J. Beaulieu, his own attorney and Judge Greendyke, that he could not incur more debt while in bankruptcy. Examples of incurring debt would include using credit cards, including credit cards not disclosed to the trustee, and taking out gambling markers.

"A gambling marker is a form of credit." Drop down to the footnote.

"A gambling marker is a form of credit extended by a gambling establishment, such as a casino, that enables a customer to borrow money from the casino. The marker acts as the customer's check

or draft to be drawn upon the customer's account at a financial institution, should the customer not repay his or her debt to the casino.

"The marker authorizes the casino to present it to the bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time.

"Porteous testified that this definition of a marker was accurate."

Do you disagree with what was written in the Fifth Circuit?

A I completely disagree. And I'm not surprised. They're not experts in the Uniform Commercial Code, and it's understandable why they would get it wrong. And I witnessed yesterday a federal bankruptcy judge, when asked whether the taking of a check suspends the underlying payment obligation, he said no, which is an incorrect statement of law, under UCC section 310 b 1. He got it wrong, a bankruptcy judge.

So I'm not surprised that Fifth Circuit judges, generalist judges, are misdescribing what a marker is.

Q Could I have Exhibit 10, please.

Now, I'd represent to you this is Judge

Porteous's, I guess, colloquy with the Fifth Circuit during his hearing there. And the question is coming from one of the judges.

"Would it be fair to state that a marker is a form of credit extended by a gambling establishment, such as a casino, that enables the customer to borrow money from the casino? The marker acts as the customer's check or draft to be drawn upon the customer's account at a financial institution. Should the customer not repay his or her debt to the casino, the marker authorizes the casino to present it to the financial institution or bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time."

The question is put is that accurate? The answer is coming from Judge Porteous, "I believe that's correct and probably was contained in the complaint or the second complaint. There's a definition contained.

"Question: And you have no quarrel with the definition?

"Answer: No, sir."

So now, Judge Porteous was wrong also?

A He was. And that's what breaks my heart

about this. I think, you know, if you read judge Dennis's dissent on the Fifth Circuit, he seemed troubled that Judge Porteous didn't have any representation here during this process. And --

Q You know he fired two lawyers, sets of lawyers, along the way, so finally it stopped?

A Again, if a bankruptcy judge is getting the UCC wrong, I'm not surprised that Judge Porteous would incorrectly agree to the legal description of what a marker is.

Q Do you disagree with Judge Keir's statement that the bankruptcy system relies on the candor of the debtor?

A I don't disagree with that.

Q You --

A I do not disagree with that.

Q Good. And was it your understanding he was saying that the bankruptcy has to be perfect, the bankruptcy process has to be perfect, otherwise it falls apart? Is that your understanding of what he was saying?

A My understanding was that it was pretty close to that.

Q Are you familiar with the quotation that he gave from Local Loan Company versus Hunt, the

Supreme Court case, back in 1934, essentially -- I'm sure it's become known to everybody.

A Yes. I've quoted it in some of my articles.

Q And it says, "Congress provided relief in bankruptcy for the honest but unfortunate debtor."

Isn't that right?

A Yes, that's a 1933 or 1934 Supreme Court case.

Q Right. Do you think it's outdated?

A I think the way that Judge Keir marshaled that was -- it just jarred me, because that's not a standard anywhere in the Bankruptcy Code.

Q So you --

A Courts are creatures of law and they must follow the law, and no bankruptcy judge could say you are not an honest but unfortunate debtor, therefore you don't get bankruptcy relief. They have to proceed according not to maxims but to the statute.

Q So far you've disagreed with the Supreme Court and the panel in the Fifth Circuit. Let's keep going.

CHAIRMAN MC CASKILL: Could --

THE WITNESS: I don't know that I've

disagreed with the Supreme --

MR. BARON: I withdraw that, sorry.

CHAIRMAN MC CASKILL: I hate to interrupt, and the question was withdrawn so you don't have to worry about giving an answer. We have members that have to be at a business session to work on the START treaty on this panel and members that have to go to judiciary session to vote on various proposals. So they need to be working in their committees beginning at 9:30. So we have to break here. I apologize for interrupting the cross-examination.

We've tried very hard not to interrupt you in the middle of your exams but we're going to have to in this instance.

We will be adjourned now until 11:00 a.m. this morning.

MR. TURLEY: Madam Chair, can I just make one point? I didn't want to interrupt my opposing counsel's cross-examination, but we just wanted for the record to say we do not agree that Judge Porteous fired two attorneys. I allowed Mr. Schiff to make that -- he made the same type of qualification. I just wanted to put that on the record.

CHAIRMAN MC CASKILL: Let me just say here, that's not something you can put on the record.

MR. TURLEY: Mr. Schiff just put a thing in the record like that.

CHAIRMAN MC CASKILL: Well, I think what you have to do, if you believe a question is being asked that's assuming facts not in evidence, you need to object on that basis, and then we can make the record clear that the question included facts that are not in evidence.

But just to stand up after questions are asked and want to put stuff in the record, that's not the appropriate way to put things in the record. And I just don't want this to get out of hand.

I'm not saying either side has been perfect here. I'm just trying to keep control of the process.

MR. TURLEY: We just want the same rules, your Honor -- Mr. Schiff made the same type of correction on the record, and we were following with our own correction. But if you don't want to do that, we won't.

CHAIRMAN MC CASKILL: I should have said it when Congressman Schiff said it. Now it may be a

trend -- I think I kind of slyly made a comment, now that we've argued, let's move on, because I felt Congressman Schiff was a little over the line also.

I'm just saying, let's try to keep within -- this isn't a trial, and I've said many times the rulings will not exactly track the rules of evidence, because we're trying to do a complete record. And we've tried to give both of you a lot of leeway.

It doesn't mean that either side can start standing up and saying let me correct the record, and offer evidence. That's not the way we're going to let it happen.

So just try not to do that in the future. If you believe evidence is coming in through a question that is not in evidence, then you should say so at the time the question is asked and we'll try to make sure the record is corrected in that regard.

MR. SCHIFF: Madam Chair, if I could comment, there's a distinction between the remarks I made which were in a colloquy with the Chair over whether memos should be sought from the Department of Justice and whether there was inconsistency, and an objection that a question is assuming facts not

in evidence.

CHAIRMAN MC CASKILL: You all are going to get plenty of time to argue this case. The record is going to be brimming with information that both sides can use to argue your positions in this case.

I don't think we need to get sloppy, is all I'm saying. So with that, we'll see you at 11:00. Thank you.

(Recess.)

CHAIRMAN MC CASKILL: We were doing so well. We have two glitches. All of the Senators that are on formulations had to go back to the START Committee hearing after we voted. That means they cannot get here.

We have the Congress -- our House team from the House -- I think that was redundant. The impeachment team from the House of Representatives has now left for a series of three votes. Without the people from the START committee, we will not get seven -- from the Foreign Relations Committee that are voting on the START Treaty, we will not get seven.

So I think it will be, rather than everyone sit around and waste your time waiting, I think it's going to be more efficient for us to go

ahead and adjourn now and to come back at 2:15, and then we will work through without a break, except for one Senate vote that is going to occur at -- oh, we're done then. We will not have to break for a Senate vote. Hopefully they won't have to break for House votes. But we will start at 2:15 and go until 6:00. And I hope that does not mean we can't get Mr. Gardner on.

MR. TURLEY: We will try, Senator, we're trying to get our bankruptcy people on. You know, we've made a lot of adjustments to our line of witnesses. And we have people that have to leave town. We have to make decisions as to who is going forward. Mr. Gardner, we've been trying to reach him continually. We probably left him a dozen messages in the last hour, and before that probably two dozen.

We've been working with your counsel to try to locate him. But --

CHAIRMAN MC CASKILL: One moment.

I'm being told that Mr. Gardner flew to D.C. yesterday; is that correct?

MR. TURLEY: Yes, we understood he was in D.C. yesterday. He's not been returning our calls, so we don't know what his schedule has been. We've

been trying to speak with him for about --

CHAIRMAN MC CASKILL: It's my understanding that he has flown back to New Orleans.

MR. TURLEY: I was just told that. My colleague Dan Schwartz has been calling continually to try to speak with him.

CHAIRMAN MC CASKILL: Who has talked to Mr. Gardner? He is telling us that he was let go yesterday and told that they didn't need him until Tuesday, and now he's being told that you all told him to get back on a plane and now he's on his way here again.

MR. TURLEY: That is not my understanding of what occurred and we'll get that all on the record if we have to. My colleague has been trying to find him, locate him.

Originally he was told to be here on Tuesday. He flew here on his own accord, and we suddenly found out he was here. Then the Senate staff asked us, you know, he's here so can you put him on.

He was originally a House witness. And my understanding is that we said okay, we'll accommodate, we'll move Bodenheimer up and Gardner up. That was my understanding of those two

witnesses.

The biggest problem we have, Madam Chair, is that we have bankruptcy witnesses as I've been mentioning for a long time that will be leaving town, these are our experts we need.

CHAIRMAN MC CASKILL: Are you telling me we're going to pay for three plane trips for Mr. Gardner? Is that actually in the realm of possibility at this point?

MR. TURLEY: That's not our doing. We've been trying to reach Mr. Gardner. This is not -- as we've been working with your staff, we've been trying to call Mr. Gardner. And we've been very unsuccessful.

Originally, he was supposed to be here to testify as a House witness. When they released Gardner, it created this confusion. We immediately said --

CHAIRMAN MC CASKILL: How long a witness is Mr. Gardner? How long do you think he's going to be?

MR. TURLEY: I would think that he would probably not be certainly more than an hour on direct. But our -- we're going to lose our bankruptcy experts, and we've made promises to them

that we would get them on as soon as possible.

We also could end up losing our judicial ethics person. We've already made adjustments to our order. And in all fairness, Madam Chair, the House did not make a lot of adjustments to their order, they cancelled witnesses, and fine, that's up to them. And you said you manage your witnesses as you want. And that's fine.

But it also created a great deal of scheduling problems because everything moved and we had flights scheduled, so we've been trying to accommodate it. That was part of our accommodation with both Gardner and Bodenheimer.

But as we've said from the beginning, we have these group of experts that we've made promises to to have them testify and get them out. Some of them are federal judges, some of them are a trustee. So that's the problem with Mr. Gardner.

And what I can represent to you is that the minute the House released Mr. Gardner, we immediately tried to reach him. We have not been successful in reaching Mr. Gardner even to interview him for weeks, so this has been a rather difficult situation.

VICE CHAIRMAN HATCH: Madam Chairperson,

could I? We realize this has been very difficult for you, as well as us.

I wonder sometimes if we couldn't have you advance in writing -- we could do away with an awful lot of delays here if we could just recognize your experts as experts. And I think you can submit in writing to us, so we don't have to go through all that rigmarole from here on in.

And I also believe there are other ways that we could shorten -- I think both sides could be even more effective if we could shorten the time on direct and cross-examination.

I think we should look for ways to do that, without diminishing your case and without taking any -- any rights that you have away. We've taken a lot of time on things that really aren't that pertinent to what we're looking at. And we're not blaming anybody, because you felt you had to do that. But I would think we could recognize their experts and save a little bit of time that way.

And I personally believe they have done the best they can to have Mr. Gardner here.

CHAIRMAN MC CASKILL: And I understand the strategy of wanting to prove up your expert even if the other side concedes they're an expert if you're

dealing with a jury, where you want to reassure the jury that the person who is giving these opinions, that you're sure they're hearing that this is somebody who has a substantial background.

But you're dealing with folks that understand these are experts.

MR. TURLEY: I've -- that's fine with the Defense. Their resumes are in the file. We've not objected to any of their experts.

CHAIRMAN MC CASKILL: And they haven't objected to any of yours.

MR. TURLEY: That's right.

CHAIRMAN MC CASKILL: I think this is one of those things, I think you're right, Senator Hatch, one way we can move it along.

Go ahead.

VICE CHAIRMAN HATCH: I also think you've all been using leading questions, it's totally all right, as far as I'm concerned. And I would think that we could -- we don't need to take all of the ground-laying approaches that have been taken. However, you have to try this matter the way you feel it is best handled.

But you might consider that as well, and then we'll certainly consider being, you know, very

gracious about that.

MR. TURLEY: We have no problem with that at all, Senators. We can -- their resumes are already in the record. We can move them as -- into evidence to meet this, and the other side can, if they agree, approve the experts that we have. We'll use leading questions and try to be expeditious. And we'll try to move our experts through.

CHAIRMAN MC CASKILL: You still have the Gardner problem. When did you tell Mr. Gardner that you wouldn't need him today? When did that happen?

MR. TURLEY: Excuse me, Senator.

What I'm told is -- I didn't do these negotiations since I was here as lead counsel. But what I'm told is that when the -- when Gardner was released as a House witness, we were planning to have him for Tuesday. I believe one -- I believe Mr. Schwartz may have spoken to him and had said, you know, you're scheduled for Tuesday. Mr. Schwartz had been leaving messages, you know, this is my understanding.

But I think there was a conversation yesterday and then we couldn't reach him again because the Senate came and said he's got to go today. So we started to leave messages, saying

you've got to go today, we need to speak with you.

I personally know that my counsel started calling him early this morning leaving messages in front of me to tell him we need to speak with you right away to schedule.

So I don't know what the status is. But we've been having difficulty for weeks to speak with Mr. Gardner. In the past he's declined to speak with us, but we finally spoke to him for some minor scheduling.

CHAIRMAN MC CASKILL: Let me ask Mr. Schwartz a question.

MR. TURLEY: Mr. Schwartz is not here right now.

CHAIRMAN MC CASKILL: He's not?

Mr. Gardner says he talked to Don Schwartz yesterday outside of the room, and Don Schwartz told him he could go home.

MR. TURLEY: My -- we're going to go see if we can pull Mr. Schwartz, it's Dan Schwartz. But my understanding is that Mr. Schwartz has told him that he was scheduled for Tuesday for our side, that is we wanted him on Tuesday because we needed to put our bankruptcy lawyers -- bankruptcy witnesses today.

So we've been trying to, where we can, move witnesses into Tuesday so that we can guarantee our witnesses in bankruptcy can be done. We also wanted frankly to just do all the bankruptcy as much as possible. We have one witness left over.

And that created this confusion. We did not know he was coming here when he appeared, and it created this confusion.

CHAIRMAN MC CASKILL: We did know because I talked about it. We talked about it yesterday.

MR. TURLEY: Yes, we were informed by --

CHAIRMAN MC CASKILL: That he was on his way. You originally said there was an accident, and then our staff began to work on this. And we said we could let --

MR. TURLEY: We didn't say -- we were told there was an accident. We're not being evasive, Senator.

CHAIRMAN MC CASKILL: Okay. Let me just say, here's our problem. He is now back on a plane coming here.

Of course, Mr. Schwartz.

He is now back on a plane, so we flew him up here yesterday, and somebody told him you didn't need him and he went home yesterday afternoon,

somebody told him you didn't need him and he went home.

Now he's flying back up here now, he's going to get here at 2:15, and he says he's on a plane at 8:15 tonight to go back.

So I am very reluctant to authorize three plane tickets for the same witness. So I guess what I would urge you to do is if you can't get to him today, because of the time, I would really see if the two of you could agree to take his deposition and submit it for the record after we adjourn tonight. You'd have an hour, at least, before he'd have to get back if he's flying -- is he flying into National?

MR. SCHWARTZ: Senator, let me just clarify what -- I apologize, I was in the other room.

We -- we had asked him to come here. Then we were told by his attorney, who is now no longer his attorney, apparently, that he had been in an accident. And we understood that he was not going to be able to appear -- not be able to get here until next week.

So I contacted his attorney and said he really -- he doesn't have to come until Tuesday.

CHAIRMAN MC CASKILL: Right.

MR. SCHWARTZ: And she told me, oh, too late, he's already on a plane.

We saw him here yesterday, and I did tell him that we, for scheduling reasons, would prefer to have him on Tuesday.

Then I talked to the staff, and they said, you know, we really want you to squeeze him in so we don't have to pay another plane trip ticket.

So I tried to get back in touch with him. I tried last night. I tried this morning. I called his cell phone. I called his motel room. I contacted his former attorney. And I have had no responses.

That's what happened.

CHAIRMAN MC CASKILL: I don't want to interfere with your case, I really don't. I want you to be able to get your experts on. I understand that they have planes to catch also.

I am very apologetic that we also have another job around this place, and that people are now in committee hearings voting on things like the START Treaty, which I can't tell Senators that they shouldn't be heard on things like the START Treaty. It's obviously a very important thing for our

country.

So I can't help that we don't have enough hours in the day today, especially in light of how long you all are taking with these expert witnesses. I've learned more about 7 versus 13 this morning than I learned in law school, and I'm not sure that compare and contrast between 7 and 13 is as probative as you may think it is.

I'm not being critical of what you're doing. You're trying to be very thorough.

But you all are going to have to make a decision, because I don't think -- I mean, unless we want to get physical with Mr. Gardner, with marshals, he's going to get back on an airplane at 8:15 tonight. And then what you all are saying to me is we're going to fly him up for a third time? Do you think he's going to do that? I have a feeling we aren't going to see him again.

So if you think he's important to your case, I would urge you to find an alternative means to get some of his testimony into the record, like asking one of the House team to sit with you in a deposition, we can find you a court reporter, you could -- you could task one of your lawyers while some of your other lawyers are doing things in the

courtroom, you could go to a different place and take a deposition of Mr. Gardner, and we would be happy to take that in the record.

MR. TURLEY: That's fine with us, your Honor. We had been told earlier we couldn't do depositions without two Senators being present. If we could do depositions, that's what we've asked all along is to be able to do depositions with a lot of these witnesses. So we'd be happy to do that.

CHAIRMAN MC CASKILL: We have to have one Senator present. We'll find you a Senator.

MR. TURLEY: Thank you.

CHAIRMAN MC CASKILL: We'll deploy one Senator to sit in the deposition, especially if you could do it contemporaneously with while we're taking evidence in here.

Who is going to do Mr. Gardner? Who was going to do the direct?

MR. TURLEY: We have to look at our -- what witnesses would be testifying at that time.

MR. SCHWARTZ: It will be one of us.

MR. TURLEY: One of the two of us.

CHAIRMAN MC CASKILL: I assume the House team can come up with somebody for a deposition with Mr. Gardner?

MR. BARON: Mr. Schiff was scheduled to do that.

CHAIRMAN MC CASKILL: You may have to do a tag team here, depending on what's going on. I'm trying to do my best to help you get your evidence in the record.

MR. TURLEY: As we are.

CHAIRMAN MC CASKILL: I don't think it's probably likely Mr. Gardner is going to take a third plane trip.

MR. TURLEY: And we didn't want that to happen.

CHAIRMAN MC CASKILL: I know you didn't. I'm not sure who to blame here. I'm just frustrated.

VICE CHAIRMAN HATCH: Madam Chairman, it seems to me that if he's on his way here and he gets here, you ought to find some way of getting him on, and as short a time period as you can, because I know you would like to have the Senators up here hear what he has to say and what your examination of him will be.

But if not, then the deposition will be a reasonable way of resolving this problem.

MR. TURLEY: Yes, we have no opposition

with deposition. We appreciate the accommodation. And we'll do everything we can to facilitate.

VICE CHAIRMAN HATCH: Does the House have any opposition?

CHAIRMAN MC CASKILL: Do you all have any opposition to trying to -- to depose Mr. Gardner, if we can't figure out a way to get it all in before 6:00?

MR. BARON: I would love to talk to Mr. Schiff since --

CHAIRMAN MC CASKILL: That's fair. Why don't you talk to Mr. Schiff, and then if you would immediately get with staff and they will be able to get hold of me. I have my BlackBerry with me. I can come out of the caucus meeting. We can confer, and I can find Senator Hatch, and Senator Hatch and I can talk about it.

VICE CHAIRMAN HATCH: If I were you, I would find some way of getting him on and disposing of the testimony. And there may be a way that we could shorten the time for the testimony as well by getting a stipulated agreement between the two parties, or just by making a ruling here.

But, you know, I think one way or the other, we ought to do it. If I was in your shoes,

I'd want him to testify before the forum.

CHAIRMAN MC CASKILL: I can sit in a deposition between 6:00 and 7:00. I'm not -- the other members have things they have to do at 6:00, but I'm -- I can -- if you want me to stick around and do a deposition until he has to catch his plane tonight, I'm happy to do that.

MR. TURLEY: Madam Chair, Vice Chair, we would be willing to do all those options.

Senator Hatch, we would be willing to shorten it as well.

We're open for anything. We've made that clear to his attorney. We've made it clear to him. And including if we can get agreement from the House to limit his testimony to, I don't know, 30 minutes or 40 minutes, we'll make it work and move him --

CHAIRMAN MC CASKILL: You can even do a stipulation about what he would testify to and send him home. You know? I mean, you all know what he's going to say; right?

MR. TURLEY: Not entirely, but --

(Laughter.)

MR. SCHWARTZ: We haven't talked to him.

CHAIRMAN MC CASKILL: Even more reason to do a stipulation.

(Laughter.)

VICE CHAIRMAN HATCH: The options are yours. There are a number of ways of handling this. What we're suggesting is you should choose whatever is in your best interest, but you ought to do it today.

MR. TURLEY: Yes.

VICE CHAIRMAN HATCH: One way or the other. If your best interest is to have him appear personally, then accommodate it so that you can. If you can't, then the deposition is a reasonable approach towards resolving this.

MR. TURLEY: I can certainly stipulate to all the things I hoped he'd say.

CHAIRMAN MC CASKILL: You guys have to work that out yourselves.

(Laughter.)

CHAIRMAN MC CASKILL: I would depend on you all to figure that out. And we will reconvene at 2:15.

MR. TURLEY: Okey-dokey.

(Whereupon, at 11:53 a.m., the proceedings were recessed, to be reconvened at 2:15 p.m. this same day.)

AFTERNOON SESSION (2:22 p.m.)

Whereupon,

RAFAEL PARDO

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

CHAIRMAN MC CASKILL: We're back. I believe we were on cross-examination of Professor Pardo.

You may continue your cross-examination.

MR. BARON: Thank you.

CROSS-EXAMINATION (Continued)

BY MR. BARON:

Q Professor Pardo, good afternoon.

A Good afternoon.

Q Doesn't the statute require that the plan being proposed be proposed in good faith? That's statutory language; is that correct?

A That's correct.

Q I want you to follow along with me as I relate the following, and I have a question at the end of it.

The evidence in the case has shown the following. First, Judge Porteous paid cash to pay off three markers totaling $1500 the day before he

filed for bankruptcy. This was on March 27 that he pays it, at the Treasure Chest Casino. This is never reported on his schedules. This is Exhibit 3012.

Second, he filed his original petition in a false name, Ortous. He also gave a P.O. Box as his street address, and it's agreed this was not by accident, it was intentional, and at the same time he swore under the penalty of perjury that the information on his filing was true and correct.

Third, he filed for a tax refund on his year 2000 tax return a few days before he filed his first bankruptcy petition, and that tax return he claimed $4100 and a little bit more as a tax refund.

This is not listed on his bankruptcy schedules, and he never tells his lawyer about it.

He receives the tax refund a few days after filing his amended bankruptcy petition, and he never discloses that.

And number 5, he submits a year-old pay stub, which is about $175 less per month than his actual current income at the time of the filing. Take all that.

In your view, are these activities, taken together, is that consistent with the good faith

requirement for the proposed plan, in your view?

A Well, the concept of a good-faith proposal of a plan, bankruptcy courts have generally used a totality-of-the-circumstances approach, where they weigh and consider a variety of factors, including the debtor's interests in having filed for bankruptcy, the motivation for having filed for bankruptcy, what return there will be for creditors, things of that nature.

And so once those factors are weighed, then it's up for the court to determine whether or not, considered in the totality, whether or not the plan would have been filed in good faith or not, and if it weren't filed in good faith and plan confirmation were denied, then generally a debtor is entitled to propose an amended plan that would meet or cure that good faith requirement.

Q But isn't it true that the concept of good faith, even in -- even in the bankruptcy context, connotes a certain level of integrity and effort to get things correct when you -- when you propose a plan?

A It's a very interesting question. And Congress, I think, has made it particularly clear since reforming the Bankruptcy Code in 2005, there

is now, as one of the requirements for plan confirmation, not only is there the good faith -- proposing the plan in good faith for plan confirmation, but another requirement for plan confirmation is that the petition was not filed in bad faith.

And so this is a distinction that courts look to before the 2005 amendments, and that was the view that there is a differentiation between the act in filing for bankruptcy and whether that is in good faith, as opposed to what are the terms of the plan itself, and are the terms of the plan in good faith.

And Congress gave statutory form to that distinction in the 2005 amendments.

And so I would have to approach the answer to your question with a little bit more nuance, to basically say those are two distinct concepts.

Q But you're talking about something that's contemporary. I'm going back to 2001.

A And so I'm -- what I'm --

Q Back then --

A Back then courts differentiated, when they said what is the proper scope of the good faith inquiry under 1325(a)(3), the issue regards the terms on which the plan was proposed and what the

plan looks to accomplish.

Q And I want to come back to my question.

A Yes.

Q Based on what -- the various activities that I delineated for you, are you saying you can't answer the question as to whether that would constitute good faith or not?

A Well, I think the difficulty in answering your question is that you're presenting the question to me from a very debtor-oriented point of view, that is what would the court say focusing on the debtor activity.

But another thing that the court has to consider is the interests of all stakeholders in the case. And a bankruptcy court looking at this case might say look at the return that's being given to creditors. And if this plan isn't confirmed, it might not be in the best interests of the creditors as a group, and there might be harms on that end.

So a bankruptcy court has a difficult task in terms of judging these competing considerations, and the bankruptcy court may ultimately say it's actually better to move forward with the plan than not to move forward with the plan.

Q So your answer is you can't really make a

determination, based on what I laid out for you?

A My answer -- I think a faithful and honest answer to your question is they are relevant considerations, what you have raised, but it's -- but --

Q You might want to know more? Is that a fair statement?

A I'm sorry?

Q You might want to know more? Is that the problem?

A No, I think the problem is I'm not -- I'm not a judge, and I am not -- you know, I'm not making the determination as to whether to move forward on good faith or not.

Are you asking me to say if I had been hypothetically a judge, what would I have done in this case?

Q You are an expert on bankruptcy, no question about that.

A That's correct, yes.

Q You've studied the cases and you've worked in the field, the volunteer program you mentioned.

I'm just asking, you know, good judgment by a good lawyer. Are those events consistent with the concept of good faith?

A I think I can now give a clearer answer to your question. I think that most of the considerations you've raised are not relevant to the proposal of the plan in good faith, they're more relevant perhaps to whether the case was filed in good faith and whether that would be a basis for dismissal of the case under 1307(c), which allows a court to dismiss or convert a case for cause. No one ever made that sort of motion in the case.

Q I understand. Let's go back to what you're now saying.

A Yes.

Q I'll reframe my question.

A Yes.

Q Given those factors, in your judgment, if those activities in fact occurred, is that -- are those activities consistent with, I guess, a proposal or filing, a petition -- let's use that word, a petition, being filed in good faith?

A Some of those actions are -- the name certainly might be inconsistent. But often, again, schedules and petitions are allowed to be amended to correct errors. And so --

Q I'm not talking about errors. I'm talking about intentional -- it's not a question of amending

because that begs the question. Someone intentionally committed or performed the acts that I've described. In your view, would that be consistent with a good-faith requirement with regard to the filing of the petition? That's all.

A I think they are relevant considerations for determining whether to dismiss a petition on the basis of bad faith.

Q Okay. Thank you.

Now, there was an order issued by the bankruptcy judge in this case which said that the debtor could not incur additional debt without the written permission of the trustee.

Do you recall that provision?

A I think so, yes.

Q Right. In your view, is it okay for the debtor to ignore a court order if he disagrees with it?

A Is it okay for a debtor to ignore a court order?

Q Yeah. I think that order was wrong, and I'm just not going to obey it.

A I think generally all individuals should try and follow court orders to -- yes, I think a debtor should try and follow a court order.

Q What if the debtor doesn't? Is it an option for a debtor to say I just don't like that order, I'm not going to follow it?

A Well, I think as I testified earlier, that if followed strictly to the letter, the judge, in order to comply with the order, would have had to schedule meetings repeatedly with the trustee to get approval to turn on the lights in his home, to go sit down in a restaurant and --

Q Are you really proposing that seriously? You have to get a conference and written permission to flip the light switch? I mean really?

A This is what you're asking -- you're suggesting to me --

Q I just want to see how far you go on this.

A You're suggesting to me the order has to be followed. You just asked me the question, don't you think --

Q You think that's what the order means?

A Hopefully you can clarify for me your question. Are you asking me whether the debtor has discretion to try and interpret the order and to live up to it as faithfully as he can based on a reasonable interpretation? Is that what you're asking me?

Q Let me move on.

A Okay.

Q Isn't it true that if you can't live with the order, don't agree with the order, you can move to amend it, you can move for reconsideration and indeed you can appeal it, isn't that true, without violating it?

A That's true.

Q There are remedies other than ignoring or violating it. Is that true?

A That's correct.

Q Now, Judge Porteous, the evidence establishes that he took out a new credit card after the order was entered. We're not talking light switches now; we're talking a new credit card.

In your view, would that violate the order?

A Taking out the credit card itself doesn't violate the order.

Q Let's say he uses it.

A Yeah, using it would technically violate the order, yes.

Q Okay. Now, if I understood your testimony earlier, you don't believe that markers, casino markers, you don't believe that they constitute debt

here, and the evidence establishes that in this case Judge Porteous took out, I believe it's 42 markers in various gambling trips totaling thousands of dollars, I don't have the number in front of me, but I believe it was about 30-some-thousand dollars.

Am I correct that in your view, that doesn't violate the order, despite what the 5th Circuit said, we looked at earlier, what Judge Porteous agreed to and what Chief Judge Keir said? You just don't think that they're debt; is that right?

A What I believe is that for the instantaneous moment in which there's an exchange of chips for the marker, there is a debt and then that debt goes away, once the exchange occurs. The same way as paying with cash.

Q Kind of a metaphysical thing, just --

A Yes, it's a metaphysical thing.

Q Okay.

A And I might add I would take the same view if he had been paying with cash for the markers. If he chose not to eat food for that month and to go and use the cash for his food for casino chips, if he paid with cash for an instantaneous moment, there would be a debt and he would violate the order.

Q Speaking of food, let me ask you this. If I understood your testimony, you were saying that if he got thousands of dollars in casino chips and markers, that that's the same, in principle, as buying a bag of potato chips.

A That's correct.

Q I thought that's what you said earlier.

A Yes.

Q Okay. And that another way I understood you put it is that there's no difference in a bankruptcy proceeding if a debtor borrows thousands of dollars from a casino and ordering a sandwich in a restaurant, going with the food metaphor here. Is that your testimony?

A I never said borrows money from a casino. I said purchases chips from a casino.

Q Take that back, to use your term.

A Yes.

Q Gets chips from the casino, signs markers; right?

A Yes.

Q And that in your view is the same as ordering a sandwich in a restaurant?

A As I testified, whether a debt arises is distinct and irrelevant from the payment form that

is used to satisfy the debt.

Q By the way, in your earlier testimony this morning, you were saying you weren't familiar with the whole issue of getting a line of credit. Do you remember that?

A I didn't say that I was unfamiliar.

Q I'm sorry. What is your understanding that in order to be able to take -- sign for markers, that you have to apply for credit and get a line of credit?

A Well, that it is basically a credit check, in terms of what risk the casino wants to assume, if it chooses to accept a check instead of cash for casino chips.

Q Okay. Could we put up Exhibit 149, please. And can you blow up the very fine print there.

I'm not sure I can read this, it's very tiny in actual print. This is -- right above the signature line, do you see that? Do you see that sort of fine print?

A Yes, the one that's blown up on the screen?

Q Yes, please.

A Yes.

Q Do you see -- let's take the last sentence of that. It says, "I agree that this application and all credit issued pursuant thereto will be governed, construed and interpreted pursuant to the laws of the state of Louisiana and venue shall lie solely in that state."

Do you see that?

A I do see that.

Q But it's clear the casino believes they are issuing credit pursuant to this and that's where you get the markers. Isn't that right?

A Well, you can call a duck a dog, but if it looks -- you can call a duck a dog, but if it looks like a duck, it walks like a duck and it quacks like a duck, it's a duck.

Q If they call it credit and they're giving you chips and you're signing markers, that quacks like credit to me.

A As a legal matter, I have expressed a view, and I stand by that view, that there wasn't credit extension going on here.

Q Okay.

A And if I might add to that, I might differentiate if instead of markers which were checks, if instead what had been executed was, let's

say, a promissory note in exchange for the chips, that would have been a debt instrument. And that I would have considered to be the incurrence of debt.

But the payment with check, which is an order and a draft, is not a debt instrument.

Q If I understand what you're saying, that a bankruptcy trustee should have no more concern about the debtor getting those casino chips and signing markers than ordering a tuna sandwich, that they're basically equivalent in your mind, neither one is credit, is an extension of credit.

Am I right? And I don't want to misinterpret you. I'm really asking you.

A I am saying -- and I think you're correct to point out that there is a metaphysical moment, whether you're paying by cash or check, when services have been provided to you or goods have been provided to you that you actually do incur a debt.

And so Judge Porteous, by the technical letter of the order, as I said before, if he's turning on the lights, he's violating the order.

And so I adhere to the view of what I've stated before, that for a metaphysical moment, there's a debt. But when you pay with a check, in

essence, it's like paying with cash.

Q Now, you said at the outset when I began cross-examination, you said that -- and indeed you said it in your direct, that the only thing that is a basis for denying a discharge under a Chapter 12 is the failure to complete the plan. Is that accurate?

A In Chapter 13.

Q I'm sorry, did I -- Chapter 13.

A Yes. And if you exclude the hardship discharge, which we are not going to talk of.

Q Do you really think that Congress intended that filing under a false name, using a false -- filing false schedules under penalty of perjury, are matters that simply don't have any consequence in the bankruptcy context?

A As I testified, I said that Congress gave the bankruptcy courts many tools in their tool kit to address these issues. But I know for a fact, if I read, for example, 727, I believe it's A(6) that relates to denying a discharge in Chapter 7 for making a knowingly and fraudulently false oath, Congress there signaled that if you knowingly make a false oath or account but it's not fraudulent, you can't be denied a discharge.

That doesn't mean you infer there are no consequences. It just means in terms of granting the biggest relief bankruptcy has to offer, those things aren't considerations to be taken into account if they're not fraudulent.

MR. BARON: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Redirect?

REDIRECT EXAMINATION

BY MR. WALSH:

Q Good afternoon, Professor Pardo. I have a few questions on redirect.

I want to make sure that everybody heard and understood something that came up in the first segment of your cross-examination and then right at the end again also.

You mentioned that a knowing false statement is not a basis for denial of the discharge in a Chapter 7 case; is that correct?

A That is correct.

Q What about a knowing and fraudulent false statement?

A That is a basis for denial of discharge in Chapter 7.

Q Okay. And you also talked in both segments of your cross-examination about whether a

false statement is a basis for denying a discharge in a Chapter 13 case. Are you suggesting that a debtor that makes a false statement is excused from satisfying the statutory requirements for confirmation of a plan?

A I am not saying that.

Q And if a plan is never confirmed, does a discharge issue?

A No, it does not.

Q Are you saying that nothing else could happen to a debtor who makes a false statement, no other adverse consequences could result from that?

A I'm not saying that. It's within the inherent authority of the court to sanction the debtor for improper behavior.

Q Okay. When you and I at the beginning of your testimony talked about the differences between discharges in Chapter 7 and discharges in Chapter 13, what was the point of that discussion?

A Again, it's to emphasize that Congress has made the distinct and discrete policy choice that there's a wide spectrum of behavior regarding disclosures and the reasons for errors or omissions or nondisclosures, and that there ought to be a variety of different consequences.

And in terms of granting the main form of relief that bankruptcy law offers to debtors, it's only in Chapter 7, if you make a false statement or oath or account in your case, you will be denied a discharge only if it was not only knowing but fraudulent.

And in Chapter 13, it's not a basis for denial of discharge at all. Again, that's not to say that there aren't consequences. But the idea is that the bankruptcy system is not predicated on a notion of strict liability regarding bankruptcy outcomes when there are errors or omissions or nondisclosures in bankruptcy cases.

Q Okay. You talked with Mr. Baron a little bit about the 5th Circuit opinion that led to these proceedings that bring us here today.

I take it from your testimony you disagree with the analysis of the majority of the 5th Circuit judicial council?

A Yes, I do.

Q There was a dissent that's already in evidence that was signed onto by four judges who participated in those proceedings; correct?

A That's correct.

Q Is it fair to say that reasonable people

can disagree and, in fact, already have disagreed, about whether a marker is a form of debt or a form of credit?

A Yes.

Q And you talked with Mr. Baron about Supreme Court's decision in the Local Loan Company case. Do you recall that discussion?

A Yes, I do.

Q What was the governing bankruptcy law in 1934 when that case was decided?

A It was the Bankruptcy Act of 1898.

Q Is that statute still in effect?

A No, it was repealed in 1978 by the bankruptcy code.

Q Was the Local Loan case a repayment plan similar to today's Chapter 13, or was it a straight liquidation similar to today's Chapter 7?

A If I recall correctly, I believe it was a straight liquidation.

Q And do you agree or disagree with the general principle that bankruptcy is designed for honest but unfortunate debtors?

A I think that basic precept underlies our notion of granting relief to bankruptcy debtors, but it's articulated in very specific ways throughout

the bankruptcy code as a matter of statutory command, rather than some general principle floating out there for courts to implement.

Q Okay. And with respect to one of the last questions you had in your cross-examination, are you here to testify that it's a good idea for debtors to use their limited incomes to gamble?

A No, I'm not.

MR. WALSH: Thank you. Nothing further.

SENATOR RISCH: Madam Chairman.

CHAIRMAN MC CASKILL: I assume we have nothing else from the panel -- from the House Managers or the Defense?

The panel? Questions?

Senator Risch.

SENATOR RISCH: Thank you.

EXAMINATION

BY SENATOR RISCH:

Q Mr. Pardo, I'm truly impressed with your detailed knowledge of the bankruptcy law, and I've got to tell you, I learned some things here. And I gathered from what you'd told us that a way around this very difficult proposition of making a transfer in anticipation is simply to have your secretary make the payment the day before you file, and that

way it is not -- it doesn't fall in the category. Am I right on that?

A On the face of the statute, that's absolutely correct, it does not fall.

Q So if I wanted to pay the creditors that I preferred, making them preferential transfers, I suppose, I would sit down the day before I filed, and I'd list them and I'd hand it to my secretary and say pay my brother-in-law and pay my neighbor and pay these, and then no one would have to worry that they would be set aside as a preferential transfer.

Is that your testimony to this -- to this group?

A I'm not sure that I follow the last part of what you asked me, in terms of what I'm testifying to to the panel.

Q Well, did I understand your testimony that it's not a preferential payment if it was made by your secretary as opposed to by you when you file bankruptcy?

A My testimony was that if the transfer was not in interest of the debtor and property, it would not constitute a preferential payment. If somehow it could be shown that what was transferred was

actually property of the debtor and there was just a mere conduit, then that's a different matter.

Q Well, what happened here? You looked at the facts here. You saw what happened.

A I do not know enough about the facts in terms of the background, in terms of where the money came from. All I know is that the payment from Judge Porteous's secretary came from her bank account. I don't know about any of the acts preceding that, in terms of -- I presume that it came from her own bank account so it was her own money.

Q Okay. So that's how you can avoid a preferential transfer, is simply have the secretary make payments out of her own money?

A The first thing I have to point out is that for any payments that are less than $600, even if they are interest of the debtor and property, they're not --

Q This one was about 11, 1200, as I recall.

A Okay.

Q Doesn't fall in that category.

A All I merely want to point out is that debtors in bankruptcy often do make preferential payments to creditors, and they do so to avoid

consequences like losing the house or something of the like.

Q Okay. Let me get right to it. Is it your opinion that the payment that was made here was or was not a preferential transfer? Or don't you know?

A If the money in the secretary's account was her money and it was not the judge's money, then it is not a transfer of interest of the debtor and property, and so it is not a preference.

Q Do you know what happened here or can we just disregard your testimony if you don't know what happened here?

A My understanding is that subsequent to -- I'm not -- I'm not sure that I follow your question, the terms.

Q You gave all this testimony about this transfer. And I gathered you were trying to convince us that it wasn't a preferential transfer. Was I mistaken on that? Were you trying to convince me it was or was not a preferential transfer?

A I'm happy to follow through on this analysis if you'd like to give me more facts about -- from what I know, I'm telling you from what I know, if it was the property of the secretary, it is not a preferential transfer.

Q So was it or was it not in this case? Or don't you know?

A I am assuming that it wasn't a preference because the money came from the secretary's bank account.

Q Okay. So then the secretary should have been listed as a -- as a creditor. Am I right?

A That's correct.

Q But was not?

A That's correct.

Q And you find no fault with that?

A No, there should have been a disclosure.

Q Tax refund. You went through this lengthy explanation for us that the tax refund coming was not part of the estate, and I got that, okay.

A Yes.

Q But he said under oath that he had no tax refund coming. You got that; right?

A That's correct.

Q Okay. A falsification in the petition is justified because it's not included in the estate? Is that what you're here to testify to?

A No. I said that it's with the inherent power of the court to sanction the debtor for a false oath or account.

Q You agree with us after analyzing everything here that this was a false statement that was made on a petition; is that correct?

A Tech -- yes.

Q Don't give me the "technically."

A This is what I -- I would like to elaborate a little bit on this. I think that -- I think that judge -- Federal District Judge Means from the Northern District of Texas put it best, he had an opinion where he analyzed the Chapter 13 disclosure requirements for debtors.

And he made three very important points. The first, he said, was of course there is the rule that ignorance of the law is not an excuse. He went on to say that notwithstanding that rule, that rule is not absolute, and the Supreme Court has refused to apply that rule with respect to highly technical statutes which have the potential to entrap individuals who are engaged in what's apparently otherwise innocent conduct.

And the third point that he made was the bankruptcy code is a highly technical statute, and its comprehension requires specialized expertise that's beyond the capacity of lay people and, frankly, most, as well, competent lawyers.

And so I think, again, these issues aren't viewed as a black or white question; there are a variety of considerations that have to be taken into account.

Q That has no application here. He checked a box that said he had no income tax refund coming. Isn't that a false and fraudulent act?

A Well, I'm not an expert on what constitutes perjury and what excuses there might be for perjury and how perjury might be cured or remedied, so I'm not an expert to testify in those matters.

Q I'm not familiar with the concept or legal proposition of curing perjury. Is that possible?

A I have no idea, I'm not an expert.

Q All right. Well, let me ask you about this. You did this analysis of how many bankruptcy cases that Judge Porteous had handled. And I guess your conclusion is simply he only had seven bankruptcy cases all the time he was on the bench and therefore was no expert on bankruptcy. Is that what I was supposed to get out of your testimony?

A Yes, that's correct.

Q Okay. Having said that, he should know that when he's asked a question on a petition for

bankruptcy that he's filing under oath, and stating that he's filing under oath, that he can't lie in it, regardless of whether he only handled seven bankruptcy cases.

Isn't that true?

A I wouldn't disagree with that.

Q Okay. Do you find any fault with anything he did here with this bankruptcy proceeding?

A Yes.

Q Are you shocked by the fact that a United States district judge would provide a false and fictitious name under penalties of perjury in filing a personal bankruptcy?

A The identity of the debtor doesn't matter to me. That would be a shocking -- it would be shocking whether it was a regular individual or a public figure.

SENATOR RISCH: That's all the questions I have. Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Any other members of the panel have a question?

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q I just briefly want to -- you've referenced what Congress intended or wanted to do,

and you've got a unique opportunity here. You get a two for.

And I want to make sure I understand from your expert opinion your analysis of gambling and bankruptcy.

These are not foreign concepts to one another, I think you would agree with that; correct?

A I agree with that.

Q In fact, there are untold thousands of bankruptcies in this country every month because of gambling?

A That's right.

Q So your testimony seemed to say that Congress has failed to make it clear that gambling activity must be disclosed on a petition for bankruptcy; is that correct?

A That's not my testimony.

Q Okay. Well, that's what I got from it. So does gambling activity have to be disclosed on a petition for bankruptcy?

A Any debt that is incurred and that is owed at the time of filing for bankruptcy must be disclosed, and so it's my view under my testimony that there was a contingent debt for any, for example, outstanding marker that hadn't been

honored, there was a contingent debt, and that debt would actually be the debt that would be owed to the casino if the marker were dishonored, so that should have been disclosed in the schedule F as marker and then the contingent box should have been checked.

But at the same time, I would also point out that when a check is outstanding, not only do you have a contingent debt, you actually have a contingent claim against your payer bank. That is because if the payer bank wrongfully dishonors the check, you have a claim against the bank for --

Q I'm not worried about a claim of the debtor against the bank. What I'm worried about is the public policy behind the notion that as intertwined, as gambling and bankruptcy are, by the nature of the activities --

A Yes.

Q -- that we somehow -- we've got an expert sitting in front of a bunch of United States Senators saying that we have failed in the law to in some way say that it's important to honestly disclose gambling in a bankruptcy petition? Is that what you're -- is that what basically your conclusion is?

A No.

Q That we have failed to do that?

A No.

Q Well, clearly, Judge Porteous -- in no place in this petition, in no place in this plan is there any hint that there's any gambling activity going on.

But yet you have testified repeatedly that it's like buying a tuna sandwich.

So I think you need to, if you can, clarify for us now, if he failed in some way to meet the public policy obligation of disclosing gambling activity on his petition and his plan in bankruptcy.

A He failed to disclose certain debts that were due, and one of those -- or including a contingent debt, and that should have been disclosed.

My testimony was merely to highlight that the choice Congress has made is that we will not withhold a discharge if -- discharge of your debts if you have made a knowingly false oath or account.

Q Is it common that gamblers hide gambling on their bankruptcy petitions?

A I'm not sure about that. I have no -- I haven't studied that.

Q How many bankruptcy petitions have you

handled of gamblers?

A I have had no gamblers -- contact with --

Q In your clinic work, you've never -- your pro bono work, you've never had a gambler?

A I've never had a gambler.

Q Well, I'm flummoxed by your testimony, because in your zeal to equate buying a tuna sandwich with signing a marker at a casino, it seems to indicate that you are blessing the notion that a gambler could come into bankruptcy and never tell anybody that they're a gambler.

And clearly, that's very relevant, wouldn't you agree, to the bankruptcy court?

A Madam Chair, I don't want you to misinterpret my testimony. My testimony was never that he should not have -- my testimony is that he should have disclosed the debt, it was a contingent debt.

I was merely -- I was merely looking to point out in my testimony about the effect of buying the chips and with the marker to show that there wouldn't have been a preference.

There have been allegations by the House that the Treasure Chest markers involved the payment of a debt, that would have been a preference.

That's a big aspect of their report. And I just wanted to emphasize that technically -- that legally that's not true.

So I don't want -- I don't want the committee to confuse --

Q I understand, I understand. I think a lot of your testimony was very technical about, you know -- and what I'm trying to get a sense of is backing the truck up a little bit.

A Yes.

Q And seeing if, in fact, the duck is quacking.

And I think Senator Shaheen as a question.

EXAMINATION

BY SENATOR SHAHEEN:

Q Mr. Pardo, I think I heard you testify to research earlier that you had seen that suggested that 95 percent of statements that were reviewed showed errors.

Did I understand that correctly?

A It was -- so in the Judge Rhodes study, the study of consumer bankruptcy disclosures, it was 99 percent.

Q 99 percent. And can you tell me how many of those errors involved the action of someone

misstating their name deliberately?

A None of those errors related to an incorrect name.

SENATOR SHAHEEN: Thank you.

CHAIRMAN MC CASKILL: Any other questions? The witness is excused.

Thank you very much for your appearance.

THE WITNESS: Thank you.

CHAIRMAN MC CASKILL: Next witness.

MR. TURLEY: The Defense calls S.J. Beaulieu, bankruptcy trustee.

Your indulgence, Madam Chair. We're looking for him right now. He's just outside the door supposedly.

Whereupon,

S.J. BEAULIEU

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AURZADA:

Q Good afternoon, Mr. Beaulieu.

A Good afternoon.

Q My name is Keith Aurzada, representing Judge Porteous in this matter.

Are you the standing Chapter 13 trustee in

the Eastern District of Louisiana?

A Yes, I am.

Q How long have you held that position?

A Near on 23 years.

Q How many cases have you presided over, would you estimate?

A About 40,000, I would think.

Q In 2001, did you become aware that Judge Porteous had filed Chapter 13?

A Yes, I did.

Q How did you become aware of that?

A I got a call and said they had filed, I think Mr. Lightfoot had called and said he had filed a case and it was originally -- he filed it with a typographical error and that they had to correct the typographical error. I did not know about it until that time.

Q What was the error?

A He spelled the last name as Ortous, the P was left out.

Q So the name on the petition was incorrect?

A That's correct.

Q Did you handle Judge Porteous's Chapter 13 case as you would any other case?

A Yes, I did.

Q Did you do any him any favors because he was a federal district judge?

A No favors. The only favor, I guess, is that his hearing was set in the morning time. I called it to order. There was no creditors present, so I continued it to that afternoon in order that he didn't have to be in front of some of his peers.

Q Then you conducted the meeting that afternoon?

A Yes, I did.

Q Judge Porteous paid over $52,000 to his general unsecured creditors; is that right?

A That is correct.

Q And he made all of his plan payments?

A That's correct.

Q Let's talk about the plan. The original plan that he proposed you objected to; is that right?

A That's correct.

Q And you objected because that plan didn't provide sufficient payment to unsecured creditors?

A That is correct.

Q Okay. And what was the result of that objection?

A We had a hearing. They appointed a judge

in Texas, Judge Greendyke. We had a telephonic confirmation hearing, and the judge overruled one of my objections and he saw fit to allow the other objections to go forward. That increased the monthly payments from 800 something dollars to almost $1600 a month.

Q The plan called for three years of payments?

A That's correct.

Q Did you receive a visit from the FBI in 2004?

A Yes, I did.

Q Was that before or after the plan was completed?

A It was at the end of the plan. I can't tell you for sure the 36th payment had been made or not. But the final account was filed sometime in April of 2004. So it was right at the end because we usually do a final review of the case to determine if we missed anything.

Q So the plan was open and no discharge had been granted; is that right?

A That's correct.

Q After visiting with the FBI, what information did they give you?

A They indicated to me that I had apparently looked at an older proof of income, and there was a difference of $130, I believe, that because of the tax bracket that the judge was in, that I -- at the end of the fiscal year, he would not be charged for FICA, he had over the total, of which I have a very limited number of cases that reach that plateau, and that he had some alleged charge card violation -- use after the filing of the petition and had some gambling -- alleged gambling markers in various Mississippi casinos.

Q As a result of that meeting, did you have one of your staff attorneys write a letter?

A I -- I most certainly did.

Q Can we pull up Porteous Exhibit 1108.

And is that a copy of that letter?

A I have the -- I have a copy of that exhibit in my pocket.

Q Let's --

A I have read that, and yes, it is.

Q And as part of that -- Madam Chair, I believe 1108 is part of the record. But if it is not, I would request that it be made part of the record.

CHAIRMAN MC CASKILL: It is. It's part of

the record.

BY MR. AURZADA:

Q As part of that letter at the end of the last paragraph, you're writing now to the Federal Bureau of Investigation, you said, "you may file an objection to the trustee's final account or you may provide Mr. Beaulieu with evidence of wrongdoing, and the same will be investigated."

Was your offer accepted and did -- was there any response to any objection filed in the case?

A No, no response.

Q For that matter, did any creditors object to any part of the plan?

A There was no objection filed either before confirmation or at any time after confirmation.

Q And when I asked you about the plan payments, is it your position -- well, does the Chapter 13 trustee have a fair bit of discretion in terms of determining what the plan payment should be?

A You look at it and determine to the best of our ability if all the disposable income has been listed, and we look at the expenses to see if they are reasonable for the family size. And based upon

that, we make our determination. Each trustee has their own figures that they use for normal living expenses. Mine are a little stringent.

One of my objections was to -- that got overruled on was to college tuition, which I believe is -- should not have been paid. But Judge Greendyke allowed it in his district.

Q Let me ask you about the actual notice that went out in this case. In reviewing your file, is it your understanding that notice to creditors in this case actually went out using the correct name and Social Security numbers of both debtors?

A That is correct.

Q Okay. In your experience, do Chapter 13 debtors sometimes make errors on their petitions, both in terms of disclosure and the assets that are listed?

A Yes.

Q Judge Porteous's bankruptcy had some problems in it, didn't it, in terms of disclosure?

A After the fact, yes.

Q You learned about them after the fact; right?

A Yeah.

Q Okay. And that included payments of

preferences?

A Yes.

Q An undisclosed tax refund?

A Yes.

Q And the understatement of income, which I think you've already testified about.

A That's right.

Q Now, I really want to ask you, had you known about that at the time, what action would you have taken?

A Just those three things?

Q I think I said them all.

A We talked about the misspelling also.

Q Yes, I'm sorry. Thank you. This, along with the misspelling.

A If I knew for a fact that it was, as I found out later, that it was done intentionally, I would petition the court to dismiss, stating why my motion would dismiss, and give it -- leave it to the discretion of the judge and the U.S. trustee to follow up on it if they see -- if they saw fit.

Q Okay.

A Now --

Q So your testimony is that that's not a decision you would have made as the trustee; you

would have filed a motion and put it before the court and let the court make the determination as to whether there was good faith?

A That's correct.

MR. AURZADA: Madam Chair, may I have one moment?

BY MR. AURZADA:

Q My co-counsel has pointed out one question I failed to ask. Have you had other cases filed with incorrect names in your district?

A A small number.

Q How often does that happen?

A Very seldom. But it's usually not caught until after the 341 meeting.

Q And in this case, when was it caught?

A Before the 341 -- before the notice went out.

Q Thank you, Mr. Beaulieu.

I'm sorry, go ahead, please complete your answer.

A Did you want me to answer the other three portions about the tax returns?

Q Please do.

A Okay. Tax returns, if I would have seen a $4000 tax return, I would have -- that would have

raised a question as to more disposable income on a monthly basis, especially $4000.

The preference, the ones that they showed were inconsequential as far as I was concerned and they were not an insider. So I would not have probably done anything on those two items, except for the tax return. I would have looked at the taxes a little bit closer.

MR. AURZADA: Thank you, Mr. Beaulieu.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good afternoon, Mr. Beaulieu.

A Good afternoon.

Q My name is Alan Baron, special impeachment counsel for the House of Representatives.

Mr. Beaulieu, in your direct testimony, you used two descriptions of the way Judge Porteous filed his initial petition. We can agree, everybody knows, it was filed in the name of G.T. Ortous, O-r-t-o-u-s.

A I believe that's correct.

Q First you said somebody called you up to say it was a typographical error. Who was that?

A I believe it was Mr. Lightfoot, and he had

already filed his motion to correct it.

Q Okay.

A I would not have known about it until I looked at the hearing -- at the petition, which is sometime after the 341 meeting notice is sent.

Q And another word you used to refer to G.T. Ortous as a misspelling, I think you pronounced it "Orteous." But there's no E in there, no P and no E.

A I'm not an English major.

Q But the evidence is absolutely crystal clear, undisputed, it wasn't a typographical error, and it wasn't an accidental misspelling; it was collusion between Mr. Lightfoot and the judge to hide his name.

MR. AURZADA: Madam Chair, I object to this question. It's very conclusory. We're at a factfinding mission here.

CHAIRMAN MC CASKILL: Rephrase the question.

BY MR. BARON:

Q There was nothing accidental, it wasn't a misstrike on a typewriter, and it wasn't a misspelling in an effort to spell the name properly. That is beyond dispute.

Does that change your attitude about how -- the effect of filing that initial petition as to whether it was done in good faith?

MR. AURZADA: Madam Chair, I raise the same objection. I'm not trying to interrupt the hearing.

CHAIRMAN MC CASKILL: Overruled.

MR. BARON: Thank you.

THE WITNESS: As I indicated, if I thought it was anything other than a misspelling or typographical error, I would have filed a motion to dismiss for bad faith.

Mr. Lightfoot has been a practitioner before me for quite some time, and I had no reason to doubt that it was, based upon his motion, a misspelling of the name.

BY MR. BARON:

Q Mr. Beaulieu, you've handled, I think you said, over your career about 40,000 cases, Chapter 13s?

A Approximately 2000 a year for the last 20 years.

Q Okay. At the time in 2001, when Judge Porteous's petition was filed, about how many did you have active, under your jurisdiction?

A About 6500 cases.

Q Okay. And how many people did you have in your office, then, to handle the workload?

A 14.

Q Okay. And is it fair to say that you can't check out, and even your people can't check out, every item that's entered on a schedule, let's say, and try to find out what might not be entered on the schedule that should have been there? You can't tell that?

A No, sir.

Q Right. So is it fair to say that you have to depend on the candor, the honesty of the debtor, who submits a petition or a plan, you're really relying on that, are you not?

A Without that, sir, Chapter 13 or Chapter 7 do not work.

Q Would not work?

A Wouldn't work, without that honesty, yes.

Q Right. There's an old Supreme Court case I want to bring to your attention, you may be familiar with it. It says the Congress provided the relief in bankruptcy for the honest but unfortunate individual.

Are you familiar with that

characterization?

A I believe that to be true. I'm not familiar with the case.

Q You mentioned, by the way, and this -- maybe you just forgot. Do you recall you were shown the April 1, 2004 letter from the FBI to you?

A Yes.

Q And I believe your testimony was you didn't get any -- any response -- you said you didn't get a response from the FBI. But did you get a response at all?

A Not that I remember, no.

Q Okay. Can we put that up? This is 299. Do you see that?

A No.

Q There we go.

A I do not remember that, no.

Q But it -- now that you see it --

A Yes.

Q And the second paragraph says, "as we previously discussed, we cannot comment on the existence or nature of an ongoing investigation or share any evidence that may have been gathered in the course of such an investigation. In Mr. Adoue's letter, he identifies several subjects about which

it might be possible for you to make inquiries or take other investigative steps.

"As we stated previously, we take no position as to whether you should pursue any investigation in any case before you. It's entirely at your discretion whether you choose to do so. Please feel free to contact us," et cetera. And it's signed by attorneys in the public integrity section.

Does that refresh your recollection about that?

A Somewhat, sir. It's been a long time.

Q Okay. Mr. Beaulieu, would you agree that Chapter 13 debtors are not allowed to use credit or obtain new credit without the approval of the trustee?

A That's what the confirmation order says and that's what I believe also. It's also stated in my brochure that I hand out to the debtors.

Q Right. There is a brochure that specifically says that, and every debtor who comes before you either gets it handed to him or mailed to him; isn't that right?

A That's correct.

Q That was the way your practice was back in

2001?

A It's been like that for at least 20 years.

Q Okay. And isn't it true, it's your position that debtors are not allowed to use credit cards without the approval of the trustee and they're not allowed to obtain new credit cards without the approval of the trustee?

Isn't that true?

A To create any type of debt after the filing of the petition.

Q Right. Do you recall telling -- do you recall being interviewed by the FBI at any point, back January 22, '04? I don't blame you if you don't remember. But January 22, '04?

A Again, it was two, maybe three occasions.

Q Do you recall saying "if an attorney and debtor filed a bankruptcy application with a false name and the attorney and debtor filing the petition knew the name was false, they should be prosecuted. Schedules filed by debtors should be accurate and any questions should be answered truthfully," and you said you look at "the total of the circumstances surrounding a bankruptcy petition."

A That's correct.

Q Do you recall words to that effect?

A That's correct.

Q Okay.

A My prosecution would be motion to dismiss.

Q Was it your position and is it your position that if the Porteouses receive any tax refunds, particularly that they had applied for just a few days before the petition and they got just a few days -- received it actually a few days after they filed the amended petition, should that have been disclosed to you?

A Yes.

Q Was it disclosed in Judge Porteous's filings?

A Not to my knowledge.

Q Do you recall that the pay stub that was submitted was an old one, it was like from the prior year, because the filing was in 2001? Do you recall that?

A May of 2000, I believe it was.

Q Right. And it was not a huge amount of money, but it didn't -- the filing didn't reflect an increase in pay of about 175 or so dollars a month. Do you recall that?

A After the FBI brought it to my attention, yes.

Q Right. And typically, isn't it true that the debtor should file the most current pay stub?

A That's correct.

Q Now, the evidence has shown that on the day before filing the original petition in bankruptcy, Chapter 13 petition, that was on March 28, 2001, well, March 27, Judge Porteous, and this is undisputed, Judge Porteous paid off three markers, $500 apiece, to the Treasure Chest in cash.

Should that have been reported on his schedules when he filed them?

A I believe there's a question in there that says anything over $500 within the last two years or 90 days, they have changed it up since 2001. So it's somewhere in 90 days or two years prior -- I mean 90 days prior, 60 days or 90 days prior.

Q Right.

A Anything over $500.

Q This was the day before. Three markers paid off $500 apiece, $1500?

A They should have been, yes.

Q In your view, does a marker from a casino -- is that a form of indebtedness for your purposes?

A Yes.

Q Now, you know the order that was filed by judge -- was signed by Judge Greendyke said that the debtor is not allowed to incur any new debt without the written permission of the trustee.

Do you recall that?

A Yes, sir.

Q And the evidence is undisputed that in the year following the filing of the petition, and I believe after the order was entered, Judge Porteous, I believe the number -- signed up for 42 markers amounting to roughly $30,000. I could be off in my numbers.

But should that have been -- first of all, did that violate the order?

A In my opinion, it does.

Q Would the taking out of a new credit card undisclosed without getting permission, would that violate the order?

A Use of the credit card?

Q And uses it.

A Yes.

Q Okay. Oh. Do you recall correspondence with Judge Porteous or his counsel concerning Judge Porteous's interest in renewing leases for automobiles that he had?

A Yes, I believe I do.

Q Do we have that? Here we go. 296. I'm sorry, no, that's not it. 339, sorry.

Could you call that up?

Do you recall that?

A Yes, sir.

Q So Judge Porteous apparently knew that if he wanted to do a refinance, he had to get written permission to do it, isn't that right, at least with regard to that?

A I would think so.

Q And wasn't the same true with regard to refinancing a mortgage? Do you recall that?

A Yes.

Q And there was correspondence on that?

A I believe so.

Q Right. Did he get permission in both instances?

A Did I give permission? No, it was no major change. In fact, I think the leases stayed about the same -- if I remember correctly, leases stayed about the same, and the mortgage was a refinance.

Q But my question was, was that -- was he allowed to do it?

A I -- I gave him authority, yeah. I believe the order says the trustee -- I think in Texas, they allow the trustee to make that determination.

Q Right. So he was allowed to do the leases for the cars and the refinance?

A Yes, I believe so.

Q Okay. Did you remember that there was a -- do you recall that you had the 341 hearing with Judge Porteous?

A Yes, sir.

Q Can we call up Exhibit 130, please.

First of all, is that proceeding -- with the debtor, is the debtor sworn in?

A Yes.

Q So he's -- his answers are under oath?

A That's correct.

Q Okay. And you asked -- come down the page, you see where it says -- you say, your signature.

Do you see that?

A Yes.

Q The punctuation is a period, but I take it that was a question?

A Yes, it is.

Q You then go down, he answers yes. Then you go down to the next line, "everything in here true and correct." There's no punctuation after that, but I take it it was a question?

A Yes, sir.

Q And he answered yes?

A Yes, sir.

Q And what's the "in here"? What are you referring to?

A I show him a copy of the petition and the signatures on the bottom of the petition. And I'm presenting to him a copy of the petition itself and "in here" means in the petition.

Q Let's go to the next page, if we can, about a third of the way down. Do you see where it says "listed all your assets," and again that's a question, isn't it?

A That is. Everything in there is a question.

Q I understand. But since there's no punctuation, I better ask it.

And he answers yes?

A That's correct.

Q Do you see that?

A That's correct.

Q And then turn to page 4. And about slightly more than halfway down, you see where it says, "any charge cards you may have," do you see that?

A Yes, sir.

Q Let me read that. That's you speaking. "Any charge cards you may have you cannot use any longer, so basically you're on a cash basis now. I have no further questions, except have you made your first payments."

A That's still my procedure, yes, sir.

MR. BARON: Thank you, Mr. Beaulieu.

Oh, excuse me. I'm sorry, Madam Chair, may I -- Senator, may I continue?

VICE CHAIRMAN HATCH: Yes.

BY MR. BARON:

Q You testified earlier that based upon your objection to the plan as proposed, it moved from $800 a month to $1600 a month?

A $875 was the original plan. $1600 is actually what he paid per month for 36 months.

Q And why did you -- why did you do that?

A Why --

Q You forced that --

A Right. I filed a formal objection of

confirmation, saying that he did not give all disposable income, his expenses exceeded that which was considered a norm at the time, and that he had -- he did not pass liquidation value, and I believe -- and also that he had a tuition -- college tuition being paid, and not paying the unsecured creditors at 100 percent.

Q So that gave almost twice as much money to the creditors than they would have gotten otherwise; is that right?

A That's right. That's right.

Q Fair to say, Mr. Beaulieu, you didn't treat Judge Porteous any differently than you would any one of those other 40,000 people?

A The only thing I did was give him a hearing date away from everyone else.

MR. BARON: Thanks so much, Mr. Beaulieu.

THE WITNESS: Thank you.

VICE CHAIRMAN HATCH: Any redirect?

MR. TURLEY: Just a brief one, Mr. Chair.

VICE CHAIRMAN HATCH: Proceed.

REDIRECT EXAMINATION

BY MR. AURZADA:

Q Just to clarify two things -- actually, one thing.

The process of the Chapter 13 trustee's office objecting to a proposed plan and then reaching resolution with the debtor, is that uncommon, or does that happen frequently?

A It happens frequently.

Q This is just part of your job?

A That's correct.

Q Is that part of the process?

A That is the process.

Q And in that process, what is your name to do? Who are you -- on whose benefit are you acting?

A I'm acting for the unsecured creditors.

MR. AURZADA: Thank you.

VICE CHAIRMAN HATCH: Any recross?

MR. BARON: Nothing.

VICE CHAIRMAN HATCH: Any questions by any member of the committee?

Senator Whitehouse?

And we'll go to Senator Risch next.

EXAMINATION

BY SENATOR WHITEHOUSE:

Q Hi, Mr. Beaulieu.

A Yes, sir.

Q We've been told that had this been filed as a Chapter 7 liquidation, then the preferences and

the tax return would have gone into the estate that you would have distributed.

A That's right.

Q And that the unsecured -- the creditors would have -- there would be a difference for them because the tax return and the preferences would have added to the estate, there would have been more to distribute, and they would have been paid more as a result.

That's the way Chapter 7 works; is that right?

A That is correct.

Q Okay. We've also been told that when it's a Chapter 13 proceeding, that is based on the future income of the individual, and therefore, what is disclosed in the original schedule of assets isn't really as relevant.

And indeed, we were shown a table that showed Chapter 13 and what the creditors were paid, Chapter 7, what they would have been paid, and Chapter 7 plus the preferences and the tax return and others and what they would have been paid under that.

And it showed that under Chapter 13, Judge Porteous paid more than he would have either under

Chapter 7 as filed or Chapter 7 even conceding the Government's case that other things should have been filed.

Now, my question to you is would it have made any difference to the plan that you approved if you had known of the tax return and the other preferences. It strikes me that if it were 100,000 tax return or if the -- you know, there was a big asset gap, that there's a point at which it doesn't make any sense that the trustee would only look at future earnings and wouldn't look at what the assets on hand are as you're determining what the payment schedule is, if that helps illuminate why I'm asking this question.

Basically I'm trying to sort out, did it make a difference to anybody that these expenses or assets weren't properly listed since this was a Chapter 13?

A I believe they talked about the preferences were being about $3000, $2800, somewhere in that neighborhood; is that correct?

Q I think that was around that number, and $4000 for the tax return.

A In order to go after preferences it cost us money. I'd have to weigh the cost of going after

the preferences.

The tax return is a little bit different in that $4000 means about $300 swing a month. $3600, or 4000 a month. So now you're talking about $12,000 going into the kitty.

Q So that information would have made a difference in the plan that you approved?

A That and I -- because basically, when you get a tax return without a dollar amount, unless there's some type of earned income credit or something like that, that means that the debtor is overdeducting from his paycheck, so that means the paycheck I'm reviewing is down $300 from the get-go.

So I would have to look at that and say, well, your income should be actually $300 more per month. So that's in a three-year period about $10,000, which in this case would be about a 10 percent turnaround.

Q And that's something you would have taken into account in your decisions about the plan?

A Yes, sir.

SENATOR WHITEHOUSE: Okay. Thank you. I don't have any further questions, Mr. Chairman. Thanks.

VICE CHAIRMAN HATCH: Senator Risch?

SENATOR RISCH: No, thank you.

CHAIRMAN MC CASKILL: Okay. You will be dismissed. Thank you for your testimony. Thanks for being here.

THE WITNESS: Thank you.

(Witness excused.)

MR. TURLEY: Thank you, Mr. Chairman. The Defense calls Don Gardner.

VICE CHAIRMAN HATCH: Let me make a point that Judge Porteous has eight hours and 42 minutes left. The House has seven hours and 35 minutes left. So I would caution you to use your time wisely, because at the end of those hours, we're going to -- we're going to basically end this matter. So please be careful.

MR. TURLEY: Mr. Chair, we are retrieving the witness.

CHAIRMAN MC CASKILL: Mr. Gardner, would you raise your right hand.

Whereupon,

DON GARDNER

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you. Be seated.

THE WITNESS: May I make a comment?

CHAIRMAN MC CASKILL: Sure.

THE WITNESS: I'd like to preface my remarks by saying I took a fall. As everybody can see, my back is injured. And I didn't mean any disrespect. There was some scheduling problems.

When I left this morning, I just wanted to go home. I've never been hurt in my life, first time on pain pills. I'm off pain pills, shaky now because I'm nervous. But I've never had pain for 62 years. But don't fall off of a ladder.

And I got a lump on my head the size of an egg, my ear is ringing on this side, and I would just ask anyone who is asking me questions to speak loudly so I can hear you, I don't want to not be clear.

Thank you, ma'am.

VICE CHAIRMAN HATCH: You're starting to feel a bit the way we do, having listened to all this.

(Laughter.)

SENATOR RISCH: Actually he's in better shape than most of us.

CHAIRMAN MC CASKILL: Thank you. We apologize for your confusion. We're glad you're

here and appreciate your cooperation.

THE WITNESS: Political science major, I understand what's going on and I respect the Senate. I meant no disrespect by leaving this morning.

CHAIRMAN MC CASKILL: None taken, Mr. Gardner.

Mr. Schwartz?

MR. SCHWARTZ: Thank you, Madam Chairman.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Gardner, my name is Daniel Schwartz. I'm one of the attorneys for Judge Porteous. Good afternoon and thank you for coming.

Tell us a little bit about your background, where you were educated and what your profession is now, please.

A Graduated from UNO in '69, LSU law school 1972, practiced law almost 38 years, I guess, and started out in criminal law, some civil, moved away from criminal I guess about 20 years ago. I refer my criminal out now.

Basically, I do a lot of persons law in the state of Louisiana, which includes everything dealing with people, adoptions, divorces, custody, anything, wills, successions, those type of things.

Primarily I would say 80 percent of my practice is that. I do some personal injury. It's very good. I have a smidgen of small corporate clients, and just anything that I feel comfortable with, I usually take it. But most of the time I would probably limit myself to persons.

Q Where do you practice?

A I practice in Harahan, Louisiana.

Q And where is Harahan, Louisiana?

A Seven miles outside of New Orleans in Jefferson Parish in a little hook of the river.

Q Is your practice primarily in state court or in federal court?

A State court.

Q Do you know Judge Porteous?

A I do.

Q How do you know him?

A Judge Porteous was in law school in 1971, I think he graduated a year ahead of me. I knew him in law school. He came to Jefferson Parish working for the Attorney General, I think they sent him down there to handle a case. They liked him. He stayed. We reacquainted our friendship and we've been friends ever since.

Q Have you been good friends? How would you

characterize your friendship?

A Good friends.

Q Did you do things together on a regular basis?

A Tom Porteous stood at my wedding. He's the godfather of my oldest daughter. I shared -- for years, I guess up until 2000s, I had Thanksgiving dinner at his house, and go over.

I interfaced with his families. I grew up with all of his kids, and my kids. And we had a social relationship, you know, outside of law.

Q Did you -- you have birthdays about the same time; isn't that correct?

A My birthday is on December 12, his is on the 15th. We usually go out and celebrate at that time to remind each other that we're one year older.

Q Thank you.

Let me draw your attention to a case called Liljeberg v. Landmark. Were you involved in that case?

A I was.

Q How did you become involved in that case?

A As Mr. Mole, I think, repeated -- I'm sorry I ever met Joe Mole. He's an excellent lawyer, but I wish I hadn't. Someone called me, and

I looked back through my calendar, January of 1997 I think, and asked me to become involved. I told them no.

They told me what the case was about, told me what division of the federal court was in, I told them I wasn't in federal court, didn't think I could help them in any way. Let the conversation lie, got another call, they would like to talk to me. Please talk to them. Not interested in talking to them, I said.

Q I'm going to interrupt you, Mr. Gardner, to make clear some of the transactions. I apologize.

A Go ahead.

Q Who called you?

A Tom Wilkinson called me initially. He's a friend of mine and we've had cases together.

Q Who is Tom Wilkinson?

A An attorney in Jefferson Parish.

Q Is he the parish attorney?

A Was. I think he stepped down from that position.

Q Was he in that position at the time he called you?

A Ooh, '97, I don't know. I'd have to guess

probably, but I don't know.

Q What is the role of the parish attorney?

A Handle all the legal matters for the parish, review contracts. Anything that the parish would need by way of a lawyer, he would be the lawyer. He has a staff of lawyers under him.

Q Does he have a brother who is a federal magistrate?

A He does.

Q And do you know if that -- what was his -- what is his name, the brother's name?

A You're stumping me.

Q It's Wilkinson; right?

A I think it's Jay Wilkinson.

Q Do you know if -- that Mr. Wilkinson had involved -- excuse me, had any involvement in the Liljeberg case?

A Not to my personal knowledge, no, sir.

Q So you got a call from Mr. Wilkinson, from Tom Wilkinson, asking you to get involved. What was your response?

A No, not interested, can't do it.

Q Why were you not interested?

A Not a federal lawyer. It was beyond my expertise. And didn't want to do it.

Q Did you get approached again?

A I did.

Q And what was the nature of that call?

A Follow-up call. They just want to speak to you, Donny, everybody who knows me well calls me Donny. And I said I don't want to do that. And ultimately convinced me to go talk to Joe Mole. And I sat down with Joe Mole, and Joe Mole said he wanted me in the case.

He would say, you know, he wanted to have a pretty face at the dais, and obviously I've got a pretty face.

Q What did he mean by a pretty face?

A You know, someone who knew the judge. He was concerned that in October of '96, the year before, that a motion to recuse had been filed and his client lost it. Big money in this case in this case. They were not going to let anything deter them from an effective presentation, and they thought that would entail also having at the bench a friendly face.

And I told them that I don't think that works. And I told them at that I don't know, I don't know if that's the second or first meeting, I said listen, Judge Porteous is going to listen to

the evidence, he is going to rule on the facts. My presence there will not affect the outcome in any way, shape or form. And he said, well, we don't know the skinny on Judge Porteous, Mole says.

And I said what do you mean? He says he we don't know who he is, he's a fresh judge, this is '97, I think Tom -- Judge Porteous took over in '94. And he says we'd like to know how he thinks about stuff.

I said, well, he read the federal civil procedure and memorized it, because he's got a fine memory. He'll beat you in the head with a procedure book. And I said you better be prepared, and he was, all certificates, memos and filing were prompt, I think I helped him there. And I told him, build a record, the judge is going to let you get everything in. And I think Mr. Mole at every stage of the proceedings said Judge Porteous gave him a fair trial. Judge Porteous gave everybody a fair trial.

People liked the fact that Judge Porteous would let you try your case, and he wouldn't cut you off. He'd let everything in.

Q I'm going to cut you off again.

A Thank you.

Q Did the time come when you agreed to

represent Mr. Mole's client?

A They don't deal through me, they deal through Tom. Because they know I already said no. They faxed a proposal to Tom Wilkinson, and he calls me up, Donny, look, these people want to offer you a serious chunk of money. And I said Tom, I'm not interested.

Oh, you'd be a fool. He called me a name, not a nice name. And I said Tom, no. And he said come on, just go talk to people. Come on, we'll get together and talk. He says they just want you to sit there, help them out, read Judge Porteous, decide whether he's angry or upset, what's he going to do, interface in the case and participate.

Q Did you finally agree?

A I did. I agreed on one condition.

Q I'm sorry, I interrupted you.

A You didn't. I agreed on one condition. I told Mr. Mole I would not be whored out. And by that, I mean I said I would participate in the case, which I did, spent 16 days, one day just Mr. Mole and I and five of the lawyers on the other side in a mediation. Because Judge Porteous thought we were close enough, he says you guys need to talk, you all are wasting a lot of time here and you all not

talking, and sent us down to talk. And we spent the whole day talking because he didn't talk numbers to us, he was not giving anybody a feeling on where the case was going. He just thought that they should all get together. And we did that.

But I told Mr. Mole that I did want to participate, I wasn't going to sit there as a pretty face, and he allowed me to do that, I have to give it to him. I prepared two witnesses, they ultimately decided to let someone else take them. I filled up 11 tablets of notes. I told them what I thought. Every day after court, Judge Porteous would have Mr. Levenson and myself, two or three of us go back, two per side, and he would go over the next day's thing.

And again, I'm not a federal lawyer, but I can tell you he goes down a list and he says duplicitous. And I said excuse me, your Honor? I've heard from that witness, I'm not hearing that witness, struck. Tell me what they're going to say that was different from the other three people who testified to that point, and I'll allow him in. But I'm not going to hear it just for the sake of you guys blabbering, I've already heard enough on it.

We'd go back and do the next day's

preparation and deal with documents. This was a case, a document nightmare, 12, 14 volumes, 3 inches thick. And the guy who was operating the little screen trying to get it electronically, he was a dodo, it never worked.

(Laughter.)

Q Unfortunately, we don't have those here, but we do have the screens and the documents.

CHAIRMAN MC CASKILL: And we do have repetition of a lot of information.

(Laughter.)

MR. SCHWARTZ: Madam Chairman, I think I knew that was coming.

CHAIRMAN MC CASKILL: Yes.

BY MR. SCHWARTZ:

Q Did you enter into a written agreement?

A I did.

Q What were the terms of that agreement?

A Mr. Mole was prepared to pay $100,000 for my participation, flat fee, for my participation in the case. And I understood that.

There were additional provisions, and one that stands out that I know everybody is going to be interested in, is that they also included $100,000 if Judge Porteous would recuse himself.

Now, remember, they had filed a motion to recuse Judge Porteous in October of '96, he had said no. But for some reason that provision was in there.

There were other provisions about stage payments, incentive payments as he said, to keep me interested.

Like he said, if I represent a client, I'm going to represent them. I don't sell people out. I practiced 38 years. Mole got to know that. I think he felt secure that I was on the team and I wanted my team to win. I always want my team to win. I graduated from LSU.

Q Did you form an opinion as to why you had been offered a provision in your contract for an extra $100,000 if the judge recused himself?

A At the time or now?

Q Well, let's say at the time, and then we'll --

A At the time I didn't.

Q What about now?

A Now I have a real strong opinion. I think that provision, incentive provision or what, was to get me to either encourage someone to get off the case for an extra $100,000. I think they already

thought I was a prostitute because it was a lot of money. They just didn't know how high the number was going to go.

But I didn't -- I never did that. I never approached Judge Porteous and asked him to remove himself. I knew -- as I told Judge Jones at the 5th Circuit, and she became enraged at me, I said I didn't know of any additional facts that would allow a recusal motion to be successful or to be heard.

She just went crazy, don't you have an ethical and moral obligation for your client? And I said I do. But she doesn't even know the standard. You better have some facts to recuse a federal judge. You don't walk in, oh, I think maybe they had lunch together, I think they used the same handkerchief.

I knew none of those. I knew Amato and Creely were friends, I knew they went hunting and fishing. I didn't know anything that you people have tried to bring out along the way, if it's true or false.

Q Let me step back for a minute. You bring up many subjects as you speak. You said that you form the opinion now that -- restate.

What did you think your client then wanted

you to do with regard to Judge Porteous and Judge Porteous's participation in the case?

A Let's make this crystal clear. When I signed on beside telling Mr. Mole that I would participate, I wasn't going to sit there and just look around, I also told him that I was never going to ask Judge Porteous to do anything immoral and illegal. And I said that a number of times.

By that I meant I was never going to put the judge, even though we were friends, I've never in all our years, in a position that would cause him uncomfortableness.

I wasn't going to go to him and say, hey, listen, I get $100,000, get off the case. Wouldn't do that. And I didn't.

Q Have you formed an opinion as to whether that's what they wanted to do?

A Read the contract, listen to my testimony. Somebody has got to decide that. As a factfinder. I'm just going to tell you, it was there, I think it was a big incentive. I think somebody thought I was a trout and I would bite.

I have to tell you, I've been around a long time. This is the first time in my lifetime my ethics and professionalism has ever been questioned,

because I don't do that.

Q You've known Tom Porteous a long time?

A A long time.

Q What is your opinion about how he would react if you were to tell him about a clause like that?

A Tom wasn't that kind of judge. He would have reacted poorly.

First of all, let's talk friendship first of all. He would have been offended that a friend of his would have asked him that, number one.

Number two, I think as a judge, he would have really become enraged at me, and knowing Tommy, even though I'm his friend, he may have done something more, may have taken another step along the way.

I would expect that if someone tries to subvert the system that way.

Q Do you think that agreement, as you look at it now, was improper?

A That's for you to decide, Mr. Schwartz. It's aggressive.

Q Did -- you received $100,000 to start as a retainer?

A I did, March 13, 1997.

Q Did you pay any of that out to anyone else?

A Mr. Wilkinson, as I told you previously, and I had a relationship on cases. He'd send me persons, divorces, successions, things like that. We had a working relationship. And I guess some motivation was there for him to get me involved, because he ultimately took a nice part of that fee.

Q How much was a nice part of that fee?

A I think it was $30,000 he asked for.

Q And you gave him that?

A His participation in it was interfacing with these people and, you know, trying -- he was the go-between between the Mole group and me.

Q Was there -- during the trial of the Liljeberg case, and you were there every day; is that correct?

A Every day, every night, every morning. We met around the clock. It was a serious case. We had suppers together, we met with Gary Ruff, the lead counsel that came in from out of town. Every night, every day.

Q Did an event occur that you recall in which some books fell on the floor or came to go on the floor?

A I'm going to repeat myself. This was a document nightmare. The volumes had been stacked before Judge Porteous's dais up there, and they were all like dominos.

At some point in a sidebar, moved it, and they just went boop, boop, boop, boop. And unfortunately, Joe Mole may have been standing in that direction and Judge Porteous didn't throw -- I guarantee you, I was eyewitness. He didn't throw anything. They just fell over. They were top-heavy to begin with. There were so many of them.

Q That was an accident, in your view?

A An incident, not really -- an accident, yes. A misfortune.

Q But Judge Porteous didn't throw them like soccer balls at Mr. Mole?

A He did not.

Q Did -- were there any discussions in that case that you know about involving possible settlement between the parties?

A Oh, the parties went round and round. Every couple days after we had a series of witnesses and somebody thought they had made a point, we'd go for this million, and they would go for that million. And there were constant hallway

discussions. There were discussions when the case settled. We still had discussions. Lead counsel wanted to get us all together again. They had a new proposal. And none of it ever went anywhere.

Everybody was so dug into their position or what they thought where they wanted to be, it's hard to settle cases.

Q Did your client ever make a monetary settlement proposal to Liljeberg?

A Many. We made many monetary settlement proposals to Liljeberg.

Q Can you tell us a little bit about the size of those proposals?

A I have to tell you, I can't. I have to tell you, they range from a low 12, 15, 18 million, and I think shy of 30 million at some point in time. I don't think they went over $30 million.

But it was substantial, a lot of money.

Q But there was a settlement proposal of $30 million from Landmark?

A A discussion. You know, this is in the hallway, after a certain witness and somebody thought they had done well, you know.

Q Okay. Let me talk a little bit about the culture, the legal culture in Gretna.

A We've only got four hours left.

Q I understand. I'll try to make my questions pointed and ask you for pointed responses.

The legal community in Gretna, was that a fairly small group of people, not a lot of lawyers?

A It's larger today than it was, but at one time it was small and everybody knew everybody, it was a tight-knit group.

Q The lawyers knew everybody?

A Everybody knew everybody.

Q Okay. Was it customary for lawyers and judges to have lunches together, have meals together?

A Very much so. In fact, one of the local cafeterias over there had a table set out for lawyers and judges, a long table. And you walked in, and everybody sat down, take your order, tear it off the little sheet, and everybody would pay and eat and come and go. People would come and go in different parties at different times. You'd say hello and go back to doing what you did. Judges went back to cases. Lawyers either went back to court or back to their office.

Q What was the name of that cafe?

A Whitesides, Palace Cafe, Courthouse Cafe.

It's changed names over the years.

Q Did you have -- did you have other somewhat more expensive lunches with Judge Porteous from time to time?

A Yeah. I was Judge Porteous's Jiminy Cricket. I limited him to two drinks. I would put his cigarette out if he went to the bathroom. That's what friends do, I believe. I get irritating at times my wife tells me, but that's what I do.

We did go out and have nice lunches. We didn't do that every day. Let me give you a period so I can go real fast. From the time Tom and I are lawyers, Judge Porteous and I are lawyers, until he gets on the state bench, a couple times a week we would meet with a group every other Friday, go out and have a nice lunch, everybody treat each other.

When he got to be a state judge, we went out to Whitesides, and every once in a while we'd go to a bigger, nicer hamburger joint, little Italian or Chinese restaurant, something like that. Nothing fancy.

At various times we'd go out to better restaurants, but that was for a celebratory thing, not -- not every day.

Q Did -- who paid for those lunches?

A Porteous paid his fair share always as a lawyer. When he got to be a judge, he paid for his fair share when he was at Whitesides. He's paid for lunches. Every year, Tom had -- went to CLEs we'd go to, he would buy eight, 10 lawyers lunch, supper, just all the lawyers together, the tip and everything, which everybody looked forward to that.

Q That was at a CLE, an annual CLE?

A Yes. Yes.

Q Did you ever give any gifts to Tom Porteous?

A Yes, sir.

Q What gifts did you give him?

A Sweaters, pens, shirts. I gave him some -- I thought he drank gin in his earlier days, I remember giving him a bottle of that.

But my wife would buy the gifts at that point in time, and there was always gifts at Christmastime, always gifts at birthdays, always gifts for the kids.

And Mel, bless her soul, she's gone, she was always generous to my daughters. They always gave something appropriate and nice at Christmastime.

Q So you would reciprocate gifts?

A Absolutely. Our families did that on a regular basis, prior to 2000.

Q Thank you.

After he became a federal judge, did you continue to do things socially together?

A You know, after 2000, that changed a little bit. My wife had some problems and she was dealing with those, and we didn't get to go many places and do a lot of stuff.

But yeah, we still did things together.

Q What about in -- when he became federal judge, which I believe was in 1994?

A 1997?

Q '4 or '5?

A '4?

Q Yes.

A I'm sorry, '4.

Q Did you continue to see him as often when he was on the federal bench?

A When he got to the federal bench, I was proud of him, happy for him, tried to get down there once a week, you know, just to see him, because he was not there anymore. I'd get -- Porteous had a very interesting courtroom. You could go there, use the phone. In those days, no cell phones. In the

early days you could go to his courtroom, use the phone, you could use the toilet, get a glass of water, you could do things. It was an open courtroom.

Everybody saw him, and it was kind of fun to have a legal community like that.

When he got down here, it's cloistered, locks and walls and everything that we have these days. Took my shoes off so many times today I'm going to have to have them resoled when I get home.

All of this security stuff. When he got down there, it was hard to see him. Then it went from every other week to once a month. I left a message once, described myself and why don't you give me a call. I'll call you next Tuesday, I'm sorry. Next Tuesday would come and he'd be busy.

We weren't as close or as frequent after we got down there, but we tried to get together as often as we could.

MR. SCHWARTZ: Thank you, Mr. Gardner.

THE WITNESS: Thank you, Mr. Schwartz.

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Mr. Gardner, I think you said in your testimony that Judge Porteous is one of your closest

friends in the world?

A I didn't say in the world, but he's a close friend.

Q But you would describe him as one of your closest friends in the world, wouldn't you?

A He's a close friend.

Q Could we call up page 5 of Exhibit 32. This is your testimony before the Fifth Circuit.

A "One of my best friends in the world," okay.

Q "But I have to tell you I'm Tom Porteous" --

A Yes, sir, I agree with that statement. I made that. I read it.

Q Is that a fairly accurate statement? You were that close? You've been in each other's weddings, godfathers. Do you have many closer friends than Judge Porteous at least at this time?

A Yes, sir.

Q So he is --

A He's one -- was one of my closest friends. Since Mel died, it's been a different thing.

Q Would you say, you know, up until his time on the federal bench, maybe during the early part of the years on the federal bench, there was probably

no one outside of his family who knew him better than you did?

A I knew him well. I don't know if anybody knew him better than I. But I knew him well.

Q And when the FBI came to interview you because of your close friendship with Judge Porteous, you were somewhat less than candid with the FBI, weren't you?

A I don't think I was. I think -- I want to go on record, the FBI agent who interviewed me came in, asked me what I did for a living, and I told him I did family law. He spent a whole hour talking about a problem that he had related to family law and in the last three seconds -- can I finish? In the last three seconds, he said, oh, by the way, is Judge Porteous a good guy and I said yeah, he's a good guy. He asked me if he had any aberrant sexual behaviors, I remember that as one of the questions, and I said not to my knowledge.

Q You can certainly finish your answers, but it will go a lot quicker if you address your answer to my question.

A Okay.

Q Were you somewhat less than candid in your interview with the FBI?

A No, sir, I think I -- no, sir, I think I answered the FBI to the best of my knowledge. If you'd like to point out some of my uncandidness, I'd be happy to reply.

Q Well, I certainly will. If we could pull up Porteous 347, this is your FBI 302. Do you recall being asked whether Judge Porteous ever was known to abuse alcohol?

A No.

MR. SCHIFF: Could you highlight that statement for me.

MR. TURLEY: Madam Chair, I just wanted to object. If the Congressman is using this document to impeach, he hasn't posed a question as being impeached by the content of the document. He simply went to the document, he's pulling out lines.

CHAIRMAN MC CASKILL: I believe he asked him if he recalled saying he'd abused alcohol. He may be using it to refresh recollection, I don't know.

MR. TURLEY: Maybe the Congressman could be clear, but usually if he's going to be impeached or refreshed, he's given a question first, such as did he use alcohol, and then if the answer is in conflict with the 302, then it can be used for that

purpose.

MR. SCHIFF: Madam Chair, may I proceed?

CHAIRMAN MC CASKILL: I think the question was whether or not he was going to be candid with the FBI investigator, so he may be impeaching him on that basis.

So go ahead, Congressman Schiff.

MR. SCHIFF: Thank you.

BY MR. SCHIFF:

Q Mr. Gardner, do you recall telling the FBI that you had never known of the candidate to abuse alcohol?

A I wasn't asked that question, sir.

Q So if we look at the record of your interview, where it provides "Gardner has never known the candidate to use illegal drugs or abuse alcohol or prescription drugs," your testimony would be that that's a false statement in the 302?

A My testimony is that's a synopsis of someone who didn't do his job and filled in the blanks. He never asked me that question, sir. I told you, he spent the entire hour talking about his personal problem with me because he was very concerned about it, and spent three minutes at the end and says, Porteous an okay guy? And I said as

far as I know. Is he competent? I said very competent lawyer. He'd make an excellent federal judge. I said that about him.

But he never asked me about drugs or alcohol, sir. I do not -- I do not remember that question specifically.

Q So your testimony, Mr. Gardner, is that the only things he asked you, other than his personal family situation, that part of the interview lasted about three minutes?

A Three minutes. And he ended up, did Judge Porteous have any aberrant sexual behavior patterns, and I said not to my knowledge. That was the last question he asked me, which I thought was strange. But he did ask me that.

Q So all of the information in this 302, according to your testimony, was gathered in the last three minutes of the interview?

A Sir, what I'm telling you, that that interviewer did not do his job. He came in, he was fascinated with the fact that I had some knowledge about an area of the law, and he asked me personal questions for almost the entire hour. We went on and on.

I'm thinking to myself, when is this guy

ever going to get to the interview? He's here to interview. And he never gets to the interview.

At the end, how is Judge Porteous? Is he an okay guy? I said he's an okay guy, very good guy.

Q And Mr. Gardner, do you recall the FBI agent asking you if you knew of any financial problems that the candidate might have?

A I knew of no financial problems that Judge Porteous may have in 1994. No, sir.

Q That's what you would have told the FBI agent?

A If I was asked that question, that's what I would have probably told him, that as far as I knew, Tommy seemed to have his finances in control. Even though we were close, he never shared with me any financial problems, and I wasn't aware of any financial problems.

Q Could we call up page 62 of the grand jury testimony, Exhibit 33.

I'd like to read a portion of this to you and see if you recall testifying to this in the grand jury.

MR. TURLEY: Objection, Madam Chair. This is a grand jury transcript. Once again, we have no

question. I'm not too sure why this is being introduced. But there was a previous ruling on the use of grand jury transcripts.

MR. SCHIFF: Madam Chair, I have just --

CHAIRMAN MC CASKILL: I believe that he should have an opportunity to ask the question. Is your objection that he can't use the grand jury testimony to impeach?

MR. TURLEY: He's just brought up part of the grand jury, he hasn't asked a question yet. And I was just --

CHAIRMAN MC CASKILL: I think -- I think we need to wait for him to ask a question, see if whether or not it's appropriate or not. He can impeach him with his grand jury testimony. You don't quarrel with that, do you?

MR. TURLEY: No. But I know of no question that he's asked. Usually you ask the question first.

CHAIRMAN MC CASKILL: Why don't we give him a chance to ask it.

MR. TURLEY: Okay. Your Honor.

BY MR. SCHIFF:

Q Mr. Gardner, do you remember being asked in the grand jury a question, "did Tom Porteous have

a good idea of what his financial situation was"?

"Answer: "Oh, I don't know that. I don't know that. I think he was always short. I think that's why, you know, he would ask me from time to time for money for stuff, you know, to buy gifts, to do this or whatever."

Do you recall testifying to that in the grand jury?

A Yes, sir. Don't take it out of context. When I say "short," there's no paper in his wallet. That's short. I don't mean short from a financial standpoint. I think you're reading something into that.

And what I said, and if you look at it, it said I believe that Tom's wife, who hung around with doctors' wives, liked to keep up with the Joneses. She told my then wife, you should have a furniture bill, make sure your furniture is up to -- hell, I bought a Duncan Phyfe set that's 20 years old for $400 and I was pleased with it.

Q Mr. Gardner, you were asked by the grand jury not whether Judge Porteous always carried money in his wallet, not whether he sometimes forgot his wallet. You were asked about his financial situation. And your answer was "I think he was

always short." Did you tell that to the FBI?

A FBI?

Q When the FBI asked you if he had a financial problem --

A I told --

Q Please let me finish the question, Mr. Gardner. When the FBI was doing a background check on Judge Porteous and they asked you about his financial situation, why didn't you tell him that you told the grand jury, that you thought he was always short?

A I just explained that. I'll do it again for you so that we can make it clear. When I said "short," I meant that he didn't carry money around in his pocket. On the occasions that he asked me, Donny, you got two 40s or two 20s or 40 or whatever, that's what I meant.

If you go on to read that, I said that I -- go to the last line there before you take it off the screen, and you will see, I don't know anything about that. Let's read it all, if we're going to read it, let's make it clear and get the full context, because take -- I'm good at taking stuff out of context, because you can do wonders with it. I don't want you to take my testimony out

of context.

Can we put the page back on where it says, you know, I don't know about his finances? That was at the bottom, wasn't it?

Q Mr. Gardner, I'd be happy to show you the quote again. Would you like to see it again?

A Let's see the page again.

Q Let's pull it up on the screen.

A No, wrong page. Yeah, right page. "Did you tell Porteous have a good idea of his financial situation was?

"Answer: Oh, I don't know that." Line 23, "I don't know that." Line 24, "I think he was always short."

When I said short, I explained to you what I said about short. I meant between him and I. I didn't mean height or that he had financial problems.

Please don't read the word "short" financial problems.

Q Mr. Gardner, I wouldn't want to put words in your mouth.

A Please don't. You won't.

Q I understand when you testified before the grand jury that he was always short, you didn't mean

that he had financial problems. That's your testimony today; correct?

A In retrospect, I learned of Tom's bankruptcy and called him up, somebody in the courthouse told me about it, and he sheepishly told me that. That was the first time that I became aware of any financial problems that Tom Porteous had.

They lived well, the kids were well dressed, they went to good schools, they always had lavish parties at their house, they had good food.

Everything was perfect at Tom Porteous's house, Judge Porteous's house.

Q And Mr. Gardner, from time to time you also would give Judge Porteous money to gamble. Isn't that right?

A From time to time throughout our relationship, before he was ever a judge, he'd ask me for a few dollars. And you have got the transcript. We were out shopping for gifts at Christmas season, he had run out of Christmas money, I guess, and I had some on me, and he asked me for some money to buy glasses for his wife.

When he became a judge --

Q Mr. Gardner, I'm not asking you about

Christmas presents right now. I'm just asking you about gambling.

A He would.

Q This is a yes-or-no question. Did you or did you not from time to time give Judge Porteous money to gamble?

A No, I gave Judge Porteous money. I told you already, if you read it, I don't know what he did with it. I presume that he gambled with it because he took it sometimes at CLEs, he would come by, everybody would have supper and everything, he would come by and said Donny, you got $100 on you? I gave you $100. Tom is a bummer. If he's out of cigarettes, he's going to bum a cigarette. If he was out of money, he would bum money.

I didn't expect -- as a friend, I gave it to him. And as you say, as a good friend I gave it to him. I would have given it to him willingly. I gave it to him with no expectation that he would ever do anything for me as a judge or that he would do anything dishonest that I was buying him. It didn't come in a bag, box or envelope. It came out of my wallet in front of everybody if he asked me for it. That's the sum of it.

A friend giving money to another friend.

And the Jiminy Cricket told him not to gamble. At some point in time, he'd be out having a few drinks and gambling. I don't gamble. I think it's a con game.

But there are a lot of people who don't think that.

Q Mr. Gardner, this will go a lot quicker if you will confine your answers to my questions.

Let's call up page 31 of the grand jury transcript.

A Yes, sir.

Q You just testified that you didn't give the judge money knowingly to gamble. In your grand jury testimony, you were asked.

"Question: Did you ever provide Porteous with money to gamble?

"Answer: I did.

"Question: Can you tell us when that happened?

"Answer: I wouldn't say often, but when I was with Tom, he'd come up to me and I was -- I don't know the proper word to say, we're such good friends, Donny, you got $200, can I borrow $200 from you? I'm a little short."

A "I'm a little short."

Q Please let me finish.

A Same "short" I referred to before.

CHAIRMAN MC CASKILL: Mr. Gardner, you can't interrupt the question.

THE WITNESS: I'm sorry, ma'am, I won't.

CHAIRMAN MC CASKILL: Thank you.

THE WITNESS: I apologize.

CHAIRMAN MC CASKILL: Thank you.

BY MR. SCHIFF:

Q "I'm a little short. I'd give him the $200, can I borrow a hundred from you, you know, and I'd give it to him."

So you did give him money to gamble, didn't you, Mr. Gardner?

A I gave him money while we were at gambling institutions. Would you go back up to line 1 through 5 also?

Q If you gave him money to gamble at gambling institutions, then why a moment ago did you say you never knew whether he gambled with money you gave him?

A I didn't know. I gave it to him at CLEs that were held at gambling institutions. Okay. I would presume then, if you want to be perfectly honest, I don't want to beat around the bush, I

guess he was going to gamble with it or go buy a drink with it or meal or something. He was going to do something in the casino with that money, and gambling is one of the, A, B, C, A is gambling.

Q Judge Porteous from time to time sent you curators, didn't he?

A He did.

Q In particular, there was a time in your practice when you had left your firm and you'd started your own practice where you needed help paying the rent, paying your secretary, and your very close friend, Judge Porteous, started sending you curators to help you pay the bill. Isn't that right?

A That's correct.

Q I think you testified as well in the grand jury, but let me ask you, you also gave him money for his son's externship; is that right?

A Timmy -- I'm sorry. Timmy Porteous externed for the Senate, I believe, or House in 1994. Everybody was proud of him. I think they had a party and I questioned the then wife and she said that she put a check, she believes, in an envelope, you know, congratulations. Because everybody was very proud of him. There were not a lot of kids in

the circle of friends that we all had and had nice friends that had that opportunity, and they were taking up gifts for him to defray his expenses. You guys don't pay for your externs, I understand.

Q Did Bob Creely tell you he was also sort of hit on by the judge to pay for externship?

A I think about the same time a number of friends had been asked to participate in the party or to give a gift to Michael -- excuse me, Timmy -- he's got a Michael son too -- Timmy for his externship.

Q Didn't Bob Creely call you and tell that "that rotten bastard is hitting me up for money for his son's externship"?

A You called Bob Creely. You watched his demeanor. He did say that. It's Bob. He didn't mean anything by that. That's the way Bob reacts to everything.

Q You don't think he felt put upon by the judge who kept hitting up for money?

A In a lot of all this testimony, I guess he felt put upon. But I didn't feel put upon giving Timmy a few dollars to -- a minor few dollars to offset his extern. But Creely did say that, yes, sir, that is a factual statement.

Q I want to ask you about the Liljeberg case. You testified that when you were brought on, you really knew nothing about federal law or federal court. That wasn't why you were brought on; right?

A Yes, sir.

Q And I think after you testified about the circumstances in which you were brought on and why Mr. Mole wanted a handsome face at the table --

A Thank you.

Q -- I think you testified in retrospect, in looking at this, you think it was unethical.

A I didn't say it was unethical. I think I was asked that. I think the ethical representation of a client is what I did in this thing. I gave my all for that client. I gave every hour, I read every document, I participated.

I did what they asked me. Mr. Mole, if you will remember his testimony, in all of the places he's testified, said Don Gardner did a good job, he did exactly what we asked of him. He gave us input, not only with the judge, but I ultimately learned the case, and I was talking to them about witnesses and about strategies and other things, because I started to enjoy that case.

It was an interesting case.

Q I thought I understood in the latter part of your testimony on direct that you were suggesting you thought there was something unethical in the way you were brought on to the Liljeberg case, that the amount of money they were throwing at you, that --

A They threw a lot of money, yes, sir.

Q Is it your testimony that you think there was something unethical about bringing you on to be basically their friend of the judge?

A They wanted to have a face at the table, and I guess because I had refused. And I was not refusing to increase the price of the fee or the cost.

Q My question, Mr. Gardner, is were you suggesting earlier that you think this is unethical that they brought you on to this case?

A No. I don't think it's unethical that I joined a case, okay.

Whether you read into it my presence there and my friendship with Judge Porteous. But remember now, my presence on that, I told everybody so that there would be no unethical even assumption or thinking I was going to do anything, to say listen, guys, I'm not going to do anything other than participate as a lawyer in this case. I'm not going

to go behind closed doors and ask the judge for any favors. I'm not going to do anything other than represent my client to the best of my ability. And that's what I did.

Now, whether you want to read into that contract -- because it's a convoluted contract. I think it's an enticing contract. But for someone who has no scruples, it's unethical.

I think I have scruples, so therefore, it didn't become unethical. Had I gone behind the door and did the $100,000 recusal, unethical. Had I tried to manipulate the numbers with Judge Porteous, one of my best friends in the world, Tom, look, just give me another this, I get $200,000, I get to take it home, I wouldn't do that, that is unethical. That's what I'm telling you.

Q So Mr. Gardner, I want to make sure I understand the ethical standards you're applying. You're suggesting, then, that it would be unethical of you to join the case, be successful in getting the judge recused from the case and take the money, but to take the money, even though he didn't recuse himself, that's okay? To take the contract with $100,000 if he recuses is okay, as long as you don't follow through on what the contract hopes will take

place? Is that your testimony?

A It's unethical for me to accept $100,000 and try and get the judge off the case. The judge had already heard a recusal motion, you heard me before. I knew of no reason to refile or to initiate another recusal.

And had I done that in any way, shape or form, in trying to go after that $100,000 incentive in that contract, that would have been unethical on my part.

Q Did you think you had an ethical obligation to disclose to your client the kind of relationship you knew Bob Creely and Jake Amato had with the judge?

A Judge Jones asked me that question, you got the transcript there, and I said no. And I'll say no now.

Because I knew of no unethical relationship that they had. I knew that they were friends like us. I knew they went out to eat. I've gone out to eat, the four of us have gone out to eat at lunch, where around the courthouse we'd all go out to eat.

I know of nothing, I knew of no facts that made the relationship between those two lawyers and

Judge Porteous unethical, immoral or in any way that I could go tell my client.

My client was afraid because they thought that they were friends. That's the only reason --

Q Mr. Gardner -- and I think you testified that you understand the ethical standards better than Judge Jones; right? Wasn't that your testimony?

A I can't say that, sir.

Q Wasn't that your testimony on direct, that you understand the ethical standards, Judge Jones doesn't really understand them?

A I can't say that.

Q Let's take a look -- you invited us. Let's take a look at the Fifth Circuit testimony that's page 472. Let's start at the bottom of the page.

"Chief Judge Jones: No, sir, I'm asking you a question. If you'd known of the facts that would -- of a relationship between Judge Porteous and counsel for the other side that would have required him to make a disclosure for purposes of recusal motion, would you not have had an ethical obligation to tell your client?

"The Witness: My client already knew that

Judge Porteous --

"Chief Judge Jones: Would you not have had an ethical obligation? Answer yes or no, sir.

"The witness: No, ma'am."

A Let's go back now. She says on line 5, you're taking this out of context --

Q Mr. Gardner, I'm not finished with my question. I would also like to read the continuation of this discussion with Judge Benavides on page 475, beginning with Judge Benavides -- excuse me, beginning with the witness, "We were giving it to Timmy Porteous, because we knew the young man as long as I did, your Honor, this had nothing to do with influencing Judge Porteous in the case or anything like that. It was a social thing.

"Judge Benavides: I can't understand that. I just cannot understand that a professional held to the standards that were supposed to be held to, I'm not talking about as a judge, I'm talking about as a lawyer, that if I had a client and I had information like that, that I wouldn't feel that it was my duty to tell my client or to tell the lead counsel in the case who had previously filed motion to recuse and had not had that particular information in his motion, which would have

triggered at least, even if he forgot it, a responsibility to advise all counsel that he had received money from these lawyers in the past, including you, which was never done. And you're acting like it's no big deal, like -- like this is some kind of culture. I can't understand it. I can't understand why you're not shocked or ashamed."

Do you think Judge Benavides and Judge Jones don't understand the ethical standards? Can you tell us --

A They were witch hunting, in my opinion. And if -- they initiate that whole line of question, do you not think you had a duty to inquire.

Inquire of what? Do I take a deposition of these people? Do I subpoena their bank records to see if there's a check written to Judge Porteous?

She said duty. I'm telling you what I knew. I knew they were friends. I told Judge Jones I knew they were friends.

The motion had already been heard that they were friends. Please, I knew of no other incident, other than what you people have tried to bring out, that would have allowed me to inquire or tell my client.

My client came in telling me, we are

afraid Porteous -- Amato, Creely and Porteous are friends. Is that true?

Q Mr. Gardner --

A They had already made that inquiry, Counsel.

Q Mr. Gardner, if I could. So you're brought into the case after the recusal motion, when Mr. Mole, who made the motion, doesn't know of the money going from Mr. Amato and Mr. Creely to the judge, doesn't know about any of this stuff that you know about, just let me --

A I don't know of any money going from Mr. Amato and Mr. Creely --

Q Let me finish.

A -- to the judge, sir.

Q Let me finish, please.

A Okay.

Q You know of the relationship that the judge had with these two lawyers that was the subject of the recusal motion, you know that Mr. Mole doesn't know the facts behind it, and you say nothing. And you think that's perfectly fine for your client.

Is that right?

A Say nothing about what? What do I say

nothing about? I told -- they knew that they were all friends to begin with. That brought some fear to them, because they thought that the judge would lean toward a friend. I told them he wouldn't.

And then I don't know -- what are you telling me I knew that I should have disclosed?

Q Do you think, Mr. Gardner, that if you knew the judge was hitting up Bob Creely for money --

A I didn't know that, for the second or third time. I didn't know the judge was hitting up Bob Creely. Oh, for the gift for his son? I knew that. I knew that everybody in the judge's circle had been asked to participate in a gift for Timmy Porteous so that he can extern. I knew that.

But you're telling me that --

Q So Mr. Gardner, you've got a multi, multimillion dollar case, and you get hit up by the judge in that case --

A Sorry, sir, that is a -- don't say "hit up."

Q You can characterize it how you'd like.

A I will.

Q You get asked for money by the judge while that case is under submission, you know that a

counsel from the firm on the other side is also getting hitten up by that rotten bastard for money.

A Wrong.

Q And I think you have no disclosure duty?

A Wrong. Timmy Porteous's externship is in '94. I join in '97. The case is tried in '97. The extern occurred before the case even went before the judge.

Q So you knew when you got on the case --

A Do you know those dates, though?

Q Mr. Gardner, according to your recollection, then, you knew when you got into the case that one of the attorneys from the opposing firm had given money to the judge, and you felt no disclosure duty on that, and you didn't feel any disclosure duty that you had given money to the judge for his son either. Is that your understanding of the ethical standards, that Judge Jones doesn't understand and Judge Benavides doesn't understand?

A No money was given to Judge Porteous for the externship of Timmy Porteous. You're trying -- your question -- you're totally wrong.

The moneys that the rotten bastard, Bob Creely's comment, were just the fact that someone

asked him for something. That's Bob's way.

But the money went to Timmy Porteous. It was a gift to a friend's son. I knew Timmy Porteous the day he was born. I just hugged him in the hallway when I entered here. And I've known him. And he's a fine young man, a fine lawyer.

And you tell me there's an ethical problem with me giving a friend's child a gift, and that gift should exclude people, and if I knew the other side gave a gift in a social context to his son, that I should go in some way file a recusal motion?

Q Mr. Gardner, you do know what an ex parte contact is?

A I'm sorry, sir?

Q Do you know what an ex parte contact is?

A Ex parte contract, I think I do.

Q Ex parte contact.

A Contact.

Q Yes.

A Yes, sir.

Q You understand --

A Sorry for the hearing.

Q You understand that's having contact with a judge who has a pending case with you outside the presence of other counsel. You understand that?

A I understand that that's --

Q Am I stating what that is accurately?

A For what purpose is the contact made with the judge?

Q Just -- Mr. Gardner, am I explaining an ex parte contact correctly?

A I don't know. You can explain any way you want and you can explain it to the panel. I don't know your explanation.

MR. TURLEY: Objection. I believe an ex parte contact has to be in the case. The Congressman is referring to an ex parte contact with a counsel, so I --

CHAIRMAN MC CASKILL: What is your objection?

MR. TURLEY: Object to the question. It's not accurate. He's asking the witness about whether he has an ex parte contact, and he says the contact with another counsel.

THE WITNESS: Contact.

CHAIRMAN MC CASKILL: The objection is overruled.

BY MR. SCHIFF:

Q Mr. Gardner --

CHAIRMAN MC CASKILL: I think,

Mr. Gardner, I know that you're a lawyer, and it would be really helpful if you would try to answer questions and not ask questions.

THE WITNESS: Thank you, ma'am, I will.

CHAIRMAN MC CASKILL: Okay?

THE WITNESS: I apologize again.

CHAIRMAN MC CASKILL: If you would try to do that, I think we can go more quickly.

BY MR. SCHIFF:

Q Mr. Gardner, you understand -- let me ask you, in your view of the ethics of legal practice, is it appropriate for you to speak with a judge about a pending case outside the presence of other counsel?

A It is wrong for counsel to ex parte conversation with a judge at any time about a case that they have without the other counsel there.

Q And so it would be improper for you, or anyone else in the Liljeberg case, worth hundreds of millions, to be talking privately with the judge about issues in the case, wouldn't it?

A Yes.

Q And one of the most significant parts of Judge Porteous's decision in that case, one of the most controversial parts, was a decision he made to

award the hospital back to the Liljebergs, wasn't it?

A Yes, sir.

Q That was a devastating decision for the Liljebergs, wasn't it?

A They -- he awarded the hospital back to the Liljebergs. It wasn't devastating to the Liljebergs.

Q Excuse me, yes. Devastating to Lifemark.

A Lifemark.

Q Devastating to Lifemark.

A I'm listening.

Q Do you recall -- well, didn't you testify that you may have talked privately with the judge during that case about --

A Also --

Q Please let me finish. Didn't you testify to the grand jury that you may have talked privately, may have talked privately, with the judge while the case was under submission about whether he should give the hospital back to Lifemark?

A On direct --

Q Liljeberg, excuse me.

A On direct I commented, we went back every day. I saw a "may have," but I corrected myself in

one of these many statements that everybody wants you to give, and I said Lenny Levenson was there, I remember Lenny being there, on an afternoon. And he says, I think it was chicken doo doo on what the Liljebergs had to take because of the mortgage not being reinscribed and the foreclosure occurring.

And I said you may not like that, your Honor, but it is legal, and it definitely was legal, that the foreclosure occurred.

But I told him the foreclosure was also legal, and he couldn't give the hospital back.

I advocated my client's position. Now, from --

Q Mr. Gardner, my question was actually very simple.

Let's pull up the grand jury testimony so we can see exactly what you said and you can see whether it was accurate or inaccurate. Page 54 of the grand jury, bottom of the page.

This is you testifying.

"I had some heated discussions with him," meaning the judge. "I had a heated discussion with him on the Liljeberg case, and I remember him getting upset at me. I think it was when the lawyers were there, it may have been when only he

and I were there.

"But I told him, I said, I think this is exactly what I said, big boy, I don't think -- care how big you think you are, but even a federal judge can't overturn, because I've done a lot of real estate, I represent the clerk of court in real estate actions, a judicial sale that has occurred in state court absent fraud and ill practices, and none have been shown. I think I said that to him at the trial, and I may have reiterated it at some other point in time to influence him."

That was your testimony, wasn't it?

A That's my testimony, sir. And I want to tell you that Lenny Levenson was present, and it was at one of the afternoon breaks, when he commented about it. And when I say "influence him," I didn't want him to get the idea that absent fraud or ill practices, that anyone had the legal authority to offset a judicial sale like that.

And if I am making a legal argument to a judge with the other side there, to try and persuade him, and the use of the word "influence," but I've never tried to influence Judge Porteous at any point in time, illegally, without the other side there.

We never talked about this case outside of

the courtroom and the pretrials. When I say "other people," we had other meetings at the nice table and chairs all federal judges have in their conference room where that same point was brought up again with other lawyers there and possibly Mr. Mole.

Q Mr. Gardner, you're not disputing this was your testimony in March of 2006, are you?

A Those are the -- those are the words, sir, but I'm explaining to you that I never --

Q Mr. Gardner, I'm just asking you if you dispute your testimony.

Do you think your memory in 2006, much closer to the time of these events, was better or do you think your memory years later in this proceeding is better?

A My memory hasn't changed, sir. I never had an ex parte conversation with Judge Porteous about the Liljeberg matter, you know. Because let me tell you what. Had I done that, the result may have been a lot different. And I told everyone at the beginning, I was not going to do that.

Q So when you said in the grand jury "it may have been when only he and I were there" --

A He and I were there in the back with Levenson, sir.

Q Mr. Gardner --

A For the third time.

Q Was that accurate when you said that?

A Well, it's --

Q Is that the best of your recollection at the time, that it may have been when only you and he were there?

A I never had an ex parte conversation without all parties involved with this case, sir.

Q And didn't you also state, "I may have reiterated that at some other point in time to influence him"? What did you mean by that, to influence him?

A I may have tried to make the point stronger, because the judge in one of the conferences we had after all these days, was not happy about the fact that he looked like someone put over on somebody. And I was explaining to the judge the legal significance of the inscription and mortgages and everything.

Mr. Levenson, Lenny Levenson, knew real estate law too. We've had many heated discussion, because Lenny and I were arguing about that in front of the judge about he's saying, look how underhanded this was. And I said Lenny, you know this is not

underhanded. We don't have to reinscribe that mortgage. There is no obligation. If the mortgage isn't there and a foreclosed creditor who stands $7.2 million judgment can foreclose, he can do that. That was the argument.

Read what you want --

Q In fact, Mr. Gardner, the point you made to the "big boy" that he couldn't take the hospital away, the point you made was correct, wasn't it? He really lacked -- he lacked the power to take the hospital away, didn't he?

A I believe it was correct then, now, and I think the Fifth Circuit agreed with me.

Q Let me ask you one last thing, Mr. Gardner.

A Please.

Q You were aware during the Liljeberg case, weren't you, that lawyers involved with that case were trying to provide benefits to the judge to influence his decision? You were aware of that, weren't you?

A No.

Q That was your belief at the time, wasn't it?

A No. I knew of no benefits that were done

by the other side to influence the judge.

Q You --

A And --

Q Mr. Gardner, you believe exactly that's what was happening, didn't you?

A No.

Q Please call up page 50 of the grand jury testimony. Let me read this for you. Question --

A Can you make it bigger over here so I can read it?

Q Yes, please blow up beginning with "were you aware."

"Were you aware of any payments made to Porteous or on behalf of Porteous related to that litigation," referring to the Liljeberg case.

"Answer: By whom?

"Question: By anyone.

"Answer: Not by me, if that's the question. If the question is did I pay or give anything in connection with that litigation to Judge Porteous, the answer is no.

"Question: Are you aware of anybody else?

"Answer: No.

"Question: Having done so? Are you aware of anybody providing benefits to members of his

family?

"Answer: I don't know what kind of benefits, you know. Some benefits were provided. I just don't know what kind.

"Question: Well, let's break that down. What do you have? What are you talking about when you say some benefits were provided?

"Answer: I don't know. I don't know what I'm talking about. I don't know. I -- I just have a feeling, to answer your question honestly, I figure there are other people who have provided benefits or at least tried to, you know, buy him a drink, buy him a whatever or give him something. I don't know, I -- I don't -- I was never there when any of that occurred. I just think that probably other people who were trying to influence Judge Porteous."

Was that your testimony in the grand jury?

A That's what the words say.

MR. SCHIFF: No further questions.

MR. TURLEY: Madam Chair, we have a brief redirect.

REDIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Gardner, let me just ask a few

questions just to make sure we understand your testimony.

What role did Mr. Levenson play in the Liljeberg case?

A He was lead counsel for Liljeberg.

Q So he was on the other side?

A He was.

Q When you and he had a conversation in front of the judge, that was not an ex parte communication; is that correct?

A We had many conversations in front of the judge with different parties. There were six, seven lawyers on Liljeberg's side, three, four, five on Mole's side. And different lawyers would interface with the judge at different times. We may have had some with all attorneys present in the conference room to kick off rules and stuff like that to begin the case.

But there were constant meetings, because there was -- the issues in this thing were so diverse. I think Mr. Mole, who is an excellent, who really had his hand on this case, knew about it.

But it was multifaceted litigation. Very interesting litigation, too.

MR. SCHWARTZ: Thank you. No other

questions.

CHAIRMAN MC CASKILL: Does the panel have any questions?

Senator Udall.

EXAMINATION

BY SENATOR UDALL:

Q Mr. Gardner, could you explain to me a little bit about this fee that you got, $100,000, I understand, as a result. You were in, and you were counsel for Lifemark; is that correct?

A Yes, sir.

Q And you got $100,000 as a result of that?

A Yes, sir. A flat fee.

Q Yeah. And then you gave $30,000, I think your testimony is, to this --

A Tom Wilkinson, yes, sir.

Q Who is a county official?

A He's a lawyer. He had a civil practice, and he worked for the county, yes, sir.

Q He was doing both things?

A Yes, sir.

Q How did it come about that you got the agreement reached that you were, when you got your payment, you were going to give him back, I guess as a finder's fee or something, $30,000?

A Not a finder's fee.

Q Tell me how it happened.

A Tom and I had a lot of cases together. We had some personal injury cases together, we had some criminal cases together, his office was doing DWIs and other white collar misdemeanors. And he would send me domestic cases and I would work on those. We would go meet with the client and he'd give me a referral fee, I would give him a referral fee.

Tom asked for the referral fee based upon the fact that he interfaced with the client and actually created the client, in terms of he and I working on it.

Although I want to make it crystal clear that Mr. Wilkinson's participation was minimal. When I say "minimal," he'd talk with me about it on a regular basis, asked me how it was going, and I told him what was going on in the trial and stuff.

But as far as taking part in the trial, he did not.

Q At what point did the discussion come about that you were going to get -- you were going to give him back the $30,000 of the $100,000?

A Tom set that number and asked for that.

Q Set that number at the beginning? At what

point?

A Very beginning. I think after I had been retained. And I don't -- I don't have those records. Katrina has taken so much from so many of us in Louisiana. I wish I could go back and see that. I tried to do that, but --

Q But you don't have any memory of how the discussion occurred and when -- when it was decided? Did he come to you and say, you know, you should get in on this, because you're going to get $100,000, but I want to have 30,000 back as a result of that?

A Senator, to be perfectly honest with you, I don't know if the discussion came at the time I was retained, shortly thereafter or thereafter. But it occurred at one of those points in times that Mr. Wilkinson asked for a portion of the fee.

Q You say it wasn't a finder's fee. What was it?

A Well, we had a relationship, Senator. Our offices worked closely on a lot of cases. Tom and I split fees on different cases, he'd refer cases to me, I'd refer cases to him.

We had an ongoing working relationship. This wasn't a one-time thing, where Tom picks up the phone and says, I'm going to send you a client, you

need to send me money.

We've got a working relationship on fees and cases. This wasn't the first case that his office and my office had ever worked on.

Not only did I work with Tom, he had a number of lawyers in his office, I worked with them too. They sent me cases they didn't handle. I participated, sent them cases, worked them with them, they worked some with me.

So we had an ongoing working relationship of cases long before Liljeberg came along.

Q Do you have any knowledge that Mr. Wilkinson got any money from Lifemark or any of the Lifemark attorneys?

A I do not, sir. I have no information to that effect, nor has anyone ever told me anything about that.

I do know he talked -- he was very close to Mr. Mole along this way.

Q Just one other area I wanted to ask about. As you probably know, Mr. Amato and Mr. Creely have surrendered their legal licenses.

A Correct.

Q And I assume that they felt that they had done something wrong as a result of that; right?

A Don't know that.

Q You don't know that?

A I know they have surrendered their licenses.

Q And have you -- do you still have your law license?

A I still have my law license.

Q And have you been investigated by the state bar association?

A Only thing the state bar association did, when they saw my name in the Times-Picayune, they sent letters out to everybody in the Times-Picayune. The Times-Picayune said get Porteous and everybody who has ever known him, to the second and third generation.

Q And you're in good standing now and not under --

A As of now I am in good standing. I believe that everything that I have done, including money given to Tom Porteous over the years, and I calculate that, nobody wants to bring that out, at about a couple thousand dollars over 20-something years. Because $100 -- I calculate about $100 a year.

Judge Porteous didn't ask me every day of

his life to give him money. We were out on an occasion, and he'd say you got a few extra dollars. I'm guessing that, and at one point in time, the grand jury testimony says, well, could be 3000, and I said far less than that.

But if I calculate, I at least gave him $100 for 20 years, I know it's $2000, give or take.

But I don't see that as an ethical problem in a friend giving money, loaning money, without the expectation of recovery.

I gave some bum in front of the Red Top Motel last night $2. Very poor hotel, by the way.

Q I just want to ask two more questions here. You're in good standing with the Louisiana State Bar right now?

A I am in good standing with the Louisiana State Bar. But believe me --

Q And that's fine. There's no question there.

A Believe me, there will ultimately -- I will answer the same questions to the bar association after you -- the Senate panel and Senate votes. I'm sure there are going to be additional questions.

Q Are you under investigation today by the

Louisiana Bar Association?

A There is a file open, Senator, and a letter has been written. And that's where it's at right now. I'm sure that the bar association is waiting for all of this to come, and I will be asked to make a statement as to my participation in Liljeberg, my participation with Judge Porteous, our friendship, gifts, any of those things.

Q So there is an open investigation now, is your understanding?

A Well, when you say "open" -- I received a letter in 2008, one letter so far. And I've retained counsel, and she wrote a multipage letter back saying that she believes that everything that I have done, in part of that inquiry, was legal under the ethical and codal articles in the State of Louisiana.

SENATOR UDALL: Thank you, Mr. Gardner.

THE WITNESS: Thank you, Senator.

CHAIRMAN MC CASKILL: Senator Kaufman.

EXAMINATION

BY SENATOR KAUFMAN:

Q Just to get an idea of kind of the Gretna mentality. You said you just gave a few thousand dollars to Judge Porteous. What would you say if

you knew that Amato & Creely gave him $20,000 over 10 years?

A I heard that only through here. I want to make it crystal clear that I don't know that.

Q I was just trying to get, what would you think about that? You made the point to say I've only given a couple thousand. Would that concern you?

A My couple thousand?

Q No, no, the 20,000. If you knew that two attorneys in town had given him $20,000 over a period of 10 years, would that concern you, a sitting judge, that they were doing -- that they were appearing before?

A That they were trying to influence the judge through money?

Q Yeah.

A That would concern me in any case I was involved in, friend or no friend.

Q I'm just trying to get a flavor of the idea. You gave him a couple thousand dollars. $20,000, that would be a serious amount of money to be given to --

A It's a serious amount of money.

Q Let me ask you another question. As you

said, during the Liljeberg case --

A Liljeberg.

Q Liljeberg case. Would you have been concerned if you knew that Amato & Creely had given him $2000?

A It would have raised my curiosity. That would have given me some concern. I would have, of course, wanted to know what was that about, was it done to influence the judge or whatever. But again --

Q So in other words, the fact just that they gave him $2000 would not concern you until you found out what the money was for?

A As the -- as Judge Jones said, I had a duty to inquire. And I would have inquired as to what the $2000 was about.

Q No, I'm just asking in terms of you're in -- by now he's a federal judge in New Orleans. There's been a lot about kind of the Gretna mentality. I'm just trying to get straight, in the Gretna mentality, if you were on the one side of the case, if you knew someone on the other side had given the judge in the case $2000, would you be concerned about that or would you just have to find out what it was about before you were concerned?

A I would be concerned and I would make an inquiry, if I thought on behalf of my client that that was in any way, shape or form done to influence the judge or done to obtain some advantage for their client.

Q So just the fact that he got $2000, you would need some more information? You don't think it's improper for someone to give a judge in a case they are involved in, as an attorney, $2000? For any reason?

A For any reason?

Q Yeah.

A I'd still be concerned for any reason, and I'd still make an inquiry.

SENATOR KAUFMAN: Thank you very much.

CHAIRMAN MC CASKILL: Senator Risch?

EXAMINATION

BY SENATOR RISCH:

Q You know, I don't think I'm going to get an answer to this, but I'm going to try.

CHAIRMAN MC CASKILL: You'll get an answer.

(Laughter.)

BY SENATOR RISCH:

Q Senator Udall asked you about the $30,000

and asked you what it was for. I listened here for about a minute and a half while you explained about all the other cases that you had with the gentleman, but you never said what the $30,000 was for. Do you want to try it again, briefly?

A The $30,000 to Mr. Wilkinson in connection with the case -- he started talking with Mr. Mole. I guess -- I want everybody to remember now, like I said, January of '97, late -- last week in January, as I remember, I think one of my calendars said I got a call from Tom or Mole about that time, and they didn't sign me on until March.

Again, I was reluctant to take it. But Mr. Wilkinson had indicated that, because of our relationship of sharing fees and working cases together, he asked for $30,000 on that case. Yes, sir. And I gave it to him. I'm not denying that.

Q And what was it for?

A Fees on a case that we were sharing. We shared fees on cases.

I didn't -- I didn't initiate that case. Mole didn't talk to me. Mole only sent stuff to Wilkinson. He was working on Mr. Wilkinson to try and get me to sign on to that case.

VICE CHAIRMAN HATCH: Mr. Gardner, you

called it a referral fee if I recall your testimony correctly.

THE WITNESS: Well, referral fee would indicate that I didn't have any relationship with him, Senator Hatch.

EXAMINATION

BY VICE CHAIRMAN HATCH:

Q That he referred the case to you and --

A He referred the case to me, and we had an ongoing relationship where cases were referred back and forth, not just between Tom and me, but between Tom's lawyers in his office and my office.

Q I don't see anything wrong with the referral fee. It just does seem strange, I have to admit, in this context. But you have a right to make a referral fee to somebody who -- seems to me, somebody who has referred a case to you.

EXAMINATION

BY SENATOR RISCH:

Q Is that what it was, referral fee?

A I wouldn't classify it as a referral fee. I would classify it as the ongoing relationship. Because, you know, I agree with Senator Hatch that referral fees are not illegal. But the code calls for it to have some type of relationship, which I

have with Mr. Wilkinson.

You can't just send me a case and do absolutely nothing on the case and me not having a relationship with you and you want a big payday.

If you and I are lawyers and you're sending me cases and I'm sending you cases, and we have a relationship, it would even out over time because on some cases, I may get a bigger portion for a small amount of work or vice versa.

But a referral fee in strict, just saying send me a case and I'll send you the money, that's not the relationship I had. And I don't want anybody to leave here thinking that, oh, Mr. Wilkinson calls up for a big payday.

We had an ongoing working relationship where clients went back and forth. We got cases. We shared them. He was a friend of mine who we did that for years and years.

SENATOR RISCH: Madam Chairman, he wins. I have no further questions.

CHAIRMAN MC CASKILL: Okay. Does anyone else have a question?

EXAMINATION

BY SENATOR WHITEHOUSE:

Q Just to be clear, Mr. Wilkinson was not

co-counsel in the Lifemark versus Liljeberg matter. He had no standing in that case; correct?

A He was not, Senator.

SENATOR WHITEHOUSE: No further questions.

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q And it is correct, Mr. Gardner, that you went to Las Vegas on the bachelor party trip; correct?

A Yes, ma'am.

Q And you helped pay for that trip; correct?

A No, ma'am.

Q You didn't pay anything for the trip?

A No, ma'am. If they had had any of that along the way, they certainly would have asked me about that. I paid for my own way. I bunked with a gentleman by the name of John Gardner, a friend of Judge Porteous's and I, and it's 52, 62 hours on the ground. I spent most of the time, we went -- John and I went to a couple shows. He didn't gamble, I didn't gamble. We went out and had a couple fine meals and looked at some of the architect back in 1999 that was going up there.

And I want to assure everybody here, since the question wasn't asked because I think it's

important, that there was no discussion at any point in time about cases. I can assure everyone, that was the last thing on everybody's mind. Everybody was up there to celebrate the young man's upcoming wedding and I guess to have a good time.

CHAIRMAN MC CASKILL: Okay. You are excused.

THE WITNESS: Thank you very much.

(Witness excused.)

MR. TURLEY: The Defense calls Professor Ciolino.

Whereupon,

DANE CIOLINO

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Welcome, Professor. Thank you for your patience. I know you've been here all day.

At the suggestion of Vice Chair Hatch, I've been speaking with Mr. Baron about just stipulating and doing away with the credentials. Mr. Baron wasn't quite as familiar with the resume yet, so he's agreed as to stipulate as to legal

ethics, and then we'll see how the questions go. I've asked for a stipulation on both legal and judicial, but he wants to look at the CV a little more. And I've got no objection.

What I suggest is we go forward and if there's an objection to some of the questions, we'll just have to resolve it. I can always qualify him for judicial if we stop.

CHAIRMAN MC CASKILL: That's fine. And let me -- I forgot to give you your time before beginning this witness. Judge Porteous has eight hours and 19 minutes remaining, and the House has six hours and 57 minutes remaining.

MR. TURLEY: Thank you, Madam Chair.

BY MR. TURLEY:

Q Just for the record, would you be kind enough to state your full name.

A Dane Ciolino.

Q Just for purposes of introduction, as you can see we have at least a partial stipulation on your expert status, could you just describe what your current position is and a brief description of your background?

A My current position is the Alvin R. Christovich distinguished professor of law at Loyola

University law school in New Orleans. Prior to teaching full-time, I graduated from Tulane law school in 1988, worked as a law clerk in U.S. District Court in New Orleans, a couple of years at Cravath, Swaine in New York, four years at Stone Pigman as commercial litigator essentially. And since 1995 I've been a full-time professor of law at Loyola, where I am today.

Q Thank you very much.

You do teach legal ethics there?

A I do.

Q I'd like to cut to the chase. One of the things Vice Chair Hatch suggested was we use leading questions so we don't keep people unnecessarily over. I know you're eager to depart with your wife so I'm sure you'll appreciate that.

Let me first ask you just generally whether you are familiar with the 24th Judicial District.

A I am.

Q Is that the judicial district for Gretna, Louisiana?

A For Jefferson Parish, and Gretna is a city in Jefferson Parish, yes.

Q And you've had experience as an academic

looking at some of the controversies in Gretna, Louisiana, regarding ethics, have you not?

A Some, yeah. The -- there have obviously been a number of investigations into the judiciary over there and into some members of the bar, and I have commented on that and been involved in some of that, yes.

Q And you are familiar generally with the allegations with regard to Judge Porteous?

A I am.

Q I'm going to be asking you some general questions about the relationship of lawyers and judges specifically as to Louisiana ethics. And your specialty, correct me if I'm wrong, is in the state of Louisiana code of ethics as opposed to the federal code?

A Correct, Louisiana Rules of Professional Conduct and standards governing lawyers and also the Louisiana Code of Judicial Conduct and the standards governing Louisiana state judges.

Q Those are the two primary sources for these types of ethical questions or lawyers and judges?

A Yes.

Q Thank you, sir. Now, in your experience

in looking at these controversies, does that include as an academic reading some of the materials in this case related to the Porteous case?

A Yes.

Q And have you read material related to the Wrinkled Robe investigation?

A Yes, a great deal of it.

Q Okay. And have you been to Gretna, Louisiana?

A Yeah. I mean, it's right across the river from New Orleans. It's not very far away.

Q As you are probably aware, some of the allegations in these controversies involve judges having lunch with attorneys. Are you familiar with those?

A Those controversies in this matter, yes, absolutely.

Q Now, the ethics rules in Louisiana have gradually changed over the years?

A Which ethics rules are you talking about, the ones that govern lawyer conduct or the ones that govern judge conduct?

Q Let's start with the judge conduct and we'll have to -- how do you want -- do you want me to qualify him right now or --

MR. BARON: Why don't we do that.

BY MR. TURLEY:

Q I'm afraid we're not going to save that time after all. I'm going to go ahead and qualify you. We've already agreed you're an expert on legal ethics.

Can you state what your educational background is?

A I got a law degree from Tulane in 1988.

Q And you mentioned that you taught legal ethics, you teach legal ethics at Tulane?

A At Loyola, and I have also taught at Tulane as well. And I teach the bar review, ethics portion of the bar review, which includes legal and judicial ethics to students in Louisiana and elsewhere.

Q Did your course at Tulane also include judicial ethics components?

A At Tulane and Loyola, yes, there's a legal component to that course.

MR. BARON: I'll stipulate to the expertise.

MR. TURLEY: Thank you very much, Mr. Baron.

BY MR. TURLEY:

Q I'm going to turn to that question about is it accurate to call it judicial code?

A Code of judicial conduct is what it's called, Louisiana Code of Judicial Conduct.

Q Okay. The code of judicial conduct in Louisiana, has that changed over the years? Is it regularly amended or changed?

A I don't know about regularly, but it has changed over the years, and it's changed significantly just in the last two or three years on some of the issues that are relevant to this matter.

Q Now, the period of time relevant to this matter largely coincides with the judge's period as a state judge. And that period, I will represent to you, is 1984 to 1994. And then he became a federal judge.

A Right.

Q Are you familiar with the rules during that period?

A Yes.

Q Now, in 1984, was there a specific rule barring judges from having lunches purchased for them or paid for by attorneys?

A No, there was no per se rule that barred that practice outright, no.

Q And your use of "per se" I think is an interesting one. Because isn't it true that you're known as something of an ethics reform, that you believe in per se rules that are clear and bright?

A Well, I mean, I think anyone who teaches in ethics and practices in the area wants clear rules so that everyone understands what the standards are, so that people can comply with them and enforcement actions, we know whether or not a violation has happened. So yeah, I mean, when it's possible, I think everybody would prefer some per se clear black letter standard rather than some rule of reason that's more difficult to -- or totality of the circumstances, evaluation, where it's difficult to figure out what the edges are.

Q In your case, though, is it true to say that you have publicly advocated for tightening the ethics rules in Louisiana?

A I think that's fair, yeah.

Q And that you have been critical of the past rules that allow gifts to be given to judges, for example?

A I think I have been and I think other people have been, including the current Louisiana Supreme Court.

Q Thank you.

A Current Louisiana Supreme Court has changed those rules because of a lot of concerns in that regard.

Q Well, I thought it would be useful for the committee to understand how the rules have changed. Your use of "per se rules" sort of makes it an easy comparison.

Would you say that the rules today are what you would call a type of per se rule, one of those clear, bright line rules?

A Yeah. I mean, effective January 1 of 2009, judges cannot accept gifts and lawyers and other people cannot give gifts to judges if it's -- they're likely to come before the court. And there are certain exceptions that are enumerated, but since that rule, the new default rule is you can't give the judge a gift, and the judge can't accept a gift, if you're likely to appear before the judge either as a litigant or as a lawyer.

And then the rule goes on and lists a number of exceptions where the gifts are appropriate. And that, to me, provides lawyers and judges with a lot more guidance as to what's appropriate.

And the starting point is no gift is appropriate, unless it fits into one of these categories.

Q And that's what makes it this type of per se rule that you described?

A Correct.

Q And you were a public advocate for passing that rule, were you not?

A I believe I was, yes.

Q I'd like to bring up one of those rules that relates to what I just asked you about, which is lunches being purchased for judges by lawyers.

MR TURLEY: And this is going to be part of a larger package of exhibits, Madam Chair, that we are going to be moving in. We're going to pull it up and get the exhibit numbers, Madam Chair, and we'll move them in together, if that's okay with the Chair.

For the benefit of counsel and the committee, these are basically just the rules that go from 1984, '94 and 2009. The reason we're putting them in the record is that sometimes we thought it would be convenient for the record because they're sometimes hard to find. And their exhibit numbers are 1001(y), 1001(j), 1001(a),

1002(y) and 1002(j).

MR. SCHIFF: Madam Chair, if these are published rules, we have no objection. It seems similar to the kind of senatorial notice that can be taken.

CHAIRMAN MC CASKILL: We will take notice of any published rules that you wish to admit into evidence. All of these are published rules; correct?

MR. TURLEY: They are available. We were going to put it in the record for ease of the committee, but that's fine. They are available. I believe --

CHAIRMAN MC CASKILL: When I say they're published rules, these are rules that are printed by an authority to give out to lawyers and judges in Louisiana?

MR. TURLEY: Yes, they are just not readily available. They're available in hard copy. We're not sure they're available on the Internet. But --

CHAIRMAN MC CASKILL: That's fine. When I say published, I don't mean that we can go on a shelf and get a book.

MR. TURLEY: I understand.

CHAIRMAN MC CASKILL: I mean they emanate from an authority concerning the rules of conduct for the lawyers and judges in Louisiana.

MR. TURLEY: Of course. These are all the code of judicial conduct for --

CHAIRMAN MC CASKILL: Absolutely, they will go into the record.

(Porteous Exhibits 1001(y), 1001(j), 1001(a), 1002(y) and 1002(j) received.)

MR. TURLEY: Thank you very much.

BY MR. TURLEY:

Q Professor Ciolino, I'm bringing up part of Canon 6, which is Canon 6(b)(3)(c). You're nodding. I guess you must know that fairly well?

A Yes.

Q And I'm going to highlight some of the language in (c), and I'm going to -- I'm going to read this rule to you to make sure that this is your understanding of the rule today.

"Ordinary social hospitality provided the total value of food, drink or refreshment given to a judge at a single event shall not exceed $50."

Do you recognize that language?

A I do.

Q Is that one of those per se rules you were

talking about?

A It is. This one became effective January 1, 2009. It was first adopted by the Louisiana Supreme Court, I guess, March or so of 2008. And then tweaked a bit later in the year, and then that's the current version of the rule.

Q And so correct me if I'm wrong, does this rule then say that you can buy a lunch or a meal for a judge, so long as it's below $50?

A More or less, yes.

Q Okay. I'm going to read -- I'm going to read on in that, because there's a special provision about the calculation of large meals with multiple persons.

It says "the value of the food, drink, refreshment provided to the judge shall be determined by dividing the total cost of food, drink and refreshment," providing at the -- provided at the event by the total number of persons invited."

Are you familiar with that calculation?

A Absolutely. I mean, it's a very detailed way of making sure nobody can game the system and try to get the judge some extra money or food and drink. So it's -- it's fairly -- I mean, it applies to Christmas parties and to -- and to lunches and

dinners with judges. So it's -- it's fairly straightforward now.

Q So first of all, let me just take a step back to get a sense of continuity for the committee. This is the current rule. Back at that beginning of the period I mentioned to you, 1984, did this rule exist at that time?

A This rule did not.

Q And what rule existed at that time with regard to buying meals for judges, if you were a lawyer?

A The rule at that time was the judge could not accept, and a lawyer could not give, a gift if it reasonably might appear to affect the judge's official conduct essentially.

So it was a totality of the circumstances type test where you would have to look at all the circumstances surrounding the gift and then make a determination whether or not this particular gift is one that might reasonably be viewed as one that would affect the judge's official conduct essentially.

Q So at that time there was no per se rule on the value of the meal; it was this more -- I don't know how -- this general rule that you

described?

A Yeah. I mean, it's -- it's akin to the appearance of impropriety standard that has long been in the code, where you look at it from the standpoint of some unidentified hypothetical observer and evaluate whether that unidentified hypothetical observer, looking at the gift, would make the determination that this gift is one that appears to be designed to influence the judge in his behavior.

Q Thank you. You mentioned that this standard is a lot like the appearance of impropriety. Just to educate the committee, you are actually a past critic of the appearance-of-impropriety standard, are you not?

A Well, it certainly means well. But it's a standard that really isn't much of a standard at all. Because it essentially tells, I guess, regulators, the Supreme Court in regulating judges, that they shouldn't do something that appears bad.

Well, what appears bad is anything that appears improper. So it's a standard that has been taken out of the lawyer codes and most of the kind of lexicon of lawyer ethics. It still appears in the judicial code, but you rarely see, in

particularly Louisiana, stand-alone judicial ethics enforcement actions, essentially, disciplinary matters before the judiciary commission, based only on that. That's usually kind of a tag-on with more specific violations.

Q Now, you said something interesting. You said that you see this that this particular language used to be in a lot of codes for lawyers, but has been gradually removed? Was that what you said?

A Well, I mean, it was in -- long ago it was in lawyer codes, and you still see judges use it every now and again. But most people agree that it is not a standard that really is one that is -- is useful in sorting out, you know, the sheeps and the goats, the good conduct and the bad conduct, because it's all about appearances.

Well, appearances to whom is kind of one of the reasons why it's a problem. And the old standard governing gifts was essentially akin to that. You ask whether this gift would appear to be one designed to influence.

And again, that is going to turn on -- the resolution of that is going to turn on who the observer is and then the totality of the circumstances surrounding the gift.

Q Professor, you said this will often turn on the whom. But can it also turn on the where?

I mean, if you say that there is an appearance-of-impropriety standard in one of these codes, can't that appearance change from place to place, that is, what has an appearance of impropriety over here maybe in this small town may be different from what appears to be improper over here in a larger town or in a town in a different place?

A Yeah. And to different people in different -- you know, in that same town. A lot of this conduct to me appears grossly inappropriate. But perhaps to others it doesn't.

Q And, in fact, is it correct to say that you've spent much of your career saying there should be no gifts, no lunches, we should just have the brightest of lines; is that correct?

A Well, I don't know about much of my career doing that, but that's certainly something that I've said over and over again to anybody who would listen.

But the -- you know, just judging that conduct by what looks bad, what looks bad to me might not be what looks bad to other people. That's

the problem.

Q Could you be described as something of a purist in that sense?

A Well, I mean, it depends. But I think, you know, a lot of the gifts that I've seen and that we've all seen in Louisiana I think are -- are inappropriate. I mean, these law firms deliver the hams and the whiskey and the wine to the judges at Christmas, and they don't give me any of that stuff.

Well, it strikes me as the only reason they're giving it is because they want the judges to be friendly to them in return. And that, to me, stinks.

Q It's not you; it's who they are that bothers you?

A But at this point, a lot of that conduct has stopped since the adoption of these new per se rules. And it didn't exist -- I mean, that conduct was fairly prevalent back prior to the existence of this. And I think we've seen a lot of change -- a lot of positive change since the adoption of these new rules.

Q So back in 1984, you stated that there was no bright line on the value of a meal that you have today.

A Right.

Q Were lunches more common back then in places like Gretna, in your experience?

A Well, I wasn't a lawyer in 1984. I mean, I was a --

Q I'm sorry, but in terms of your academic work, I should say.

A Well, I guess going all the way back in the late '80s and through the '90s and the early 2000s, I think it was -- I'm certain it was very common to have lawyers and judges going to lunches, hunting trips, fishing trips, those sorts of events, without the judges paying. That was just -- there was nothing uncommon at all about that.

Now, I personally think that that's inappropriate.

Q Sure.

A But at the time, I wasn't regulating lawyers and I wasn't the observer, you know, who was making the decision whether or not that that was improper.

Q And so I want to -- I want to comb out a little bit some of that information. You said that -- you mentioned fishing trips, I think you mentioned hunting trips.

Does that get back to that difference between whom and where, when for example, in some areas, the "where" has a lot -- that fishing and hunting is very, very common, so those areas it might be less of an appearance of impropriety to go on those types of things than in other places, where it's less common?

A It may be. Obviously, if there's a consensus that something appears to be improper, then that conduct is not going to happen -- it's going to happen behind closed doors and in the dark at night.

But that sort of conduct was happening at midday at Galatoire's. It was there for everyone to see, and no one, no judges were being prosecuted in the judiciary commission process for those lunches and those outings, and no lawyers were being disciplined for it.

Q Would you call that a sort of custom of the area, that there's sort of a customary practice that evolves in this sense?

A That's just the way things were. Now, I can say somewhat proudly for the judiciary that these new rules have had a marked effect on this, on that sort of conduct, and things are markedly

different today.

Q It changed customary practice?

A Well, now those kinds of gifts are per se unethical. You can't do it. And if you do it, you know you're going to get sanctioned for it. So it doesn't -- it doesn't happen. I mean, judges are worried and lawyers are worried about this $50 limit. Law firms have consulted with me about whether they can have judges to the Christmas parties. And it's all about whether or not the Christmas party is going to cost more than $50 a person.

So the law firms have told the judges that Ciolino says you can't come to the Christmas party.

Q That must be an awkward position during the holidays for you.

Let me ask you this about how that rule changed the custom. Is it your -- have you seen a marked difference that, in terms of what people considered to be an appearance of impropriety, that the rules change, that they change people's attitudes of what was improper?

A Well, more importantly, you don't have to ask the question, does it appear improper. You have to ask the question whether or not it complies with

the black letter of the rule.

Q I see. So there's no -- this is actually part of the value of this rule, is that you really don't have to rely on the fluid concept of an appearance of impropriety; the rule says what it says?

A And that's the benefit of a per se rule.

Q Let me ask you just to fill out this rule, to understand how it is done mechanically. You mentioned that this applies even to holiday parties and things like that, where there's lots of people.

How do you -- so let's say we have -- if I invite 10 people to lunch at Galatoire's, assuming I could afford that, and in order for me to comply, if they're all judges, and in order for my guests to confirm that they comply, how would I calculate this under the ethical rule, if I have a check and 10 guests?

A Well, the rule tells you how to do it. You count the number of heads and you divide by the total cost. If a judge is there, it's got to be $49 or less.

Q So in this case, if I got a check at Galatoire's for $100 for dinner, which would be itself a miracle, I used to live in New Orleans, but

let's say I got a $100 check from Galatoire's for 10 judges, I would quickly calculate and say okay, each judge got $10, so I'm below that bright line rule of yours; correct?

A Correct. Not mine. Louisiana Supreme Court's bright line rule.

Q I didn't mean to give you that much credit.

Let me show you a demonstrative that we have in this case. Mr. Meitl is putting up a demonstrative that we have shown the committee before. Now, I'll represent to you, Professor, that in this case the House of Representatives has located six receipts while Judge Porteous has been a federal judge that are related to the allegations in this case, that is meals in which he had meals paid for him.

Now, I'll mention that two of these receipts they believe they could charge against the judge because there is a reference to ABS, you see that, in that yellow, I don't know how good your eyes are.

A Yeah.

Q The Government has represented that that probably means Absoluts, and because the judge drank

Absoluts, then it probably indicated that he was the guest at that time.

But let's assume that's true, whoever was drinking the Absoluts had to be G. Thomas Porteous. We'll assume that for a second.

You'll see the dates of these receipts -- these are from a place called the Beef Connection in Gretna. You'll see the dates over on the left, and then there's the total bill.

Now, what the Government did is it put into evidence those total bill figures. So we went and took a look at how many people were at the meals, you see.

So it shows five, 10, 10, nine, eight, 14. These are pretty big meals, okay.

Now, we did what the rule you just described suggests. We took I guess you would call it a per capita or per-person share of the meal. And you will see the value of the meals on the end column here under per person share.

Do you see that?

A Yep.

Q Okay. Now, five of those six are below $50. Can you see that column?

A Yeah.

Q Now, is it true that those five meals fall below the line in the code provision you just described?

A Yes.

Q And so under the Code provision, at least from the information that you have here, those would be possible today as ethical meals; correct?

A Yes.

Q Okay. And the one that would not be possible, correct me if I'm wrong, is 8/6/97, because that one was $57 and that's --

A Yes, it's over the limit.

Q By how much?

A $7.

Q Yeah. So that's $7 over, so that would violate the current rule; correct?

A Yes.

Q But otherwise, the rest of them would be okay?

A Correct.

Q Now, Professor, can you tell us, you've already explained to us how you do this per capita calculation of meals. Can you also explain to the committee what the rule is in terms of individual meals? Is this $50 per day, or is it $50 per meal?

A It's per, quote, single event.

Q And the single event is usually a single meal, am I correct, like lunch or dinner?

A That's the way that I would read "single event."

Q So you can actually have more than one meal in a given day, even from the same lawyer, and it doesn't technically go beyond the $50 limit. You have to stay at a $50 per event or per meal that you described?

A That's what the rule says, yes.

Q Thank you. One of the curious things about the rules of the 1980s that you described is that it wasn't just a -- that there was no prohibition on lunches; right? There was -- was there a specific prohibition on gifts that, you know, per se that you couldn't receive a gift?

A There was just the general rule that says -- that at the time provided that a judge could not accept a gift if it would reasonably appear that the gift was made to influence the judge's official conduct. That was the rule.

Q And that's that rather fluid concept you mentioned before that --

A Yes.

Q -- you didn't particularly like?

A Correct.

Q Did you ever know any -- in your recollection and studies, have you ever known a judge who was prosecuted under that old rule for having lunches bought for him?

A No.

Q And have you ever known a case where a judge was, when I say "prosecuted," I should say "charged ethically," for having a gift under that standard, under the old rule?

A No.

Q And, indeed, as you described, you said that it was very, very common for law firms to give gifts to judges; correct?

A Right. The Christmas gifts, the lunches, the golf and hunting and fishing outings, that was not uncommon.

Q And in that sense, there was no distinction between gifts, so there's no distinction between a lunch, a flower basket, a bottle of bourbon or an oil change; correct? I mean, there was no definition of these types of gifts versus that type of gift?

A No.

Q Thank you.

A All gratuities were treated the same.

Q Professor, were you present when Mr. Don Gardner sat in that chair just now giving testimony?

A I was.

Q Did you hear him talk about giving Judge Porteous, I just wrote down two, I heard him say gin and sweaters, those are the ones that stuck out in my mind. There was a large list. Do you remember him talking about that?

A Yes.

Q Okay. Now, under the old rule in the 1980s, was there a per se rule that you could not give a judge gin?

A No.

Q And how about a sweater?

A No. As I've already said, there's no distinction between types of gratuities. All gratuities were treated the same.

Q Thank you. But I don't mean to understate this. There was still a rule there that was sort of a catch-all rule that was that more fluid rule you talked about, that you analogized sort of appearance of impropriety; right?

A You would look at the gift, who the giver

was, what the gift was, what the occasion of the gift was, and, based on the totality of the circumstances, make the determination whether or not this gift might reasonably appear to be given to influence the judge's official conduct. So things like the prior relationship of the judge and the giver would matter. The monetary amount of the gift. Everything. The totality of the circumstances would matter.

Q Well, Professor, you just said that in the totality of the circumstances, it would matter, for example, what the relationship is between the judge and the gift giver. So in the case of Mr. Gardner, I believe that Mr. Schiff, for example, showed him that he referred to himself as his closest friend in the world. Did you hear that testimony?

A I did.

Q So would that be relevant in determining whether a particular gift was improper under that old standard?

A Yeah, of course it would. I mean, I think -- gifts are all going to fall on some kind -- on a spectrum. At one end, kind of the bad end of the spectrum, you'd have the new car given to the judge by the litigant as soon as his case is

allotted to the judge. That would be obviously given to influence the judge in his official conduct.

At the other end of the spectrum would be the gift given to him by the old friend, the birthday card from the old friend, which obviously would be given as a friend.

Now, where other gifts fall in between, that's the problem with the rule, is that you were not given any guidance as to where along that continuum to place various different gifts.

Q That's very clear. And to be fair to you, I get the impression that you would put that line on that spectrum pretty much near zero, because you seem to be more of sort of a purist.

A Yeah, I would. I mean, because -- yes, for reasons I've already said, I would.

Q And then there's lots of people that obviously are at the other end of the spectrum, and that's part of that fluidity that you described; is that correct?

A That's fair, yes.

Q Now, I'd like to ask you about one type of allegation in this case that my colleagues from the House side have raised, and that's with regard to

curatorships. Do you know what a curatorship is?

A I do.

Q Can you give me just a general idea? Lawyers handle curatorships and they send out notices, correct, about property and --

A When a lawsuit has been filed and the defendant is absent, they can't find him for whatever reason and the plaintiff who has filed the lawsuit either needs a divorce from the missing spouse or needs to foreclose on some property, it might be a lender, a bank or something, and you can't find the other person, the defendant, the judge will appoint usually a lawyer to be the curator to accept service from the plaintiff, to run some ad, purely ministerial, really, run some ads, run an ad in the newspaper, then file a note of evidence telling the court what they have done.

Then once that note of evidence is filed, then the plaintiff can get their, essentially, default judgment against the absent -- the absent defendant.

Q Have you ever done curatorships?

A I've done some before, yes.

Q While you were a practicing attorney?

A Yes.

Q So you speak of them not as an academic but a practitioner. So they're not very tough, in other words?

A No, they're very simple, very ministerial.

Q And you get sort of a small fee, I can't remember --

A 2-, 3-, $400. I mean, certainly not anything more than that, but around a few hundred dollars.

Q Are you familiar with the allegations with regard to curatorships -- allegations with regard to curatorships in Gretna, that is judges giving curatorships to friends?

A Yes.

Q In fact, is that fairly big news in Louisiana, this whole curatorship controversy?

A No. I mean, most of the curatorships are given to friends of the judges, the campaign contributors for the judges. Sometimes some judges give them to younger lawyers who are just starting out to help them out. But usually you see them -- and again, there's less of this going on today. But traditionally, friends, campaign contributors and former law clerks sometimes. So that's -- that's typically the way that those curatorships have been

given out.

Again, I'm making a blanket statement because every judge decides who they want to give their curatorships to. And some care about it more than others.

So I mean, some of these generalizations really aren't fair. But that's -- there they are.

Q Well, isn't it true that it was a common practice for judges to give curatorships to friends in Gretna until certainly in the 1980s and '90s?

A Yeah. Not just Gretna, but Orleans Parish, and other parishes as well.

Q In fact, isn't it still the case that judges can give curatorships to friends and acquaintances?

A Yes, but they know people are watching. So the Times-Picayune has run a number of articles on curatorships, they have come up in this proceeding. So judges are much more concerned about who they give those curatorships to today than they were then.

Q So you think -- so is it true to say, then, that the attitude has changed as to the propriety of giving out curatorships to friends or --

A I think that's a fair statement, yes.

Q Is that fair? But back in the 1980s and 1990s, was it a fairly open practice?

A Well, curatorships were filed in the public record, yes. I mean, it's not any secret about giving a curatorship to someone or who gets the curatorship. It's all a matter of public record.

Q But did that violate legal or judicial ethics to give a friend a curatorship?

A No. I mean, assuming that there was no kickback given to the judge of the -- of the curatorship money.

Q Because a kickback or bribe would make it unlawful; correct?

A Absolutely. Not just unethical but unlawful.

Q Right. You wouldn't need an ethics charge?

A Right.

Q It would just be a straight crime, wouldn't it?

A Yes.

Q Okay. And just to make sure we cover the waterfront, do the -- I guess we'll start with the

current rules. Do the current rules distinguish between lawyers and nonlawyers in giving gifts to judges? I mean, is there a separate rule for one for lawyers and one for nonlawyers?

A No, one rule and the rule specifically mentions that applies to lawyers as well.

Q Okay. So --

A Lawyers as gift givers as well, yes.

Q Okay. So if I'm correct, if I'm at that dinner at Galatoire's and my son, Benjamin, buys the meal and he's 12, but he's definitely not a lawyer, he still would have to comply with that same rule of $50?

A Well, the judge would have to comply with the rule.

Q The judge, thanks for that correction, all right. Thank you very much. Now, since you were sitting here, you probably heard Mr. Gardner talk about a retainer agreement for -- it was with a man named Joe Mole. Did you hear that?

A I did.

Q Now, were you already familiar with that controversy involving the Mole retainer?

A I wasn't familiar with it until a couple of days ago when it came out during these

proceedings that that contract had been made. And I actually heard from a couple of people, asking me about that contract, whether that was ethical.

Q So these are people --

A Just lawyers.

Q That just called you out of the blue?

A Right.

Q So they had heard about it through these proceedings?

A Yes.

Q And they called you to just ask, can you do that? Is that what they were calling about?

A I had to ask, what are you talking about? And then I figured out what they were talking about. To me it seems not even a close call. I mean, it seems to be, to me, blatantly unethical.

Q Let me pull up an exhibit, Madam Chair, that's already in the record. And this is House Exhibit 35(b). And this is the retainer agreement.

I'm going to direct your attention to a couple of things in this letter. Have you seen this letter before -- I should say this retainer agreement?

A I saw it for the first time when you sent it to me.

Q Correct, thank you. First of all, I'll just highlight the name at the top. And it says, "Don C. Gardner, care of Thomas Wilkinson."

Do you see that?

A Yep.

Q Do you know who Thomas Wilkinson is?

A He was the parish attorney before -- of Jefferson Parish before he resigned.

Q Do you have any idea why he resigned?

A There were a lot of investigations going on into Jefferson Parish government, and his name came up in connection with those, and he resigned shortly after that.

Q What type of investigations are those?

A All sorts of public corruption investigations.

Q Let me go down to --

A I'm not suggesting that he -- I don't know what his involvement is in any of that.

Q You have no personal knowledge?

A All I'm doing is just telling you what the time line is. I'm not accusing him of anything.

Q Fair enough. And my question was just for that purpose.

A Right.

Q Thank you. If you look at paragraph number 1, if we could highlight that for the professor, it says, "retainer of $100,000 payable upon enrollment of counsel of record."

Can you see that on that little screen next to you?

A I can.

Q Can you tell us, what -- in your experience, what does it mean, "upon enrollment"? Are you familiar with that term?

A I understand what it means, yes.

Q What does it mean?

A Well, when he enrolls as counsel of record in the case, when the judge signs the order enrolling him as counsel of record in the case.

Q So you've served, correct, on disciplinary ethics committees?

A I have.

Q So if you saw a line like that in an ethics case, would you interpret that to mean you get $100,000 just by entering the case?

A Right. It's a fixed fee. I mean, there's nothing per se wrong with a fixed fee.

Q Fair enough.

A It seems high, but nothing per se wrong

with a fixed fee.

Q I'm going to direct your attention to the bottom of this document. There's a paragraph that begins "further Lifemark." I'll read it to you. You can follow along on that screen.

It says, "further, Lifemark will pay you $100,000 as a severance fee in the event that Judge Porteous withdraws or if the case settles prior to trial."

And then goes on to say, "this would result in a total of $200,000 (100,000 retainer plus 100,000)."

Do you see that?

A I do.

Q What do you take the meaning of that paragraph to be?

A Well, it seems to me that the -- and again, this is speculation from reading the language, but that they are getting Mr. Gardner involved in an effort to get Judge Porteous disqualified.

And that, to me, is blatantly -- if that's the purpose, is blatantly unethical, because we've had lawyers in the Eastern District and in Louisiana harshly sanctioned for manipulating the random

allotment system, where you're trying to judge shop. You might bring two petitions to the courthouse and file the first one and if you get the wrong judge, you file another one, and then dismiss the first one.

Well, we've had lawyers disciplined for that, because it is conduct prejudicial to the administration of justice in violation of Rule 8.4 of the rules.

To the extent that this is going on kind of after the fact, in an effort to manipulate who the judge is on the case through recusal rather than through allotment, it's essentially the same thing, if that's what the purpose of this was.

CHAIRMAN MC CASKILL: May I interrupt just for a second? Would you mind, Congressman Schiff, and Mr. Turley, would you approach the bench for a minute? We need to talk about our time and this witness. It's my understanding this witness can't be carried over?

MR. TURLEY: I was actually going to try to wrap up soon. I'll come over.

CHAIRMAN MC CASKILL: Stop the time.

(Discussion off the record.)

BY MR. TURLEY:

Q Professor, in fairness to the House counsel, I'm going to be stopping very soon so they have a chance to speak with you because we know you have to leave town.

I just want to direct your attention to two more things on the letter and then I'll let you go on. If you look at the second page of the letter it says on the very top, "as you explained it, the trial is continued beyond June because Judge Porteous withdraws or gives the case to a new judge, you will not be able to remain involved."

So if you had gotten a letter like this at one of your disciplinary committees, what would you interpret that line to mean? I mean, does it suggest that?

A Again, it's pure speculation, but it looks like they're just getting him involved because he's friends with Judge Porteous. And once Judge Porteous is off the case, then there's no need for him anymore. That's what it appears to me.

Q I'm going to quickly draw your attention down at line 1, and it gives that same language of calculation on the preceding page. It's the very first thing 200,000 if Judge Porteous withdraws, 100,000 plus 100,000.

A Okay.

Q At the bottom we're going to highlight the name of the person who wrote this contract, Joseph Mole.

Do you see that name?

A Yes.

Q Now, I'm going to ask you just one simple question. You had already sort of answered it. You said that this seemed blatantly unethical.

A If the purpose of it was to get Judge Porteous off of the case.

Q So as an expert in legal ethics, do you believe that Mr. Mole, in executing a retainer like this, is presumptively acting in a blatantly unethical way?

A I don't know about "presumptively." If the purpose of this letter was to judge shop after the fact, that's conduct prejudicial to the administration of justice, and without a doubt, at least in my mind, that would be improper.

Q That's similar to those -- you've analogized it to those cases that you talked about, two or so cases recently?

A Well, they weren't recent cases, but yes, that's -- I think it's similar, very similar.

VICE CHAIRMAN HATCH: Could I interrupt for a second? What if the purpose is to make sure, because friends are on the other side, to make sure that things are even and balanced? Is that a fair reason for hiring?

THE WITNESS: Yeah, and I think that's a fairly common occurrence.

VICE CHAIRMAN HATCH: I've seen that, many times.

THE WITNESS: Absolutely.

VICE CHAIRMAN HATCH: And knowing that they have got to balance, make sure there are friends on both sides, so it's got more chance of having the judge act appropriately.

THE WITNESS: Yeah. I mean, kind of a sad state of affairs, but I think that happens often.

VICE CHAIRMAN HATCH: Nothing unethical about that, is there?

THE WITNESS: No.

MR. TURLEY: Thank you for that clarification, Mr. Vice Chair.

I'm going to go ahead and pass the witness to my opposing counsel.

CHAIRMAN MC CASKILL: Thank you very much, Mr. Turley. I appreciate you being considerate in

that regard.

Cross-examination.

CROSS-EXAMINATION

BY MR. BARON:

Q Good afternoon, Professor Ciolino.

A Good afternoon.

Q Let's begin quickly with this chart. 1997, '97, '97, '98. This is 10, 12 years ago.

A Yes.

Q These numbers are 10, 12 years ago, by today's numbers, under the new rule, the $50 rule, every one of these would have gone above it?

A You very well may be right. The rule does build in adjustments for cost of living, so I guess you would have to work backwards to do those numbers somehow, yeah, that's fair.

Q Fair? Okay let's put ourselves in Gretna back in the mid to late -- mid to late, during the period when Judge Porteous was the -- on the state bench. Can we agree that if you have a judge giving close to 200 curatorships to a lawyer who is a good friend and they're worth about $200 apiece in fees, in return for a portion of the fee which is generated by the judge calling up and saying, hey, where is -- can I have some of that curator money,

so it might be termed reasonably, and one of the lawyers has termed it a kickback, did you need a per se rule even in Gretna to know that that was unethical and indeed criminal?

A Absolutely not. Kickbacks would clearly be criminal.

Q And if you have a judge in Gretna back in that era setting bonds, splitting bonds at the request of the bondsman, in order to maximize the financial benefit to the bondsman, in return for which the bondsman takes the judge to Las Vegas, pays for it, many expensive lunches, maintains his cars, fills it with gas, tires, radios, air conditioning, services them, and repairs, does home repairs, do you need a per se rule even in Gretna to know that is unethical and perhaps indeed illegal?

A No, not at all. I mean, if there's -- if there's a quid pro quo, if Judge Porteous is saying I will do this for you if you do this for me, then that's -- that's bribery, extortion, whatever you want to call it. It's a crime, and it's unethical. And unethical, right.

Q Okay. Sorry. And indeed, a couple of judges down in that part of the world have gone to jail for their -- in part, at least, because of this

kind of relationship with the Marcottes. Isn't that true? Bodenheimer?

A This kind of relationship? Judge Bodenheimer obviously went to jail for conspiracy involving himself and the Bodenheimer -- and the Marcottes, yes, absolutely.

Q How about Judge Green?

A Judge Green wasn't convicted of a count involving the Marcottes, I believe.

Q Okay. Well, I can't challenge that.

A Right.

Q But he was charged?

A He was charged with a lot of things, and I think he was convicted on a single count of mail fraud that didn't involve the Marcottes.

Q But if there was, as you termed it, a quid pro quo between the judge setting and splitting bonds as requested in order to maximize their profits, in return for which, the trips, lunches, et cetera, et cetera, do you have any doubt that even in Gretna, without any per se rule, it's wrong, it's unethical, it's criminal?

A Not any doubt whatsoever.

Q Even in the absence of a per se rule, and one can certainly see the advantages of that, in

Gretna, is there an issue of degree? In other words, is there a difference between taking a judge to lunch, you know, on an occasion, a birthday, some sort of celebration, maybe just you run into him maybe three times, four times a year, is that different from, even under the old rule, hundreds of lunches over the years paid for by the lawyer in which the judge, according to the testimony, paid for a couple of lunches throughout that time? Even in the absence of a per se rule, doesn't that raise serious questions about the relationship?

A I mean, that's the continuum that I talked about. It's all a matter of where those gifts or each particular gift fit on that continuum. The problem with an indeterminate standard like that, who is to say with regard to a particular gift where on the continuum it falls?

Q We've been talking about Gretna. To what extent are ethical standards, even in the absence of a per se rule, determined by venue?

A Excuse me?

Q By the venue.

A Well, as -- I mean, the Louisiana code of judicial conduct applies the same to every judicial district in the state. It doesn't apply differently

in Orleans Parish as it would in Jefferson Parish. It's the same black letter rule everywhere.

Q And even in the absence of a per se rule, you say you wouldn't do these things but others might, I wouldn't do it but others might?

A Yes, absolutely.

Q Is it determined by the lowest common denominator? Is that where the standard ends up?

A Well, that's the question. That's the problem with the standard. If -- who is looking at the conduct and who is making the determination?

If the conduct is being done openly, unabashedly and over a long period of time, you would think that if there was a community norm, if there was a standard that everyone agreed to, that was improper, this stuff wouldn't be going on in the open at high noon.

But -- and again, we're being very general, we're saying "this stuff."

Q Right.

A But a number of these practices. So that's -- again, we're trying to figure out where on the continuum this conduct falls, and because of the indeterminate standards, it's difficult to say where.

Q Well, but isn't --

A For me --

Q You don't have any trouble?

A No, I don't have any trouble.

Q And isn't it true lawyers, and especially judges, make judgments about what is acceptable, what they can do and what they can't do? You don't need a per se rule to say every act or activity. There's an ethical sense, a judgment. And at some point, your activity is so beyond what's acceptable, you don't need a per se rule, do you?

A At some point, whatever that point is.

Q And finally, with regard to Mr. Gardner, it would have been unethical, in your view, for Gardner to accept and sign up for that contract that you were discussing with Mr. Turley?

A Absolutely, if that was the purpose.

MR. SCHIFF: Excuse me one second. I'm done, thank you.

MR. TURLEY: Madam Chair, we have the world's shortest redirect, if I can beg your indulgence for just a second.

CHAIRMAN MC CASKILL: We like the terminology "world's shortest."

(Laughter.)

CHAIRMAN MC CASKILL: You got our attention.

MR. TURLEY: I'll make good on this, I promise.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Professor, would it make a difference in that totality of the circumstances that you described to know in addition to what Mr. Baron described as some of the facts in the case, to know that the Government has conceded that no bonds were set too high or too low for the Marcottes? Is that one of the things that would go into that totality test?

MR. SCHIFF: Madam Chair, we would object to the foundation for this question. That is not what we've represented.

MR. TURLEY: You've not -- you've not said that in your summary?

MR. SCHIFF: What we've said is that the bonds were set to maximize the profits of the company. Whether, in fact, by maximizing profits, they were set too high, that may very well be the case. We're not saying that that didn't happen. But we are saying that they were set for the purpose

of maximizing the profits.

They may very well have been set too high for purpose of maximizing the return of the bondsman.

MR. TURLEY: That's a valid point. I'll take that. Why don't I change the question for the witness.

CHAIRMAN MC CASKILL: I think you need to rephrase the question.

MR. TURLEY: Sure.

BY MR. TURLEY:

Q If the summary -- if the Government, and we can debate to what extent you've said this, if the Government conceded that bonds were set -- were not set too high or too low for the Marcottes, is that one of the factors that you would look at in that totality of the circumstances?

A If Judge Porteous did not do something for the Marcottes in exchange for them doing something for him --

Q No, no, I should clarify. My colleague, Mr. Baron, gave you a whole bunch of different allegations in the case. And I just wanted to ask that if one of the allegations -- if one of the factors in the case was a finding that bonds were

not set too high or too low by Judge Porteous, would that be one of those elements in your totality test?

A It might be. The problem with talking about elements in a totality test is you want to know all the circumstances.

Q Thank you.

A And then evaluate which of these factors should be given what weight. So I don't think I could fairly pull one out and talk about it. It's just not the way you do a totality analysis.

Q And Mr. Baron made a fair point when he pointed out that, you know, these are prices of meals a few years ago, and they may have gone up.

A Right.

Q And so today you would want to know what the -- what the current costs are at the Beef Connection; correct?

A Yeah. I have no idea about any of that.

Q We do. We actually went to the Beef Connection and got a menu.

MR. TURLEY: I'd like to enter the menu of the Beef Connection into the record. It is Porteous 1008, if there's no --

MR. SCHIFF: We have no objection.

CHAIRMAN MC CASKILL: We welcome the menu

of the Beef Connection.

(Porteous Exhibit 1008 received.)

(Laughter.)

MR. TURLEY: I'm told you get a free entree, but I'll leave that to the members.

Thank you very much, Madam Chair.

CHAIRMAN MC CASKILL: Senator Risch.

And we are going to try to wrap up the questions from the panel in 10 minutes or so, if possible. I don't want to hurry you. Everybody take whatever time you want.

SENATOR RISCH: I'll be relatively brief, Madam Chairman.

EXAMINATION

BY SENATOR RISCH:

Q Professor, I'm struck by your testimony that you've -- it's kind of -- and I don't mean this the way it sounds, but it's kind of antiseptic. You've talked about lunches and these kinds of things.

But let's talk about this case. You said you're from down there in Louisiana, you have followed these cases, you've looked at what's going on. Are you familiar with the allegations against Judge Porteous here?

A I am, yes.

Q Okay. And you understand, this is -- it is different in that you're kind of involved in the issues of ethics, and we're -- the Founding Fathers gave us a few words we've got to hang our hat on, which has been done I guess 10 times before and we're going to wind up having to weigh that in this case.

But let me just -- let me just walk you through briefly a couple or few of these. Article I that the judge has been impeached on by the House alleges that 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 have 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.

A Okay.

Q You know, it's good of you to come here, but we don't really need an expert witness to tell us there's a big problem here. Would you agree with that? Assuming that the evidence reflects what's

alleged by the House?

A Yeah. And I think my testimony is I agree with that. I mean, my view of not just these gifts but all these gifts from lawyers to judges are a problem. And you don't -- I don't need an expert to tell me that either.

Q But these rise above going to lunch a couple of few times or something like that. Would you agree with that?

A They are further to this end of the continuum (indicating), I would agree, yes.

Q And -- I'm sorry?

VICE CHAIRMAN HATCH: No, go ahead.

BY SENATOR RISCH:

Q And as far as the evidence in this case, have you reviewed this to -- and reviewed all of the -- not all, but the substance of the evidence against Judge Porteous regarding these allegations?

A Not all of it, no.

Q Enough that you got -- this gives you a little queasy feeling after looking at the evidence?

A I think I've already said that it does. And all of these gifts do.

Q Beyond the -- beyond the gifts, former Judge Bodenheimer testified here, and clearly laid

out the scheme that they have, which to me is stunning, where the bail bondsman goes in in the morning and meets with the family and the person in jail and finds out how much cash they can extricate them, then goes to the judge, gets the judge to set the appropriate bail.

The bail gets set, and then cash goes back or gifts go back or something to the judge.

Is that -- have you got a problem with that, from either an ethical standpoint or just overall?

A I've got a problem with all lawyer gifts to judges.

Q Lastly, are you familiar with the fact that Judge Porteous willfully, intentionally and knowingly falsified his name on a petition for bankruptcy that he filed?

A Yes.

Q Have you got a problem with that from an ethical standpoint?

A Yes.

Q Okay. Rises above just an ordinary ethical sort of difficulty. Would you agree with me on that?

A Yes.

SENATOR RISCH: That's all I have, Madam Chair.

VICE CHAIRMAN HATCH: Madam Chairman?

CHAIRMAN MC CASKILL: Senator Hatch.

EXAMINATION

BY VICE CHAIRMAN HATCH:

Q Just to kind the set the record straight on one matter. You said the scenario Mr. Baron described would be clearly unethical if there was a, quote, quid pro quo, unquote.

A And illegal.

Q Well, to go further, does there have to be a smoking gun or a literal phrase or a conversation to establish that quid pro quo?

A No. I mean, obviously in a criminal case, just evidence by -- beyond a reasonable doubt that there was a quid pro quo. So no, obviously I don't think there needs to be a smoking gun or anything like that. Circumstantial evidence would be, I would imagine, enough to convict in a criminal case.

VICE CHAIRMAN HATCH: Okay. Thank you. We appreciate your testimony.

SENATOR WICKER: Madam Chair?

CHAIRMAN MC CASKILL: Senator Wicker.

EXAMINATION

BY SENATOR WICKER:

Q Does the giving of $2000 from lawyers to a judge, during the pendency of a very important case, for the judge's son's wedding go beyond the normal practice in the community that you were testifying about?

A I would think so.

Q You would view that as how serious on a scale of 1 to 10?

A Oh, jeez. It's certainly toward the other end of the spectrum. It's from, if you put lunches and social hospitality toward the more benign end of the spectrum, it's certainly over at the other end. But again you have to take into account all of the facts and circumstances, the prior relationship.

So again, this is the problem with the standard, is we're just trying to figure out where to put it on the continuum.

But I would agree with you, it's toward the -- more toward the malignant end of the continuum. I know that kind of sounds like a weasely answer, but with one of these kinds of standards --

CHAIRMAN MC CASKILL: We're very comfortable with those kinds of answers in our line

of work.

(Laughter.)

SENATOR WICKER: Thank you.

CHAIRMAN MC CASKILL: Yes, Senator Kaufman.

EXAMINATION

BY SENATOR KAUFMAN:

Q The point about the lunches and the fact that people go to lunch and everybody can see them having lunches, I can understand that. But do you think most people assume that the judge is never paying for any of the lunches or is paying for like one out of a thousand? Isn't that a factor? You're at a restaurant, you're having lunch together, I understand that.

But you don't know, people in the lunchroom don't know that the judge is never paying for the lunch. Isn't that a factor in terms of whether it's ethical or not?

A I think historically judges, when they go to lunch with lawyers, generally didn't pay. I think there's much less of that going on today, thanks to the new rulemaking by the Louisiana Supreme Court.

But back in the day, I think most people

assumed that the judge wasn't going to pay.

SENATOR KAUFMAN: Thank you.

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q Senator Wicker asked about the $2000. Let me give you a few more facts.

The lawyer -- it's a bench-tried case, and the case has been submitted to the judge. The judge is at the point where the judge could make a decision any day.

The lawyer involved is a good friend of the judge. They're social friends. They have known each other a long time.

The judge asks for several thousand dollars for a family need. The lawyer goes to his partner at his law firm and gets half of the money from him, who is also a good friend of the judge.

And finally, the lawyer admits that part of the reason he gave the money was because he had the case pending.

In your expert opinion, would that conduct be considered ethical under any circumstances?

A Well, I think that's conduct on that malignant end of the spectrum. And again, it's all a matter of who is determining where the line is,

whether it's ethical or unethical.

I draw my line way back here (indicating). So I do. But as I've said, I find most of this conduct, at least in my personal view, unethical. Whether others do, that's for others to determine.

Q And finally, I want to ask, and this may be an obvious question, but I think it needs to be asked.

There was a great deal of discussion during your testimony about the fact that the rules -- the per se rules changed. Would it be a fair conclusion that one of the rules -- reason the rules were changed was because there was an incredibly embarrassing amount of unethical behavior going on by the judiciary and some lawyers in the community where Judge Porteous served as a judge?

A I think that's part of it. But there are also parallel reforms going on that Governor Jindal had started in the administrative branch. And there was some pressure being brought by the legislature and the executive branch on the judiciary to conform their rules to what the executive branch and the legislative branch had to do.

So it was kind of a mix of that political dynamic, plus the bad press and other things from

the 24th JDC and elsewhere.

Q Isn't it fair to say the judiciary was drug along in this reform?

A No, I don't think that's -- I don't think they were drug along. I think that they -- you know, just like, I guess, history is kind of replete with situations where practices, de jure and de facto practices that have been long accepted, subsequent policymakers finally decide it's time to change. And I think the Louisiana Supreme Court got to that point in part because of all of this stuff that happened in the 24th JDC and in part because of the changes in other branches of the government.

Q And the 24th JDC is the Jefferson Parish?

A Yes, Jefferson Parish, yes.

CHAIRMAN MC CASKILL: Thank you. Any other questions?

You are released.

THE WITNESS: Thank you all.

(Witness excused.)

CHAIRMAN MC CASKILL: Let me do a few housekeeping before the lawyers leave and before our members leave.

We have now finished all but one witness that was listed for today. It appears to me we have

eight witnesses left. Assuming that you all can figure out a way not to call the custodian of records of something, which I'm hoping you guys can figure out how not -- no need to call a custodian of records.

MR. TURLEY: We've already figured that out. We will not need that.

CHAIRMAN MC CASKILL: Perfect. That's what we have left. We now know that there is going to be a Foreign Relations markup on Tuesday. They have changed it from Wednesday to Tuesday; correct? Am I correct? That will be -- so you all can plan your day on Tuesday and your Wednesdays, that hearing will be at 2:15 on Tuesday.

So that means we will have to adjourn for lunch and will adjourn for lunch at almost 1:00, and we will not return -- depending on how we can count noses, there's a possibility we won't return until 4:00.

If we have enough members without -- because I don't think we have a judiciary conflict. That's when we get in trouble because we've got enough members on both that we couldn't work today.

MR. TURLEY: Madam Chair, we'll be starting at 8:00 again or 8:30?

CHAIRMAN MC CASKILL: We will begin at 8:00. We will begin at 8:00 a.m. on Tuesday, the 21st. And obviously, all the members should plan on not scheduling things for Wednesday also, because with that hearing now at 2:15, it is unlikely that we'll get through all of the witnesses on Tuesday. We will probably have to use at least part of Wednesday to finish up. So if everyone will plan accordingly, that we'll need to be here on Wednesday also.

Is there anything --

SENATOR WICKER: Madam Chair, I realize it's unusual, but I wonder if the members of the committee could meet in camera around your chair for a question I'd like to pose off the record.

CHAIRMAN MC CASKILL: Okay.

(Discussion off the record.)

CHAIRMAN MC CASKILL: There isn't a Foreign Relations Committee. Hot off the presses. We have a vote at 2:15. So you should just assume that we will work according to the schedule that you have on Tuesday.

MR. TURLEY: I didn't mean to interrupt. Madam Chair, you mentioned eight witnesses. We only have six listed.

CHAIRMAN MC CASKILL: Let me count. I see Mamoulides, Tiemann, Griffin, Rees, Hildebrand, Mackenzie, Levenson and Barliant.

MR. TURLEY: Yes. Thank you for that clarification. We did move -- we did move some witnesses from today, I'm sorry to have bothered you with that.

CHAIRMAN MC CASKILL: No, that's fine. Not at all.

Let me say also for the members that I talked to the leader today, and I am optimistic that we will not have to vote on our report until we return on the 15th. And I will try to let you know that for sure next week. The 15th of November.

I had mentioned to some of you that we might have to travel back just to have a committee hearing to vote on whether or not the report of the evidence is objective, which is all we have to do. We don't make any recommendation to the Senate, other than providing them with a report of the evidence that is an objective analysis of what we have heard.

Is there anything that either party needs to bring up with us today?

MR. SCHIFF: Madam Chair, could you just

give us the update on the time remaining?

CHAIRMAN MC CASKILL: Oh, sure. That's a good idea.

MS. JOHNSON: Six hours and 50 minutes.

CHAIRMAN MC CASKILL: Why don't you give it to me so I can read it into the microphone, if you don't mind. Thank you.

The House has six hours and 50 minutes, and Judge Porteous has seven hours and 30 minutes.

Okay?

Let me just say that we would expect all witnesses to come within your time. And I know you have decisions to make about who will be called and won't be called. I just want to make sure that everyone realizes that we are assuming this would be all of the witnesses.

MR. TURLEY: We understand, thank you.

CHAIRMAN MC CASKILL: Okay. Thank you all very much, and if you need anything else over the weekend, you can get hold of staff. We will try to accommodate you.

I appreciate all of you very much. I think today went very well, and I appreciate all your cooperation. And thank you to the panel.

(Whereupon, at 6:08 p.m., the proceedings

were adjourned, to be reconvened at 8:00 a.m., on Tuesday, September 21, 2010.)

C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
RAFAEL PARDO				
by Mr. Walsh	1407		1507	
by Mr. Baron		1460		
by Senator Risch	1511			
by Chair McCaskill	1518			
by Senator Shaheen	1523			
S.J. BEAULIEU				
by Mr. Aurzada	1524		1547	
by Mr. Baron		1533		
by Senator Whitehouse	1548			
DON GARDNER				
by Mr. Schwartz	1554		1612	
by Mr. Schiff		1575		
by Senator Udall	1614			
by Senator Kaufman	1620			
by Senator Risch	1623/1625			
by Vice Chair Hatch	1625			
by Senator Whitehouse	1626			
by Chair McCaskill	1627			

-- continued --

C O N T E N T S (Continued)

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
DANE CIOLINO				
by Mr. Turley	1628		1677	
by Mr. Baron		1671		
by Senator Risch	1680			
by Vice Chair Hatch	1684			
by Senator Wicker	1684			
by Senator Kaufman	1686			
by Chair McCaskill	1687			

E X H I B I T S

NUMBER DESCRIPTION	RECEIVED
Porteous Exhibit 1097	1407
Porteous Exhibit 1100(g)	1435
Porteous Exhibit 1067	1451
Porteous Exhibit 1070	1453
Porteous Exhibit 1068	1455
Porteous Exhibits 1001(y), 1001(j), 1001(a), 1002(y) and 1002(j)	1639
Porteous Exhibit 1008	1680

United States Senate

Impeachment Trial Committee

Impeachment of Judge G. Thomas Porteous, Jr., U.S. District Judge For the Eastern District of Louisiana

Volume V

Tuesday, September 21, 2010

Dirksen Senate Office Building

Washington, D.C.

APPEARANCES:

SENATE IMPEACHMENT TRIAL COMMITTEE:

Senator Claire McCaskill (D-MO) - Chairman

Senator Orrin Hatch (R-UT) - Vice Chairman

Senator John Barrasso (R-WY)

Senator James DeMint (R-SC)

Senator Michael Johanns (R-IA)

Senator Edward Kaufman (D-DE)

Senator Amy Klobuchar (D-MN)

Senator James E. Risch (R-ID)

Senator Jeanne Shaheen (D-NH)

Senator Thomas Udall (D-NM)

Senator Sheldon Whitehouse (D-RI)

Senator Roger Wicker (R-MS)

SENATE LEGAL COUNSEL:

Morgan Frankel, Senate Legal Counsel

Pat Bryan, Senate Legal Counsel

Thomas Caballero, Assistant Senate Legal Counsel

Grant Vinik, Assistant Senate Legal Counsel

-- continued --

APPEARANCES (Continued):

HOUSE OF REPRESENTATIVES MANAGERS:

Representative Adam B. Schiff (D-CA)

Representative Robert W. Goodlatte (R-VA)

Representative Zoe Lofgren (D-CA)

Representative Henry C. Johnson (D-GA)

Representative James Sensenbrenner, Jr. (R-WI)

HOUSE OF REPRESENTATIVES IMPEACHMENT COUNSEL:

Alan Baron, Chief Special Impeachment Counsel

Mark Dubester, Special Impeachment Counsel

Harold Damelin, Special Impeachment Counsel

Kirsten Konar, Special Impeachment Counsel

RESPONDENT: Judge G. Thomas Porteous, Jr.

RESPONDENT'S COUNSEL:

Jonathan Turley, Esq.

Keith Aurzada, Esq.

P.J. Meitl, Esq.

Daniel O'Connor, Esq.

Brian Walsh, Esq.

Daniel Schwartz, Esq.

P R O C E E D I N G S (8:13 a.m.)

CHAIRMAN MC CASKILL: Good morning, everyone. We apologize for being 15 minutes late, but we have seven members on the committee so we may begin. And I believe Judge Porteous, it's the appropriate time for you to call your first witness.

MR. TURLEY: Thank you, Madam Chair. We call Mr. John Mamoulides.

Whereupon,

JOHN M. MAMOULIDES

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Good morning, Mr. Mamoulides.

A Good morning.

Q As you know, I'm Jonathan Turley, one of the lawyers representing Judge Porteous. Can we start by asking you to first state your full name for the record.

A John M. Mamoulides.

Q I'm going to ask you to begin with by giving you a little bit of your background in Louisiana as an attorney.

CHAIRMAN MC CASKILL: Mr. Mamoulides, would you please turn on your microphone? There should be a button on the base of it. And speak into it, please.

THE WITNESS: 1, 2, 3.

CHAIRMAN MC CASKILL: It's still not on. Can you help him?

THE WITNESS: Now can you hear me?

CHAIRMAN MC CASKILL: Now we go.

BY MR. TURLEY:

Q Can we begin by asking you a little bit about your background as an attorney in Louisiana. What is your background as an attorney and prosecutor?

A Well, I graduated from Tulane Law School in 1960 and was practicing just general practice of law in Jefferson Parish for about six years, and then got involved as an assistant district attorney, the DA's office, and my boss was Frank Langridge who had been the DA for 20, 30 years, and handled misdemeanors in that court with him.

Started and then worked there probably a year or so, and eventually worked into handling felony cases and began doing more and more work. I never intended to be a criminal lawyer. I thought

I'd always be a civil. But it kind of grew on me, and so I stayed doing that work until sometime in 1968, I think.

I was promoted by Mr. Langridge to executive assistant and began doing more and more work in the area of organizing the office and prosecution.

In 1972, Mr. Langridge retired and I was named as his replacement by Governor McKeithen at that time, and had an election that year, I think I was named DA in April. And in August I was elected for the full term, which is a six-year term, in '72. And got elected three more times after that, for six-year terms.

So when I retired in '96, I had 24 years as DA and six years as an assistant. I had 30 years and retired. And one of my assistants, who was my first assistant at the time, became the DA under the law. The law had changed. And he ran against another ex-one of my assistants, who is Paul Connick, who won the race between the two of them. And Paul Connick is now still the DA.

Q Excellent. So if I get the math correct, then, you were 30 years total with the district attorney's office, then?

A Yes.

Q And is it correct, then, that you began with the district attorneys in 1972, retired in 1996?

A I began in the office in, I think, '68 -- or '66, I guess it was, as an assistant part-time, and then stayed until I finished in 1996.

Q So as district attorney, that began in 1972?

A '72. DA from '72, in April I think I got appointed.

Q So is it true to say you were district attorney during the entire period of when Judge Porteous was both a prosecutor and a state judge, since he took the bench in '94?

A Yes, I think Porteous -- I met Porteous in 1972. My office was working with the Attorney General's Office of the state. And he had sent down two young lawyers to assist us in some -- a case, one of them was Tom Porteous and one of them was a fellow named Mac Gauchet. And one of them stayed, we were hiring. And I hired Tom as assistant at that point.

And he was with me until he ran for district judge, which was probably 12 years or

something later.

Q Just to wrap up on your background, did you also have occasion to be appointed by the governor to the prison overcrowding policy task force?

A Yes, I think I was appointed to many task forces. The death penalty task force, and a bunch of other things. And that was probably one, because we had a serious overcrowding going on all over the state, in the jails.

And I don't remember any of the specific meetings, but there was times when we would try to get the sheriffs to work closely with the state corrections department, which ran the state prisons, and make sure that all of -- they had all of them they could find and do the right thing to keep the overcrowding down.

Because we were constantly being hit with the federal courts on overcrowding.

Q I'm going to return to that in a second, but I'd like to pick up on what you had said earlier, about when you first met Judge Porteous. Was that around '72, '73 that you first met him?

A I'm going to guess '72, end of '72 sometime, might have been '73, he had come over and

was assigned to help work with us, with my staff from the Attorney General -- State of Louisiana Attorney General's Office, Billy Guste, two of them, he and a fellow named Mac Gauchet. And we offered him a job, he wanted to stay. We hired him as an assistant DA and put him in screening and misdemeanor stuff until he got some experience.

Q Is it true, then, that he stayed an assistant district attorney with you until he became a judge?

A Yes. I think he -- my recollection is that he was an assistant DA until the time that he decided to run for judge. That was a state district court judgeship.

Q And you said until he got some experience. Did he eventually become one of your more seasoned prosecutors?

A Oh, yes. He did very well with prosecution, and he was one of the -- he started off with misdemeanors and then he was assigned to work with one of my supervisors at that time. And I had some policies that the DAs, assistant DAs would work with a supervisor, and they would be assigned to a particular division of court.

We had -- eventually, I think, there were

16 district court divisions, and Jefferson Parish, the judge does both civil and criminal. And I would guess probably 40 percent of the judge's time is in criminal and maybe 60 percent in civil.

But the cases would be allotted at random to the various divisions, and I had an assistant assigned to each division and a supervising assistant to supervise three or four divisions, depending on what -- and Tom was -- was assigned to whichever division, I don't know.

But I wouldn't keep him in the same division for more than about six months and I'd move him to another one, so that the DA and the judge wouldn't be too close.

So we would -- I'd move him from division to division, about six months or more, they would be assigned. And they would have a supervisor.

He eventually became a supervisor, and during that period of time, he was handling some of the bigger cases, like some of my more experienced people. Tom eventually became a supervisor, and then he decided to run for a vacancy, and he won.

Q And you supported him for that run, did you not?

A Yes, I would guess that probably, I don't

know how many, but 10, 12, 13 of the judges had previously worked at the DA's office when they became judges. And whenever those happened, and if it was one of my -- my people, I would support them if they were worthy of support.

Q And what was your impression in terms of being worthy of support? What was your impression?

A Well, they knew the law, and they had good work ethic in my office. And Tom was a good prosecutor during that time and did good work.

Q Did you continue to interact with Judge Porteous after he became a state judge?

A Not really. We met with the judges from time to time when there was something that had to be done on some kind of -- you know, some -- some judge and DA's meeting. But the judges would -- they operated on their own from wherever -- from their divisions.

I'd see them from time to time, but I didn't participate with him directly, with not much -- any more than any other judge.

Q And when he became a judge, what was the reputation he developed as a judge in terms of his capability?

A Well, my standpoint, from the criminal law

standpoint, he did a good job. We were -- we measured a good job in the fact that he kept his docket current, he would work with the DA, trying to set cases and bringing them into trial and not delaying the trials and going forward with the cases. And he was one of the ones that basically had a current docket, which is important to DAs in that time.

Q Because some judges would allow cases to lag or to go on too long?

A Yeah, they would -- they would take -- some of them would just let -- allow other defendants -- continue cases a lot more and put us in an awkward position.

Q Did Judge Porteous have a reputation for moving cases along?

A Yes, we had a good relationship in my office, DA's office. This was in -- most of the judges worked pretty good with us on that type of thing.

Q Did you hear back from assistant DAs on how they viewed Judge Porteous as a judge?

A Well, the ones that we had, the supervisors and the assistants, they had no complaint about -- you know, the judge ran a good --

he ran a good office from the standpoint of if it's a trial, his rulings were accurate and good in most instances. And it's kind of like a referee in that case, that he knew the law, he knew evidence. And his decisions and rulings were generally good.

If we didn't like a ruling, and my assistant would object and take a writ, he would ask the supervisor or the head of my appeals and research, and we didn't -- we took writs all the time. If we thought the judge's ruling was not what the law is, we'd take a writ and go to the Circuit Court of Appeals. Because that was -- it was -- just like we didn't -- I didn't generally allow my assistants to recommend sentencing. I used to tell the judges, look, you -- I don't ask you which cases I ought to prosecute and I don't want you asking my assistants for recommendations on sentencing.

So that was basically what we would do.

Q Did you have occasion to be interviewed by the FBI as part of Judge Porteous's 1994 bank -- background check?

A I don't recall it, but I'm sure I did, because all the judges, all the federal judges that got appointed in that area, some -- I'd have -- an FBI agent would come by and ask me questions about

it, find out -- they could come from different parishes or different areas.

We had one other one, who was a Judge Carr, Pat Carr, was appointed before. And yes, they would come in and talk to me, ask me questions.

Q Do you recall saying that you felt that he had a good reputation and was highly respected?

A Yeah, I probably said that. I respected him because he did a good job in my office and the district court from the standpoint of the docket and all. He did a fine job. I don't recall the specifics I talked about, but I was recommending him.

Q Mr. Mamoulides, I'm going to return you to something you touched on earlier with regard to overcrowding. You had mentioned that overcrowding was a serious problem in Louisiana. Can you describe particularly in Jefferson County what the overcrowding problems were in the '80s and '90s?

A Well, Jefferson Parish had a sheriff and we had two different police agencies that could make arrests. There were six cities with chiefs of police. There was a sheriff, a state police, two levy districts that had policemen, so any of those police could make an arrest and bring them to the

lockup, drop them off and get them booked.

So there was -- we had an old jail originally, and it was always overcrowded. And then we -- there were serious times when the overcrowding was enough where there was an old case named Holland versus Jefferson Parish, I think was the original name of that case. And it was filed in federal district court in New Orleans, alleging overcrowding and improper handling of prisoners in the jail.

And Judge Rubin was handling that case at the time. And of course me being the DA, we had to defend the parish on that. And there was really no defense. It was overcrowded.

So that case eventually moved to -- was moved from Judge Rubin's office in New Orleans to Baton Rouge and a judge by the name of Polozola took over. Eventually Jefferson Parish built a new jail, but it was also overcrowded, it filled up quickly.

So judge Polozola decided to take all of the jail overcrowding cases and he was in charge of them. And they set amounts per jail how many people could be there.

And our sheriff was put in a position of being -- he told these sheriffs, if you overcrowd for over a certain period of time, I'm going to hold

you in contempt.

So we had a serious overcrowding problem. Jefferson was a growing parish. We were about 450,000 at that time. And we had a lot of people being brought to the jail.

Q To understand how these court orders worked, is it fair to say that eventually the court order set that maximum level so that if you put in someone, someone had to be released?

A Well, it -- I think he told the sheriffs yes. But what -- they would have an opportunity to put them in a lock-up. And I think it would be within 24 or 36 hours, if he didn't have -- you know, you couldn't put him in a permanent cell, put him and have it overcrowded, you had time to try to move them out.

My sheriff took the position that if I got -- I'm not going to be held in contempt. He had a meeting with the judges and said I can't just turn somebody loose, particularly if he's sentenced to parish time or whatever. So when that happens, I'm going to let you know. And I'm either going to turn them loose, not put them in jail, or you're going to have to they will me who to turn loose.

Obviously what they wanted to do was keep

the more violent people in jail and let out some people that are maybe just serving what we call parish time, might have been put in jail for 60 days or might have been on something. So they would try to figure out that and -- I didn't participate in that because it was between the judges and the -- and the sheriff's office primarily. But there was a serious overcrowding problem.

Q And even though you didn't participate in it, wasn't this a concern for the district attorney's office, that so many people were being released because of these court orders of overcrowding?

A Well, it was a concern, but it was being handled very well, I thought, by the sheriff and the -- and the -- basically the judges, they had a committee and magistrate. What we did was Judge Polozola had put -- he brought in the DAs, even though we objected, and he wanted the district attorneys to get a jail list every day and check to see what -- who was in jail and how many -- did we get the reports.

Under law in Louisiana, you arrest somebody, technically speaking, they were supposed to file a charge with the district attorney within

48 hours. Very often we wouldn't get a charge filed, so that my screening department could look at it, we wouldn't get it for a long time in some cases.

So we started having a daily -- I assigned to a girl in my office to get a daily jail list from the sheriff's office, so we knew everybody supposedly that was in jail. Then if they were over 72 hours, and we had not gotten a report filed with the DA's office, I would send a letter to the chief judge of Jefferson Parish into whoever the arresting agency was, if it was a Westwego police or to the chief of police saying on such and such a date, Mr. Jones or whatever his name is was arrested, and these are the charges. And we have not received the report from the DA's office yet on that.

And we would call them so they could bring the reports in, because a lot of times they would be -- my screening department may not -- they may have four or five counts of stuff in there and we may just accept one, and that would have an effect on what the bond would be and everything else.

Q I'm going to return to that in terms of how these bonds were set. I just wanted to ask, in terms of a busy weekend for the parish, was it

possible in a single weekend, for example, for a couple hundred people to be released due to overcrowding?

A You mean a busy weekend because of people being arrested?

Q Yes, sir.

A I can't say for sure, but that would not be unusual for -- I mean, it could be a -- we have a big party going on or something and they could have quite a few arrests, coming from any one of those communities.

Q And Judge Polozola that you just mentioned, the sheriff that could be held under contempt, was that Sheriff Lee?

A Yeah, Sheriff Cronvich originally and then Sheriff Lee.

Q And is it correct that he was saying that he could hold not just Sheriff Lee in contempt but other --

A I think other -- I think that was probably a standing order. I don't know that, but in all the parishes that had a serious overcrowding, I think Judge Polozola was watching it pretty careful.

Q Mr. Mamoulides, people may not be familiar with, obviously, court orders for overcrowding and

mandatory releases. Can you -- is it accurate that when you're released under a court order for overcrowding, you're generally released on your own recognizance?

A Well, that depends on the judge. In Jefferson, we had anywhere from, depending on the time when it took place, we ended up with about 16 district judges.

But I can remember when there was eight, nine or 10, until they would add -- in the growth, you would get the state legislature to authorize another judge.

Those judges would set bond, and they had also a system that they worked out, I think, together on they would assign one judge over a weekend who would be the duty judge, just like I had a duty assistant all the time.

And they would have -- they also had a magistrate, I think his name was Judge Trout, and then for a while, and then Wilkie. And they happened to be justice of the peace, but they both happened to be lawyers. Sometimes you didn't have a lawyer who was a justice of the peace.

And they would -- he would be available at the court -- I mean at the jail to set bonds. And

generally speaking, they would set a bond with what they saw from the police, what the charges were.

So if you had someone charged with resisting arrest, DWI or threatening an officer, whatever it is, those would be the counts that he would be booked for. And the bonds -- the magistrate would set a bond on each one of those.

Q I'd like to return to how those bonds were set. But to close this circle, if you didn't have a bond put on you during this period of overcrowding, generally did that mean you would be released on your own recognizance?

A Yes, that could happen. But they would generally have a bond. When I said a bond set, that doesn't mean they made bond. They're being held until they either make bond -- the way the bonds are made, the bond could be $20,000, but the magistrate or a judge could say, okay, your bond is $20,000, I'm going to release you on your recognizance based on that. Or a personal bond from somebody, mom or daddy coming over to help them, or a property bond or commercial surety bond.

Any one of those would be part of the, quote, bond that it is, making up the bond.

Q If you did not have a bond, the only way

you would return to court is if you just fulfilled your promise to return to court; correct? That you were basically being released on the --

A Everybody that got arrested had bond. Somebody would set -- the judge or magistrate would say this is the bond. Whether you made bond or not. But if they released him on his own recognizance, it's technically recognizance on that amount of the bond. It's theoretically a bond but it's on nothing.

And those people, it would -- if they didn't show up, then the sheriff's office, the DA's office on an arraignment, we would -- if somebody didn't show up, my assistants would then ask the court to issue an attachment for the arrest of that person and to cancel the bond.

So based on that, then that would happen, and somebody would try to at least -- initially the sheriff's office would try to locate them and bring them in. If they couldn't locate them, they would just stay out as a fugitive.

Q And was there a problem in Jefferson Parish of people not coming back to court during this period of overcrowding?

A Oh, sure. There were lots of -- if they

made a phone call or something, basically, there was nobody looking for the numbers of people who were out on -- who may be on recognizance or just didn't show up, including ones on surety bonds, commercial bonds.

Generally, a commercial bond, judge may have a -- maybe, let's say, it's $30,000 of bond. And he would -- they would have a bondsman who would be trying to represent them to try to get a bond on that portion or some portion of it.

And so the judge or the magistrate would say, okay, we're going to -- we're going to authorize a commercial bond for $10,000, and the balance will be on your own -- on your personal recognizance or personal surety from your daddy or somebody. And that would total up the amount of the bond.

When that happened -- and if you didn't show up, I had a whole section dealing with bonds in my office. And if they didn't show up at the arraignment, then we would -- the DA would move for forfeiture of the bond and an attachment.

If it was a commercial bond, that was a forfeiture of the entire $10,000. And under the law in those days, I think commercial bonds had --

bondsmen, commercial insurance companies had like 60 days to find the person and bring them in before we could perfect the judgment. If they didn't and we perfected the judgment, then we would seize the $10,000 on that and then go forward. And still would have an attachment out for that person.

Q Mr. Mamoulides, you had stated that -- that if someone was released on their own recognizance for example, there wouldn't be anyone looking for them if they didn't show up.

A They might look the first day when they didn't come. My people would make the phone calls on the first time he didn't show up. We would have some information.

But we would ask the sheriff. And it depends on the crime. If it came out of a narcotics case or it came out of a detective bureau who had been interested in it, those guys would sometimes go look fort people.

But basically if it was traffic or some misdemeanor offense, there's just too many attachments outstanding, they didn't go look. If they happened to get stopped on the automobile -- speeding or something, and they looked in the computer that said there was an outstanding

attachment, they would bring them in back under the warrant.

But if they didn't, there would be an attachment go out, and that would be spread out all over, for all the other jurisdictions to know this person jumped bond or didn't show up and there's an attachment out for him from Jefferson Parish.

Q If someone had a bond on them, however, there would be a bondsman that would also look for them; correct?

A Well, if the bonding company -- and they had representatives, bondsmen, whoever they had, they knew if they didn't find them, they were going to lose that money that was filed.

And so the bondsmen would have people to go out and look for them. Most of them had -- in the companies would have people to go out and actually look for these people and bring them in.

Q Some of these people were often called bond jumpers, they would look for bond jumpers?

A Yeah, that was -- yeah. They would look for it because they had a reason. They were going to lose cash. And that's also -- if it was a house or somebody, if they came in with a property bond which was set by the court on stuff, we would

proceed against that residence or whatever that piece of property is. And there was some -- those people usually didn't have anybody, like bonds -- the bond people had people to go out and look.

But if they were a relative, they would call, they would call their son or somebody and try to get them come in, we're going to lose our house if you don't come in, you know. So they had somebody working on them.

Q Mr. Mamoulides, I would like to show you in Exhibit 1134, and I'll represent to you this exhibit is an article showing the different rates at which criminal defendants failed to appear at court. That is, whether they're released on their own recognizance or if they're released on bond.

And I'll represent further that this report suggests that there's a much higher rate of people coming back if they're on a bond.

And the line I want to draw your attention to and ask you about is actually on page 26. I'm going to read the line to you to see if this is also your experience.

The study found that "defendants released on surety bonds are 28 percent less likely to fail to appear than similar defendants released on their

own recognizance."

Is that also your experience, that there was -- that having a bond meant that they were more likely to appear, to put it in a positive sense?

A Absolutely. Because the bonding company, or the insurance company, they knew they were going to have their bond forfeited and they had to go try to find them. Those people, they just took off if they could.

MR. TURLEY: Madam Chair, we would like to move Porteous Exhibit 1134 into the record.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

MR. TURLEY: Thank you.

(Exhibit Porteous 1134 received.)

BY MR. TURLEY:

Q Now, to return to Jefferson Parish, during that period, did the court system start to use what are called split bonds?

A Well, I don't know where that term comes from, but what it really was is, in effect, would be let's say the bond is $30,000 and the judge is going to set whether it's going to be a property bond or if the guy came in and said I have a piece of property worth $10,000, Judge, or whatever, or he

said the bondsman, they said this man or this family is willing to put up 10 percent of a $10,000, that's usually what the fee was for the bond. So that's $1000.

So the court would then say all right, if that's all he can make or whatever he could make, they would put down a $10,000 commercial bond, $10,000 property bond or $10,000 personal bond on some -- on the daddy and the balance in recognizance.

So in effect, you're splitting the amount. And that's what that amounts to.

But most of the judges would not be upset with that because they had some portion of it in the form of a surety, of a commercial surety, meant that they were going to have a better opportunity to come to court, because they knew they would forfeit that bond.

Q You referred to most judges. Is it true that most judges did execute split bonds?

A If -- yeah, if that's what you want to call it. I mean, they would -- my office didn't participate in the setting of bonds and all. We didn't -- and we weren't there at the jails or anything like that, whatever, when the bonds got

set.

There would be somebody, the magistrate or whatever or the defendant, would hire a lawyer and he would go -- if he was in jail on a bond of whatever amount was there, he may go talk to the judge and say, look, they can't make this, your Honor, can we do -- they would talk to them outside our presence.

Now, remember, the DA has not gotten the charge, we don't have a record on them or anything on that.

The only time we would participate is if we had a call from, let's say, the narcotics squad or from the detective bureau saying they have got somebody in, and he's a flight risk, he's got a bad reputation, a bad record, and we'd like to -- we're going to ask the court to set a high bond, would you have an assistant available at the hearing.

We always, if there was going to be a reduction of bond, they had to do a motion in service. And my people would go in at that time.

And the only other time is if it was a violent criminal and the police didn't want him out. We would then recommend a -- that he doesn't get reduced in the hearing.

Normally, otherwise, we left it up to the court. We would not participate in trying to just hold them in, because we had a jail problem. And a lot of the judges wanted to make sure the guy shows back up.

But if he was a flight risk, had a bad reputation, came in -- like I can remember one, it was a boyfriend of some girl who had a baby, and he had burned the kid with cigarettes. And they had a big deal on that.

And we were told about it. And they went in, and we asked him not to release because he would take off. And he had a bad reputation and we kept it in. That particular case, it went all the way to -- the defense lawyer was able to get the federal judge to order -- hire a -- our local judge to refuse the bond. Our local judge refused. So we had a big fight between us and the federal court. Ultimately the federal judge recounted and they left the bond as it was.

Q Now, in those cases, those cases you described where you would be involved --

A Oh, yes.

Q -- generally, did judges go with the recommendation of the district attorney in those

cases?

A Yeah, they -- it depended. We would not make -- I just told you, we wouldn't make a recommendation that the bond not be decreased, or would leave that up to the court if it was just a routine case. If we didn't have some knowledge of the request of the police or something, my assistant would say, well, this is -- this is why, your Honor, and we'd give them the reasons.

And basically, I think the judges would agree or take a hard look at it before they would release somebody, particularly if it looked like he would take -- skip the country, you know, take off, if he was a risk.

Q Mr. Mamoulides, do you recall any case where Judge Porteous set or adjusted a bond over the objections of the district attorney?

A No, I would not have -- I mean, I wouldn't have been in that particular courtroom. But I don't recall one either way, on any of the of the judges. But if it was a routine thing, they would ask. If the judge didn't do it, we would proceed, that's all. That was the discretion of the court.

Q We've been referring to this as split bonds, both the House and the defense. Do you --

did you see anything wrong with split bonds?

A Oh, absolutely not. The type of bond that is set by the court, the judge could say, no, I want a property bond, no, I want it all in the commercial, I want it -- let them off on recog, whatever. That's the call of the judge and the magistrate, not the call of the DA. Didn't bother me at all.

As a matter of fact, just because of what you showed, if it was -- we were always more pleased if there was some sort of commercial bond involved, but somebody would be looking for them if they didn't show up.

Q Now, you had mentioned when people are arrested, eventually a bond is set. Was it sometimes the case that a bond was set higher or too high because of charges later being dropped for a defendant?

A Well, remember, the judge, if he -- say it's on a weekend, some night, and the judge is on call, and they call him up and say we've got this guy in jail, he's charged with $100,000 bond for armed robbery or something of that.

If the offense was a serious offense, the judge would say fine, I'm going to put $100,000 bond

on him until we can get a look at it tomorrow or morning and have a look, if he wants a reduction, he'll have to file something on it. So it happened.

Not only that, you could have four or five counts of somebody. They charged somebody with a burglary or several different things. And when the police would put the counts on, the bond -- the magistrate would put a bond on each one of those counts.

When it got to my office, in the screening, looked at it, they looked at the thing and they said, you know, we're not going to accept that, we'll only accept these two. You got him on resisting arrest, DWI, threatening an officer, whatever it is. Some of those things we wouldn't charge. And therefore, the amount that would have been set on that count would not be -- they would not have to make a bond on because we weren't prosecuting on that count.

But sometimes we didn't get that case brought in for maybe weeks. We wouldn't know when the police would call them to try to get them there. But more serious cases they were pretty good about getting the charges in as quickly as possible.

Q I'd like to ask you a little bit more

about the mechanics of the system.

Is it accurate to say that Jefferson Parish often had a magistrate judge that was assigned for a week by rotation?

A I don't know how long they assigned them, but that was done -- the judges did that among themselves. In other words, they would put one of the judges on duty to receive calls, to sign warrants, to sign whatever there is. He was available to the -- to the sheriff's office or any of the police agencies to go in. Suppose they wanted to get a warrant for arrest, they would bring it to the judge, or search warrants. That judge would be the on-call judge for the criminal section.

And the magistrate would be primarily -- the other magistrate I was talking about, the ones that I told you used to be justice of the peace, they were there just to set bonds. And if -- they usually set the bond based on what the charge was. Coming in, they had a burglary, this and that, they would just play a ballpark, and just say I'm going to put this on it. That would hold them until something happened.

Q Now, looking at those magistrate judges that did this, was it true that some of the judges

were better than others in performing that duty?

A I don't know that. I hear that, some of the judges would not be available to the detectives would have to go find another judge. Because they knew all the judges, and they could call them at their home. Any district judge could sign a warrant or search warrant.

If they couldn't find the judge who is the duty judge, who is supposed to have a phone and do that, then they would go find a judge to try to convince him to sign the warrant so they could get this guy before he took off, or whatever it is they were working on.

Q So your detectives would call on judges who weren't magistrates and say look, we really need to have this done, we can't reach the magistrate judge?

A And the detectives knew which judges were more able to accommodate them. Yeah, go see judge such and such, he's here, across the river, this one is over here.

They knew the judges and they would call and say Judge, I can't find the assigned judge, would you let us come talk to you about a warrant, a search warrant or whatever it's going to be.

And those judges would either accommodate them or they would pick up the phone and try to find the duty judge and read them the riot act. But that was among the judges, had nothing to do with us.

Q And would you -- sometimes detectives, were some judges simply more available so they would go to -- try the same judges?

A Sure, that's normal.

Q Do you know sometimes would they call Judge Porteous for that service?

A I'm sure. I don't know. I wouldn't be involved in that. I mean, I don't know what his relationship was with all the detectives and all. But I would assume that he was available to -- he was a good prosecutor, and he understood.

Q Now, I just want to be certain about one thing. Putting aside the term "split bonds," which we have been using, was it your understanding that Judge Porteous invented split bonds, or did many judges do split bonds?

A I don't know what the term -- when the term "split bonds" -- that's not anything unusual. I mean, somebody would get arrested for a charge, and he's -- he's in jail. So he calls mama or daddy. And so they come over there to try to see

what the thing is and see what it's going to take to get them out. And the police would say here's what the bond is that's been set.

So then they would either have to put up something or they would find -- there would be a bondsman around, lurking around, to try to get the business.

So they would talk to them apparently and say well, $25,000, it's going to cost you $2500 and whatever it is. And that's how that happened.

And then if you -- if you could only make that amount, they would say I don't have more than 2500, and the bond is $100,000, that means you can't get out of jail unless -- either the bondsman talking to the magistrate or defense attorney, they get a lawyer at that point to call a judge and say, you know, the family --

In most instances, if there was a possibility of a commercial bond, the judges preferred it, because -- at least a portion of it. That's what you would call a split. They would take a total bond and say okay, we're going to allow this much on here, this many on property, this much on recognizance or personal surety of the daddy, something like that.

Q Let me ask you, another aspect of that bond system. Is it accurate to say that during this period we're talking about, roughly in the '80s and '90s, that the Marcottes cornered -- had a corner on the business for bonds?

A Well, that's what it appears now. I didn't know it at the time, whatever it was. But they were very aggressive and did a lot of bond work. That's what they -- how they made their money.

Q Was it your -- is it your understanding that the Marcottes had roughly 90 percent of the bond business in Gretna?

A I can't answer that. I can tell you this. Later on, way at the time when I was gone, Marcotte was indicted. And I think a couple of deputies that were in Harry's office were fired and indicted for making -- giving preference when people came into jail, notifying them who they were and when they could come over there and look for them.

I guess the first bondsman there would have a hand up on trying to get the bond put together.

Q Let me ask you about that. You brought up the indictment with the Marcottes.

You're familiar with the federal investigation called Wrinkled Robe?

A Yeah, that happened after I was gone, but yes.

Q I want to clarify that. You were never -- in fact, you've never been charged with any ethics violation?

A Not that I'm -- no, no.

Q And you've never been charged with any obviously criminal investigation?

A I was very disappointed with what happened in that. But if they did what they did, they deserved it.

Q Now, to your knowledge, in the Wrinkled Robe investigation, was Judge Porteous ever an unindicted co-conspirator in that case?

A I don't think so. I wouldn't have known. It would have came out of the U.S. Attorney's Office. And that's where they did it. And we've had -- there were two of those judges had been assistant DAs. One of them was Bodenheimer, he had been assistant DA, and was a good assistant doing that, when he was a prosecutor, and a fellow named Green.

And they had Judge Green on camera, taped,

taking money, cash money from either a bondsman or a bondsman's representative, I don't know who it was. But -- and they both were convicted.

Q I'd like to return to them in a second. But was it your understanding of the Wrinkled Robe investigation, they investigated all the judges in this judicial district?

A Well, I'm sure once they had that --

MR. SCHIFF: Madam Chair? Madam Chair, I'm going to object. This witness said the Wrinkled Robe investigation happened long after he had left the DA's office. He's being asked about his knowledge about something that didn't take place while he was the DA.

MR. TURLEY: I'll withdraw the question. It's not important. Thank you, Madam Chair.

BY MR. TURLEY:

Q Now, the House has relied on a statement made by Judge Bodenheimer, where he makes some comment about from -- where he relayed a comment from Judge Porteous about never having to buy lunch as a judge.

Have you heard that comment?

A I mean, I wasn't there, but I've heard the comment on testimony here. I mean, I heard it on

C-SPAN.

Q Well, let me ask you this. You were not there. But Judge Bodenheimer testified last week that he was actually relaying a joke made by Judge Porteous in front of other people.

Is that consistent with your past relationship with the judge, that he was given to those types of jokes?

A I'm -- I'm sure he could be, it could have been. But yes, I mean, that's the -- I mean, that's -- the judges and the lawyers in Jefferson Parish very often had -- would go to dinner and go to lunches and what have you.

And as long as they maintained their -- their own ethics problems with it -- we had a very active judicial ethics in the state. And you didn't very often have lawyers and judges going out and -- to my knowledge, and talk about a case. But you don't know that. Depends on the individuals.

And the defense -- on the criminal side, the DAs and the public defenders, we were able to work all time, they would work together and talk and talk to the judges. But not -- we wouldn't go to lunch with them.

But there was always a close relationship

with the DAs and the -- and the indigent people. I had an open policy. We would allow the defense attorneys to see our entire file, as long as we had to sign -- the point is if they didn't have a good defense attorney, not good for the prosecution. Because the case would be overturned after conviction and the lawyer would be called incompetent. So therefore I would have to try the case again.

So I helped get the funding for the indigent defense office in Jefferson Parish, because I wanted them to have competent lawyers, because it caused me more problems.

Q Well, let me turn to that, the relationship between lawyers that you just discussed. Can you give me an idea of Gretna itself? I mean, is it accurate to say that Gretna is a relatively small legal community where lawyers and judges knew each other?

A Well, Gretna is a -- is the -- everywhere else you'd call it the county seat. It's a parish in Jefferson. That's where the courthouse was. It's across the river from New Orleans, it's a smaller town. It's been there a long time.

They had two or three -- you know, in the

area, restaurants and that. And so the lawyers who operated in Jefferson came from all over. They came from the east bank, from Kenner and Harahan and New Orleans. But they also knew each other.

And they would go over, and rather than go back across the river, if it was lunchtime, they would go, they would go to some of the little restaurants around in Jefferson -- in Gretna.

So yes, it was a small, so to speak, community. Most of those guys and the judges and the lawyers, prosecutors, they grew up together, they went to high school and college together. I mean, they knew them.

Q So you mentioned lunches. Was it fairly common for -- is it correct that judges and lawyers would go out to lunch together?

A It wasn't unusual.

Q And was it also common for lawyers to pay for lunches for judges?

A I would assume so. I mean, yes, they would do it -- that was not unusual.

Q And are you aware of any rule in the 1990s that said that a judge could not accept a lunch from a lawyer?

A I don't think there were any state ethics

laws on that. They were depending on the judge's own integrity, if he was going to do it or not. I can't imagine a judge going to a lunch with somebody he didn't like or somebody he had a quarrel with or something, or if he felt the guy was trying to just take him to lunch to do something. I mean, most of the judges that I knew on that, they wouldn't -- they wouldn't allow that to take place. Their own ethics would stop that.

Q So is that -- so is it accurate to say that you were never really concerned about any judge being swayed by lunches?

A Particularly not in criminal cases. I mean, I didn't fool with the civil -- but I mean, the judge, we tried the cases. If the jury found them guilty, they're -- and we wouldn't participate in the sentencing. If it was a nonjury trial. That was strictly up to the court. We would not -- I would not object to a sentence and I would not comment on the sentence the judge made, even though I may not dis -- I may disagree with it.

But unless it was an illegal sentence, and we would immediately call it to his attention, tell him you can't do that. If he did it anyway, we would take a writ.

Q Mr. Mamoulides, was it also a common practice particularly among holidays for lawyers and others to give gifts to judges?

A I think that's probably true. I think the civil bench, all over -- Christmas and all, they would bring -- they would send things to the judges. I assume. I wouldn't -- I didn't -- I didn't do it. But I would think they would give them gifts, something not out of -- not big or something like that.

Q Would it concern you as a prosecutor to know that gifts were given to a particular judge by lawyers or others?

A No, I would not know about it, and it wouldn't -- just, you know, gave them a car or something, yeah, that would concern me. But, you know, sending them a bottle of whiskey or bringing them a cake or something, I wouldn't know about it, but it wouldn't bother me.

Q I'd like to ask you a little bit about expungements. We've talked a lot about expungements in this case.

The expungements are specifically allowed under Louisiana law, are they not?

A Yes.

Q Okay.

A It depends on what's done. They have an article -- in our office, we would authorize or agree, almost like a plea bargain, if we wanted to allow someone to lead to an 893, that meant that he was going to get some probation or whatever, parole. And at the end, if he successfully did it, if the judge gave it to him, then they could come back in at the end and file the motion to expunge the record.

Q And those types of 893 sentencings were fairly common?

A Yeah, particularly for young people and kids or people that didn't have records. Even if the record, if they were fine, it was up to the discretion of the court. The court had a lot of discretion, the judges.

Q The purpose of expungements for judges was to give someone a second chance. Is that how it worked?

A It was the purpose for the whole law.

Q Would it be a typical case, for example, we have an expungement case involving an individual who committed a crime at the age 17, 17 years previously. Is that the type of typical case where

you would seek an expungement to clear the record?

A Yeah, if it was something way back like that, it probably was done before you had an 893. But it was not unusual for the court to entertain a motion. In fact, there was some statutes, I can't remember them now, it's been a long time, but like on DWIs and what have you, they would automatically go off the man -- the person's record after like 10 years, so they couldn't always be there. The state did that on it.

So yes, it's not unusual for the court to do that, but it had to be with the court's approval.

Q And is it generally true that your office didn't object to expungements in most cases?

A We didn't -- that depended on the assistant and what the background of the guy was. If the assistant in the courtroom decided he didn't -- he would oppose, I would say I object. And if he's serious about his objection, he would tell his supervisor or the -- my appeal man. And we would file a formal writ on it, if we thought it was -- but very seldom would do that. Most of the time if the judge wanted to do it, he had to live with it more than anybody else, he's the one that did it.

Q Now, in this case we've talked about two expungements. I want to talk about the first one involving a man named Reverend Aubrey Wallace. I'll represent to you that Judge Porteous had a hearing to consider a motion filed on Mr. Wallace's behalf, seeking what's called a set-aside of a prior conviction under 893.

A Right.

Q Okay. At the hearing, the assistant -- I'll represent to you that the assistant district attorney was an individual named Mike Reynolds. Are you familiar with Mr. Reynolds?

A Yes, he was one of the assistants, he had worked in New Orleans as an assist and came to work with me for a couple years. Did a good job.

Q Mr. Reynolds does not object in the hearing, but I wanted to ask whether it is at that hearing that usually any objection would be heard to a set-aside?

A If he was in a hearing, that's when he could voice his objection into the record.

Q Did Mr. Reynolds ever come to you to raise any concerns about that expungement -- I mean that set-aside, I should say?

A Personally, no, I don't recall any of

that. He would have normally gone to his supervisor or to the -- to the appeals person who would then have that. And I didn't -- expungements would not normally come to me. I wouldn't be -- know about them. 16 courtrooms that were going on, and it could be any of those.

Q Are you aware of Mr. Reynolds coming to his supervisor to make objections either about the set-aside or the expungement?

A No.

Q Now, if Mr. Reynolds had come to you or the supervisor with concerns about a set-aside or expungement, would he have been punished in any way for doing that?

A Absolutely not. If he had a reason, he would give his reason. His adviser would come in and tell me. It may be that it was improperly done, that he wasn't following the law, in which case we would say no, you can't do this, it's too late or it's been too long or whatever it is. And we would use the portion that the law says, and say but Judge, you made a mistake.

It's like a judgment sometimes would give a sentence that was improper, like some sentence that could come out on an armed robbery did where he

didn't do certain things, it understand mandatory. If we caught that, we would go back and say Judge, we would -- because it doesn't follow the law.

But nobody would get punished for that. He would give his opinion why he was doing it.

Q Now, Mr. Mamoulides, we also had an expungement for an individual named Jeff Duhon. And I want to just ask you, in that case, there was -- we showed evidence of one judge signing an order in a case from a different division. Was there anything wrong with a judge in a case like that of signing an order from a different division?

A No. All of the district judges were technically the same in authority. And the rules that they would make among themselves was between them.

For one judge to change something, what another judge did, you'd have to assume, or we would assume, that he would have talked to that judge. If he didn't, that judge and he would have to have a battle about it.

But it was legal to do that, and the judge may -- something coming up and he may not be there. Any judge could theoretically do that. And it didn't happen often.

In the old days when I first was there, all the judges -- a lot of the judges wouldn't take criminal cases. So among themselves, they would say, only three judges are going to take criminal and we're going to be -- those are the ones that are going to do it.

That got to the point where we couldn't get anything done. So when I was DA, I came to the judges and got a big meeting saying I want -- I'd like to have all the cases set by -- by -- allotted across the board, felonies, relative felonies, capital cases, each allotted separately, so one judge wouldn't get all the capital cases, which took so much time.

So we put balls in a thing and we had different one. There were still things happening, judges would get -- so I would send an assistant every day to witness the drawing of the balls out of those things to make sure they were even and the judges couldn't play games.

If they wanted to change among themselves, they could do that, but one judge didn't get all of the death cases or whatever it is, and then fall way behind on his regular docket.

But there was absolutely -- a judge doing

something for another judge is legal, and it's legal on the record. They have to make that change themselves. It wasn't up to us. We couldn't do anything.

We would be bound by whatever had happened with the judge making that. But that judge and the judges' rules among themselves, saying don't you sign one for me or yeah, would you take care of this, I don't know what went on from that stuff.

But it would be a legal thing, and we would assume that that was how it went.

Q It would be helpful to get some understanding of how these cases developed. You had talked about expungements. But am I correct there's first a motion to set aside before any expungement occurs; correct?

A Well, no, it depends on how -- the expungement in itself is let's say we've got a guy on a charge that is -- that could be an expungeable charge, in other words, he pleads under the expungement, he pleads guilty under this particular article, which in itself says that if he -- the judge sentences him, gives him probation, and if when he completes that probation, you would automatically be able to come and his lawyer to be

able to file a motion to expunge because he has successfully done what he was told to do, okay.

That would be filed and we would not object to that and it would get done.

And a lot of times the DA's office, we didn't want that to happen, we'd say no, we're going to object to a plea on 893 -- we didn't charge people under 893. We'd charge them for a crime.

Q Right.

A If we didn't agree to if, then we'd say no. Now, the judge had great discretion, fine, I'm going to do it anyway. The judge had discretion to give them a charge -- I mean a sentence that could be expunged. But generally speaking, that would be done with the DA and the assistant and not me but the assistant DA and the defense lawyers, saying, well, would you all accept if he pleads guilty to an expungement. And I said -- well, they would look at it and see it. If he didn't fall into a category which allowed them to do it, we would say no, and then it was up to the court.

Q Now, you refer to expungements as this would be automatic. Expungements at that point were automatic or ministerial?

A No, they're not automatic. Someone has to

file -- if they didn't come back and file for that expungement to seal that record and show it, then it didn't happen. Finish his probation and all, it just stayed open as a guilty plea and whatever it is, even though it was under 893.

Some action, as I recall, had to be taken by the defendant or his attorney when everything was completed to come in and do it. And that expunged the record. And that meant that the record couldn't be picked up.

Q Now, in this case, in the Duhon matter, we earlier looked at an order signed by Judge Richards, setting aside a sentence in that -- in that case.

When have a set-aside motion like that, isn't that the key motion --

A On that type of thing, yes, it would have been the key motion that would do it.

Q As opposed to the expungement, that's the one --

A Well, it's a set-aside on the -- there's some rules in law, and, you know, if you -- if it happened after they tried to change a sentence after the sentence was being executed, there were some statutes that didn't allow the court to do that, they couldn't go back and change it once it was

being executed, okay.

MR. TURLEY: That's all my questions for now, Mr. Mamoulides. Thank you very much.

I can pass the witness.

CHAIRMAN MC CASKILL: Thank you, Mr. Turley.

Cross-examination?

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Mr. Mamoulides, when you first became the district attorney, did the assistant district attorneys have some power to set bonds in certain cases?

A Yes, when I became an assistant in 19, I think it was, '66, I was shocked one day when I get a call at home from a man who was a bondsman by the name of Rock Hebert, who I didn't really know, saying he had such and such in jail and wanted me to set a bond.

And I said do what? I had never done any criminal law per se. But -- and I said no, I'm not doing that.

And the next day I met with the DA, and talked about it, and he said yeah, he said the law allows the DAs to set bond. And I said, well, I

don't want to do that and I don't think we ought to be doing it and so forth. At the time we talked.

And I found out then that every public official in the Parish of Orleans had bond-setting authority, even -- so as it went -- as things went on further and I did -- became very active with the DA association, I got Frank Langridge to agree to allow me to go to Baton Rouge and revoke that. We did away with that. No DA had the ability to set bonds. And Frank told all of the assistants, don't set bond. We didn't set bonds.

Q Back at the time before the change was made, back in the time when assistant DAs could set bonds, did you become aware of a practice of, I think, the bail bonds, Mr. Hebert, that you mentioned giving gifts to assistant DAs?

A The same year, I was appointed in October I think, and in that same year I got a gift certificate sent to my house from Hebert Bonding for like $80 worth of something. I brought it to Frank and said who is this? Frank Langridge, my boss. And they told me. And I said I don't want it, I'm not taking that, and gave it back.

When I did become DA, I wouldn't allow my assistants to take anything from bondsmen or

anybody.

Q Why is it that you didn't want your assistant DAs to take gifts from bondsmen?

A Well, I didn't want -- nothing wrong with it per se, but there was a -- it was obvious that the -- at that time when they would set bonds, that's why it was there. They would -- they would be easy to call an assistant DA at home and get a bond set than go look for a judge.

So all that ended at that point. And Rock Hebert, who had been around for a long time, Hebert Bonding, he knew all the judges, would put on Christmas parties and do all kind of stuff. We didn't allow that.

Q So it's fair to say, Mr. Mamoulides, that you put an end to this practice of bondsmen giving gifts to the DAs because you didn't want the DAs beholden to the bail bondsmen; correct?

A Correct.

Q You thought there was something potentially corrupting in the bondsmen giving gifts to people who could set the bail, am I right?

A Yes, sir.

Q Please let me finish. Am I right about that?

A That's right.

Q If you didn't think it was appropriate for deputy DAs to take gifts from a bondsman, how would you feel about a judge taking gifts from a bondsman?

A Well, I didn't -- I didn't know about any specifically. On Christmas, like you said, people giving Christmas presents, that's up to the judge, if he want to accept it or whatever, that's fine.

It wasn't illegal to do that. And --

Q So Mr. Mamoulides, your testimony is you wouldn't want a deputy DA who can set a bond to take a gift?

A Absolutely not.

Q But you're okay with a judge setting a bond who take a gift?

A I didn't say it was okay. I may have left it up to him and his ethics. But the assistant DAs, I didn't want them taking presents from bondsmen.

Q So it would concern you if a deputy DA did it, but not if a judge did it?

A The judges didn't work for me. I'm responsible for the assistant DAs. That was who worked for me. And I don't know -- and I wouldn't have known, except when I got that one and I told the assistants after I became DA, nobody -- you

cannot accept a gift.

Q As DA, did you accept gifts from bondsmen?

A No.

Q As DA, did you accept expensive lunches from bondsmen?

A Never went to lunch with bondsmen.

Q As DA, did you allow bondsmen to do car repairs for you?

A No.

Q Would you allow bondsmen to do home repairs for you?

A No.

Q What would you think about a judge who let a bondsman do home repairs for him?

A If he was an old friend or something, that's up to him. Judicial ethics are different. That's what he has to live with, not me. And I wouldn't have known about it anyway.

Q Your view would be laissez-faire, let a bondsman do whatever he wants for a judge?

A Well, it wasn't a crime. If it was a crime, I would do something to investigate or something like that. But he could have been his brother. Who knows who the bondsman is. I don't -- I didn't have any knowledge until I was reading some

of this stuff on that. But I didn't know specifically of any instances until --

Q And as DA, it wouldn't concern you that a judge who is setting bond on defendants that you're charging is getting home repairs and car repairs and gifts from a bondsman? That wouldn't concern you?

A I don't think -- setting bond -- and again, that's again -- we stayed away. We wouldn't recommend bond and being set. And it was always done without a DA there. That could be in the middle of the night or whatever it is. Now --

Q But my question, Mr. Mamoulides, is wouldn't it concern you that a judge who was setting bonds in cases you were prosecuting, defendants you want to show up in court, is getting car repairs, home repairs, gifts and expensive lunches to trips to Vegas from the bail bondsman? Wouldn't that concern you?

A Well, it doesn't concern me if the bond got set. As far as I'm concerned, the bond was set and it's a commercial bond or what have you. It's only if they don't show up in court that I would get concerned with it. That's -- we would automatically forfeit the bond and ask for an attachment.

But the practice of setting -- everybody

is entitled to bond. Whatever they set it at, it's at the discretion of the court and based on the background and what happened.

But that doesn't mean that just because it had -- he set the bond that there's something wrong with it.

Q And so if the judge -- let's say the judge was getting cash from the bondsman --

A That would be.

Q As long as the bonds get set, you don't care?

A If I knew about it, I would think it was wrong, cash to pay a judge to do something.

Q But you think it's fine to take all of the gifts in lieu of cash that -- car repairs --

A I would not have known that. When you're saying that -- it wasn't up to me to go by and ask a judge on a Monday morning and say did you get money for this.

Q Mr. Mamoulides, I'm asking if you knew --

A As far as I'm concerned, if I were judge, I would not --

Q Mr. Mamoulides, would you have concern as the deputy DA that the judge who is setting bond and determining in part whether your defendants show up

in court so you can prosecute them, is getting all kinds of favors, trips to Vegas, car repairs, home repairs, free lunches? Would it concern you if you knew that?

A Well, I would think it would be improper at that point from the ethics standpoint. But I wouldn't have known it.

Q So you'd concede that would be improper ethically?

A Well, it's improper, when I don't want my assistants having at that time -- to be able to have a bondsman come and call them on the phone and go get something done for them, okay. I wouldn't -- that was a portion of the district attorneys -- bonds got set by the judge. We did not -- we didn't recommend bonds unless we were specifically asked by the sheriff's office or somebody on a flight problem or whatever. It was done without us being there before we even got a charge. And I didn't want my people participating in that.

Q Mr. Mamoulides, you were asked a lot of questions about the prison overcrowding situation.

A I'm sorry, the what?

Q You were asked a lot of questions about the prison overcrowding situation.

A Okay.

Q Let me ask you a different question. How would you feel about a judge setting bonds not with an eye to the prison overcrowding but for the purpose of maximizing the profits of a bail bondsman who is doing him favors? How would you feel about that?

A Well, I don't know if that -- you ask me a hypothetical question whether he knows that's maximizing it or not.

If he is -- if a bond is being --

Q Mr. Mamoulides, you've testified to the character and reputation of --

MR. TURLEY: Objection; counsel is not allowing the witness to finish his answer. I object that he should allow the answer to be put on the record.

CHAIRMAN MC CASKILL: Overruled.

BY MR. SCHIFF:

Q Mr. Mamoulides, you've testified to the character reputation of Mr. Porteous, and I would like to ask you how this would affect your opinion of his character and reputation. How would you feel about a judge setting bonds not with an eye towards prison overcrowding but with an eye towards

maximizing the profits of a bail bondsman who is doing him favors? What would you think about the character of a judge who would do that?

A I -- you're asking me at a time -- I mean, I don't -- it's hard to answer the question. I don't think it's proper, of course. But when the jail was overcrowded and the bond had to be set, the bond was generally set by a magistrate before, or whatever it is.

The type of bond that would be set, there could either be a commercial or they would add a commercial to a recognizance to a personal -- personal bond or property bond.

Q Mr. Mamoulides, you recognize that would be improper; right?

A That would be improper?

Q It would be improper for the judge to be set the bond --

A But I wouldn't know what his reason would be.

Q Mr. Mamoulides, I understand, I'm not asking you whether you knew he was doing this at the time.

My question is, would it affect your opinion of his character if you knew that he was

setting bonds to maximize the profits of a bondsman that was paying for his trips and his car repairs and his home repairs? Would that have --

A If that were true --

Q Would that affect --

A If that were true, I would not like it. But I can't imagine the judge setting a bond to maximize anything for somebody else. There's a bond that gets set on a commercial surety is if they can make that bond, he would rather have a commercial surety because there's a better chance of that person coming back to court. And so his reason for doing it, I don't know that.

Q Mr. Mamoulides, if the bondsman were to tell a judge, this is the point where I want you to set the bond, because this is the maximum amount I can wring out of the family, you can set a bond for a lower amount, and he'll show up. But if you set it at this amount, my profits will be maximized. Would you do that for me, Judge? How would you feel about a judge who did that?

A If he did that, I think it would be improper. But I think if the bondsman -- I can't imagine a judge letting a bondsman telling him what to set. He would make it his decision on what he

thought the people could -- what the amount of that surety bond would be.

Q You would agree that would be unethical, wouldn't you?

A Well, if it was accurate and correct, yeah, I think it would be unethical if it were true.

Q Were you aware at the time, Mr. Mamoulides, that, in fact, Louis Marcotte was paying for innumerable expensive lunches for the judge?

A No.

Q Were you -- did you know at the time, Mr. Mamoulides, that the Marcottes were paying for trips for the judge to Vegas?

A No. I just read that recently. I had been gone since '96.

Q Did you know that the Marcottes were having the two people Mr. Turley asked you about, employees of the bail bonds businesses, Mr. Wallace and Mr. Duhon, did you know that he was having them do car repairs for the judge?

A No.

Q Did you know that he was having them do home repairs for the judge?

A No. I wasn't there.

Q If the judge had asked you whether you had any objection to his setting aside a conviction of one of Louis Marcotte's employees who had been doing him favors, doing his car repairs and home repairs, what would you think of that request?

A I would tell him it was wrong.

Q And I take it he never asked you whether you approved of his setting aside Mr. Duhon or Mr. Wallace's conviction, did he?

A No, I don't recall anybody asking me about those.

Q And had he asked you and told you what they were doing for him, you would have said no, that's wrong?

A I'd tell him don't do it, for that reason. If that's the reason he would give me. And if that's the reason the bondsman has been told --

Q Mr. Mamoulides, I think you said with respect to -- we were on the subject, Mr. Turley was on the subject of Mr. Duhon, that this was a case where another judge was assigned the case, another judge had passed the sentence, another judge had done a post-sentence change, but Judge Porteous pulled the file and did the expungement himself. That would be unusual, wouldn't it?

MR. TURLEY: Objection to the question. There's no evidence that he pulled the file. The question assumes a fact not in evidence.

THE WITNESS: If that would have happened --

CHAIRMAN MC CASKILL: Excuse me. I'm going to sustain the objection. Reword the question, if you would, please.

BY MR. SCHIFF:

Q It would be unusual, wouldn't it, for a judge in which another judge has handled both the original sentence and a modification of sentence, it would be unusual for another judge to take the folder from the other -- the first judge's department and handle the expungement. That would be unusual, wouldn't it?

MR. TURLEY: Same objection, Madam Chair. That fact is not in evidence.

CHAIRMAN MC CASKILL: If you could just omit the part of pulling the file.

MR. SCHIFF: Thank you, Madam Chair.

BY MR. SCHIFF:

Q It would be unusual for a judge to intervene in a sentencing matter that was currently being handled by another judge, wouldn't it?

A I would guess it would be unusual. But it's not all the way un -- we had judges that would -- would be absent or be in the hospital, what have you, and they would -- another judge would handle their business. Or if the judge talked to somebody, maybe one judge couldn't get there.

I would have assumed -- first of all, it was legal. I would have assumed that the judges talked to each other. Who am I to say that they didn't, that he was -- look, I'm going to do this because it's legal for him to do it. If a judge can't be there or is not there.

But normally speaking, they would talk to them and would not come to us.

Q Mr. Mamoulides, you're making a lot of assumptions that maybe a judge is in the hospital. You have no indication --

A I have no idea.

Q May I finish, please? You have no indication that the judge we're referring to here, Judge Richards, was in the hospital at the time Judge Porteous expunged Mr. Duhon's conviction?

A No.

Q You have no indication of that, do you?

A No.

Q If you could answer verbally for the record. You have no indication that --

A No. I don't know -- he could have been sitting in his office and said look, I want to do this, and say okay. That's up to them.

Q And you also have no knowledge of whether they ever discussed the case, do you?

A No way. I would not know anything about that.

Q In fact, this isn't a situation you mentioned like on your -- during your direct testimony, where the original judge didn't get involved in criminal matters, because clearly --

CHAIRMAN MC CASKILL: I am reluctant that I have to do this, but I do, and disappointed that I have to do it. But we do not have seven members on the dais right now. So we are going to have to stand in adjournment. And I implore the members who are here not to leave. We are trying to find Senators and locate them and get them here as quickly as possible. We do believe that one other Senator will be here any minute, which will allow us to immediately continue. But for the moment, we're going to have to stand in adjournment, and hopefully it will be no more than three or four minutes before

we can come back.

So you all know, Judge Porteous, you have six hours and 30 minutes left, and the House impeachment team has six hours and 35 minutes left. And for the members that are here, when this witness concludes, we have six witnesses left.

So if we can get everyone's attention again and get them back in the habit of showing up here, not leaving here, I'm optimistic that we can finish the evidence today. And I apologize to the lawyers and to the other witnesses for this recess.

(Recess.)

CHAIRMAN MC CASKILL: You may resume your cross-examination. Thank you for your indulgence.

MR. SCHIFF: Thank you, Madam Chair.

BY MR. SCHIFF:

Q Mr. Mamoulides, it's unusual to have to interrupt a cross-examination. I don't usually have to ask this question, but during the break of the cross-examination, did you have an opportunity to consult with attorneys for Judge Porteous? I'm not asking what your conversation was, but did you have an opportunity to consult with him?

A The statement, he came up and spoke with me for a minute just to tell me they were going to

have a few questions on redirect.

Q Mr. Mamoulides, in order to have a sentence set aside, isn't it correct under Louisiana law that a person has to originally have been sentenced under 893?

A I'm sorry. I didn't catch the last of that.

Q In order to have a sentence set aside at some later date, isn't it necessary under Louisiana law, at least at the time, to have originally been sentenced under provision 893?

A I'm not sure. I think probably so. But I think if a sentence was erroneously set originally and they recognize it, it could be brought up to be set aside or resentenced with the discretion of the court. But generally, I think it would be done in 893.

Q Mr. Mamoulides, you've been watching the trial on C-SPAN, I think you testified earlier.

A Not all of them, not everybody.

Q Is that why you raised this argument, because you've seen this argument on C-SPAN?

A I'm sorry?

Q Is that why you've raised this argument, because you saw this argument on C-SPAN?

A Please, which argument?

Q In order to have a sentence set aside, you need to be sentenced under 893.

A I remember some instances where an illegal sentence was set and it wasn't recognized until later. Like someone was set on a case where they didn't allow for good time or something, and we would recognize it, or we were told later we would go back and say judge, this sentence, we didn't catch it, but he was set and it doesn't allow for this. And so with that, we make a motion.

Q Mr. Mamoulides, there's no indication in this case that Mr. Wallace was illegally sentenced by Judge Porteous originally, is there?

A I'm sorry?

Q There's no evidence in this case that you're aware of --

A No.

Q -- that Mr. Wallace was illegally sentenced by Judge Porteous when he originally sentenced him not under section 893? That was a legal sentence, right, as far as you know?

A As far as I know.

Q And if you want to have your sentence set aside generally, you need to be sentenced under 893;

right?

A That's one of the areas, correct.

Q The judge had the discretion to sentence him originally under 893 but didn't; am I right?

A Correct.

Q And in fact, at the time he sentenced him, Mr. Wallace had a pending drug charge against him as well; correct?

A I don't know that. You're telling me that, but okay.

Q But if he had a pending drug charge against him at the time, that might be one reason why the judge --

A Correct.

Q -- wouldn't sentence him under 893; am I right?

A Correct.

Q And isn't it also a provision of Louisiana law that in order to make use of 893 to set aside a sentence, it has to be done before the sentence has been served?

A As I recall -- it's been some time, but that's correct. I don't think you can change a sentence after they started serving the sentence under the Louisiana law. There's a separate

statute, I think, that did that.

Q And so if Mr. Wallace, in fact, had already finished his sentence, he wouldn't be eligible, even if he had been sentenced under 893; am I right?

A He wouldn't be eligible for what?

Q Even if he had been sentenced under 893, if he had already finished his sentence, he wouldn't be eligible for a set aside; correct?

A That would probably be correct.

Q It's fair to say, Mr. Mamoulides, that you had a fairly laissez-faire attitude about sentencing with judges? You pretty much left the sentencing to the judges?

A Yes. We did not participate unless it was something specific in a plea bargain that we were doing.

Q So in the vast majority of cases, whatever the judge said about sentence, you didn't quarrel with; am I right?

A It was his prerogative under the law to set the sentence.

Q In the vast majority of bonds, you didn't quarrel with what the judge set as a bond?

A Correct.

Q So if a deputy DA thought there may be some illicit purpose behind a sentence or an amending of a sentence but didn't have proof, it's not something you would overturn or contest, would it be?

A I probably wouldn't know about it unless he came and talked to me about it.

Q Were you aware that Mr. Reynolds, the deputy DA in the Aubrey Wallace case, in fact, went to the Metropolitan Crime Commission to raise an issue about Judge Porteous's --

A I'm aware of it now.

Q -- set aside of the conviction?

A I'm aware of it now since you said it and I saw it in one of the articles on C-SPAN.

Q Were you also aware that he ended up speaking to the FBI about his concern about how Judge Porteous handled this sentencing proceeding?

A If I did, I did. I don't remember the particulars, but that assistant, if he objected, all he had to do was go tell his supervisor or my appeals person if he objected to the -- being that it was illegal or something, he needed to tell somebody.

Q Isn't it true, Mr. Mamoulides, that your

policy was essentially let the judge do what the judge wants on sentencing in the vast majority of cases, wasn't it?

A That's not exactly what I said, but yes. The question is, we didn't interfere with sentencing, but if the sentencing was illegal and we knew it was illegal, the assistant knew, he would object, and we would then let -- notify the Court that we thought the sentence was illegal, or we would take a writ on it.

Q But if you didn't think it was illegal --

A Then we would not interfere.

Q Mr. Mamoulides, let me finish. If you didn't think it was illegal but you thought it was -- there may be some illicit motive going on, would you file a writ in a case like that?

A No, if it's not an illegal sentence, we have no right for a writ.

Q Would it be fair to say that if a deputy today just didn't like the sentence that a judge was giving, there was no point in raising that issue with you, because you were going to say let the judge sentence, that's his prerogative?

A If the assistant didn't like it, that's fine. That's exactly right. If it's illegal, he

should say -- object and notify us on it. All the assistants knew my policy. I would not try to second-guess the judge on sentencing. He could give someone 1 to 5, that's what the law said it, if he gave him a one or a five or he suspended the sentence, we would not interfere with that.

In Louisiana, if you want to know something about that, all the judge had to do was order a presentence investigation, and there would be a presentence investigation done for him by the parole department giving him all the facts, and then he had that evidence to use. That's why they had the discretion. If it was in the guidelines of the sentencing, if it was a violation of something.

Q But your general policy was let the judge do what the judge is going to do on sentencing; right?

A Let him do -- I don't know what you're -- my general policy is we would not -- I would not object or publicly say anything about a sentence that was legally done. Okay?

Q So unless the deputy could prove to you it was illegal or based on some illicit motive, you would say let the judge do what the judge is going to do?

A Why are you -- you keep asking me -- if it is an illegal sentence and we are aware of it, then we would take action. We would take a writ on it. If it was an illicit, what you're saying illicit, I wouldn't know that unless there's been an investigation or something and that comes out. But we wouldn't know that at that time. I have no way of knowing anything like that.

Q And your deputy DAs would know that your policy was essentially, within very broad confines on sentencing, let the judge do what the judge wants to do? Your deputies understood that?

A You keep trying to repeat my comment. The answer is yes, I would not interfere. The judge was elected, and he's the one that has the say so and the discretion on sentencing. Just like I wouldn't allow the judge to tell me what to charge. The DA would pick the charges, and once you put those to prosecute on and the ones we didn't prosecute on, that was our reasoning, and we would go forward. And so the judge couldn't tell me what to file charges on, and I wouldn't tell the judge what his sentence is if it was a legal sentence.

Q If you had known, Mr. Mamoulides, that the reason the judge was setting aside a conviction was

to do a favor for bail bondsmen, would you put a stop to it?

A If I knew and I thought it was improper, yes, if I could stop it, or we would investigate, or we would call for an investigation or something of that nature. If a judge was doing something wrong, taking money, that's a crime, and we would get involved if we could. Basically speaking, that would be a bribery situation, if that's what happened. We would call the detective bureau and report that something ought to be looked at. But the chances of me knowing that from something like this is very slim. Go ahead.

Q You testified earlier about the judge's reputation and character when he was on the bench. Would your opinion of his reputation or of his character change if you were aware that he had received $20,000 from attorneys appearing in his courtroom that he had been sending curatorships?

A Well, yes, I would not think that was proper. I would not know that --

Q Would that just be improper, or would that be illegal?

A When you're saying -- during the time that I was DA, if I knew that a judge was taking money

for giving --

Q Let me restate the question. If a judge is sending curators to lawyers and asking back kickbacks of a percentage of the curatorship money, in your view, is that illegal?

A No, it's not illegal. I think it would be something to look at.

Q So your view is it's not illegal to take kickbacks for sending court cases?

A It would be illegal for him to take money -- to give a curator to a lawyer with the lawyer understanding that he's going to get part of the fee of whatever he makes out of it. I think that would be illegal.

Q So if a judge sends curators to the lawyer and calls the law firm and says I want some of the curator money back, you would agree that's illegal?

A I think that would be illegal.

Q And if you knew that had happened, would that affect your opinion of Judge Porteous?

A If he did that, sure, I would not think that was proper.

Q You also testified that you thought that Judge Bodenheimer was a good deputy DA.

A He was a good deputy DA. When he was

prosecuting cases for me, he had some good cases and was effective in the courtroom.

Q And would you say he was also a good judge?

A Sorry?

Q Would you also say he was a good judge?

A I didn't have much contact with him when he became judge, but apparently his docket ran pretty well. Otherwise, I didn't spend much time with him individually. Whatever division he had, I would assume that. I had no complaints from my assistants on.

Q Because you had no complaints from your assistants about Judge Bodenheimer, you would say that both Judge Bodenheimer and Judge Porteous enjoyed a good reputation on the bench?

A From me, my standpoint, they had a good reputation from working with the district attorney's office and moving the docket and what have you. That's what my experience would be with them.

Q So when you say Judge Porteous had a good reputation, you're looking at it from the narrow confines of how it affected your office?

A Basically how he handled himself in criminal cases. I wouldn't be -- I wasn't in his

court, and we didn't have anybody in his courtroom in civil cases, but if he ran his docket, one of my supervisors, my assistants, if they thought that things -- we couldn't get cases done or he was interfering or something was happening, they would tell me. I would have some knowledge of that.

Q Do you still think that Judge Bodenheimer has a good reputation?

A No, not at all.

Q Are you aware Judge Bodenheimer pled to at least one count --

A Absolutely. I was shocked and embarrassed.

Q I'm sorry?

A I was shocked and embarrassed to know that he had done that.

Q Would you be shocked and embarrassed to know Judge Porteous had done similar things?

A If he did. I don't know that, but yes.

MR. SCHIFF: Nothing further, Madam Chair.

MR. TURLEY: Madam Chair, we just have a brief redirect.

CHAIRMAN MC CASKILL: Okay.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Mr. Mamoulides, as I mentioned earlier, I'm only going to keep you briefly. I just have a couple follow-up questions. First of all, in setting a bond, doesn't a judge usually inquire as to how much an individual has in assets? Isn't that one of the questions that is often asked?

A I don't know that, but I would assume if he was trying to set the bond, I'm sure there would be a bondsman there telling him what the man could afford or something of that nature, if he was trying to get a commercial bond put in place.

Q Because that's a highly relevant question in setting the bond amount, isn't it?

A Yeah. And of course, most of the judges, before they set the bond, if they have time in the daytime, they would talk with the police, what's the charge, what has he done, what's his background. They want to know as much as they could about the matter.

Q And when you told Mr. Schiff that sometimes prosecutors had what you called an illegal or erroneous sentence, you're talking about simply a sentence that was originally set that you -- that the prosecutors believe should be reset because it was not done correctly?

A Yes, that happened. Judges sometimes would make an error on a sentence that was technically illegal to make. Like they didn't -- failed to put in -- like an armed robbery, given 10 years without the benefit of parole or probation. Without saying that, so -- he left that out but the law said he was supposed to do it, we would catch that and ask him to amend the sentence and put the right thing in it.

Q Mr. Mamoulides, you've had lunch with federal judges, for example, have you not?

A Sure.

Q And when you've gone to lunch with federal judges, who has generally paid at those lunches?

A Whoever made the invitation. If I invited him, I paid. If he invited me, he paid. There's a couple of federal judges I've been knowing for many, many years. So it's whoever invited who.

MR. TURLEY: Mr. Mamoulides, thank you very much for your time today.

THE WITNESS: Thank you.

CHAIRMAN MC CASKILL: Does the panel have any questions? No questions by the panel at all for this witness?

You may be excused.

THE WITNESS: Thank you.

CHAIRMAN MC CASKILL: You may call your next witness, Mr. Turley.

MR. TURLEY: Thank you, Madam Chair. The defense calls Darcy Griffin.

Whereupon,

DARCY GRIFFIN

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you.

MR. SCHWARTZ: Thank you, Madam Chairman.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Ms. Griffin, as you know, my name is Daniel Schwartz. I'm one of the attorneys for Judge Porteous. Thank you for returning today for your testimony.

Could you tell me a little bit about yourself, your educational background.

A I have a bachelor of arts from Tulane University. I work for the Jefferson Parish Clerk of Court and have worked there for 25 years.

Q What is your current position, please?

A I supervise the criminal department.

Q For the entire court?

A Yes, for the 24th.

Q And what was -- how long have you had that position?

A From -- I'd say about 1998 to present.

Q And what was your position before that?

A In '86, I was training. In '87 to '92, I worked for Joseph Tiemann; from '92 to '94, Thomas Porteous; '94 to '98, Walter Rothschild, all judges of the 24th Judicial District Court.

Q And when you say you worked for them, who was your actual supervisor?

A My boss is John Gegenheimer, the clerk of court for Jefferson Parish.

Q So you were assigned to various judges' chambers?

A Correct.

Q Have you ever been interviewed by the FBI or other government officials in connection with this or related matters?

A Yes, I have.

Q How many times have you been interviewed?

A I would say approximately seven or eight times.

Q You worked, you said, with Judge Porteous from '92 to '94; is that correct?

A Correct.

Q So you were with him until he became a federal judge?

A Correct.

Q Okay. And what was your title while you were working with Judge Porteous?

A I was his criminal minute clerk.

Q What were your responsibilities as a criminal minute clerk?

A Setting the daily docket, handling any pretrial motions, arraignments, trials, anything that required a minute entry or anything that needed to be done by the judge.

Q Would it be fair to say you handled the paperwork for the criminal side of his docket?

A Yes. I maintained the record for the Court.

Q Was there also a clerk handling the civil side?

A Yes, there was.

Q Who was that?

A Jolene Acey.

Q Did you ever know Judge Porteous to set or adjust bonds?

A Yes.

Q Tell us a little bit about that process. How did it work?

A An individual would get arrested for a charge, whether it be burglary or theft, and a bond was set. The bond would be split occasionally.

Q Who would set the original bond?

A Any judge for the 24th.

Q Any of the judges sitting in that circuit?

A Yes.

Q Did the judges rotate the responsibility to act as magistrate judges?

A Yes, once a week. They had magistrate for one week.

Q For one week. And then how many judges were there in the circuit?

A 16.

Q So every 16 weeks, a judge would have responsibility to act for a week as a magistrate judge; is that correct?

A Correct.

Q And how would it work for a magistrate judge in terms of setting the bonds?

A An individual is arrested, and we had magistrate court in the morning between 8:00 and 8:30, 9:00. Bonds would be set according to the

arrest, the prior convictions of the alleged defendant. Or throughout the day, if they were arrested and they didn't make magistrate court, people would come in, whether it be a family member, an attorney, a bondsman, and say we have so and so arrested for this charge and we need a bond set.

Q In looking at -- in setting the bond, was the amount of assets that the individual had relevant in terms of the setting of the bond?

A I don't know. I couldn't answer that.

Q Did Judge Porteous sometimes act as a magistrate judge?

A Yes.

Q Did -- when he did that, did you accompany him at all? Did he go over to the courthouse -- I'm sorry, to the jailhouse?

A Jail, yes.

Q And he would do that every morning when he was acting the magistrate?

A Of that week, yes, sir.

Q Did you participate in that process?

A Yes.

Q He would need information about the individual who had been arrested. Where did he get that information?

A It was prepared at the jail by the sheriff's office.

Q And then he would set the bonds and then return to his normal duties as a judge?

A Correct.

Q Did some judges not enjoy the service as a magistrate judge?

A Absolutely. I would say none of them really enjoyed it.

Q Did any of them sometimes fail to perform those duties?

A I wouldn't know that.

Q Did Judge Porteous sometimes adjust bonds when he was not sitting as a magistrate judge?

A Yes.

Q And how would that occur?

A Someone would call or come to the office and say they had someone in jail and a bond needed to be set.

Q Was there any difficulty getting into the office and to Judge Porteous's office?

A None whatsoever.

Q There was sort of an open-door policy; is that correct?

A Yes, sir.

Q Are you familiar with the Marcottes?

A Yes, I am.

Q Were they -- did they ever receive special treatment in terms of their access to the judges' chambers?

A That, I wouldn't know.

Q What was your role when the judge was asked to adjust bonds? What was your role in terms of collecting information?

A I would call the jail and get the priors on the arrestee.

Q And sometimes you would do that. Would other people in the office also do that sometimes?

A I would think so.

Q Rhonda Danos would sometimes do that as well?

A I would assume so.

Q And what information would you get from the jail?

A Prior arrests or convictions -- and/or convictions.

Q What would you do with that information?

A Relay that to the judge.

Q And what would he do with it?

A Then he would determine how the bond would

be set.

Q Now, was that the standard operating procedure, that you would always check with the jail to get prior arrest records or convictions?

A Yes.

Q We talked about the Marcottes. Did you see them frequently or their representatives, employees?

A I would say probably so.

Q Were they -- can you estimate the percentage of bonds that they were responsible for during the time you were in Judge Porteous's office?

A No, I couldn't answer that.

Q Did you have contact with other bail bondsmen as well?

A Yes.

Q Did you ever see Judge Porteous -- did you ever know Judge Porteous to reject a request for an adjusted bond requested by a bail bondsman?

A Yes.

Q What about one requested by the Marcottes?

A Yes.

Q Did you, on occasion, go out to lunch with the Marcottes?

A Yes, I did.

Q Tell us about that.

A We went to lunch.

Q Was it just you and the Marcottes?

A Oh, no, no, no. Different staff members, whether it be division A, which was Porteous's division, or other divisions.

Q So there would be a number of staff members who would be invited out to lunch?

A Yes.

Q And do you know why they did that?

A No.

Q Did they ever ask favors from you or discuss bonds while you were having lunch?

A Not with me.

Q Did you ever see them discuss bonds with anyone else while you were having lunch with them?

A Not that I recall.

Q Okay. And who paid for those lunches?

A I would assume the Marcottes.

Q And you saw that happen with the staffs of other judges' offices as well; correct?

A Yes.

Q Did either Louis or Lori Marcotte ever give you cash?

A No.

Q Did they ever give you presents of any kind?

A No. Presents? No.

Q How about over Christmastime?

A Yes.

Q What kinds of things would you get at Christmastime?

A They would bring hams or turkeys or cakes to the office, to all the divisions, to downstairs, not just the divisions of court.

Q So would they bring them just to you --

A No.

Q Other people on the staff as well?

A Absolutely.

Q And to other people on the staff throughout all the judges' offices?

A Correct.

Q Did anyone in the bond business ever give you cash?

A No, sir.

Q Do you know who Adam Barnett is?

A Yes, I do.

Q Who is he?

A He was a bondsman or is a bondsman. I don't know for what company.

Q Did he ever give you cash?

A No, he did not.

Q Prior to working with Judge Porteous, you worked with Judge Tiemann?

A Correct.

Q And what was your job when you were working with Judge Tiemann?

A I was his criminal minute clerk.

Q Did you ever know Judge Tiemann to set or reduce bonds?

A Yes.

Q Did he handle them basically the same way Judge Porteous did?

A Yes.

Q He asked you to collect information about priors and convictions and so forth?

A Yes.

Q Did Judge Tiemann have the similar kind of open-door policy that Judge Porteous had?

A No, sir.

Q How was it different?

A Well, a lot of people hung out there, had coffee, used the jury room to talk. But he didn't have his door open always.

Q After Judge Porteous went to the federal

bench, you worked with Judge Rothschild?

A Correct.

Q Did he also set and adjust bonds?

A Yes.

Q And did you similarly collect information on arrests or convictions before you set those bonds?

A Yes, sir.

Q And was his manner of dealing with that about the same as Judge Porteous's? I mean, did he have an open-door policy? Did he frequently --

A No, he did not have an open-door policy.

Q That was a policy judge by judge it would differ?

A Correct.

Q I would like to ask you a little bit about the number of bonds that would be set in a year. Do you have any estimate of how many bonds Judge Porteous would set in a month, say?

A No, I have no clue.

Q We looked at records on bonds, and we picked a year, 1986. We estimated a total for that year for Judge Porteous of about 3,300 bonds for the whole year. Does that seem reasonable to you? High? Low?

A Him setting 3,300 bonds in a year?

Q Yes, bonds that he had set or adjusted, had anything to do with.

A I would think that would be a little low.

Q What do you think the number should be?

A Around 5,000.

Q For the year?

A Yes.

Q If I told you Judge Porteous had sent about 29 bonds in one month, would you consider that a high number? Low number?

A In one month, low number probably.

MR. SCHWARTZ: Thank you very much. I have no other questions.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. DAMELIN:

Q Good morning, Ms. Griffin.

A Good morning.

Q While you worked for Judge Porteous, your office was located physically in his chamber area; is that correct?

A I was the first office when entering his chambers, yes, sir.

Q So for the period you worked for him,

about three years, you were in his chambers?

A Yes.

Q And at that time you had indicated that there was 16 judges in the 24th Judicial District?

A Yes, sir.

Q And any of those judges could set bonds; is that correct?

A Correct.

Q And while you were working for Judge Porteous, did you see Louis Marcotte and Lori Marcotte, either separate or together, come into his chambers to have bonds set?

A Yes.

Q Okay. And along with Louis and Lori, did you occasionally see Jeff Duhon accompany the Marcottes?

A Yes.

Q And did you occasionally see Aubrey or Skeeter Wallace accompany the Marcottes?

A Yes.

Q And with respect to the setting of bonds by Judge Porteous, was your only function in connection with that to call the jail to obtain the prior arrests?

A Yes; correct.

Q Now, you had indicated with respect to Mr. Schwartz that Judge Porteous had, on occasion, rejected bonds for the Marcottes; is that correct?

A Correct.

Q Okay. How many?

A In a given day?

Q Excuse me?

A In a given day?

Q You recall him rejecting bonds. How many would you say --

A At least three or four.

Q Three or four over the period of time?

A Yes.

Q Do you recall the details of any of those?

A No, I do not.

Q Now, while you were with Judge Porteous in his chambers, is it a fact that you saw him go out to lunch almost every day?

A Yes.

Q Okay. And among the people that you saw him go out to lunch with, was Robert Creely one of the people he went to lunch with regularly?

A I don't know for sure who he went with. I know he left the office every day.

Q Okay.

A I'm assuming that he went with Robert quite often.

Q Okay. And what about Jacob Amato?

A Yes.

Q And what about Donald Gardner?

A Yes.

Q And what about Louis and/or Lori Marcotte?

A Yes.

Q Excuse me?

A Yes.

Q And while you were with Judge Porteous during that period of '92 to '94, did you, in fact, know that he had traveled to Las Vegas?

A I heard that he had, yes.

Q Okay. How many occasions do you recall him going to Las Vegas while you worked for him?

A Once or twice.

Q Okay. Who did he go with?

A I don't know.

Q Do you know if he went on either of those occasions with Louis Marcotte?

A Not to my knowledge, not specifically who he went with.

Q Do you know who paid for his travel to Las Vegas?

A No, I do not.

Q Okay. While you were with Judge Porteous, what type of automobile did he drive?

A He had a blue Cougar.

Q Old or new at the time?

A Old.

Q Okay. And to your knowledge, did the Marcottes do anything with respect to Judge Porteous's automobile?

A Yes.

Q What did they do, to your knowledge?

A I don't recall specifically what was done.

Q You said they did something to his automobile. What did they do?

A Whether they washed it -- I don't know the specifics. I know they were coming to get the keys or something like that.

Q You do remember that?

A Yes.

Q Okay. And you had indicated, I think, with respect to questions from Mr. Schwartz that you had, on occasion, gone to lunch with the Marcottes?

A Correct.

Q Okay. On one or more of those occasions, was Judge Porteous present with you?

A I don't recall him coming often. He may have been once, but when we went, generally, he was not with us.

Q But you do recall at least one occasion when he was --

A He may have been with us, yes.

Q Okay. And when you had those lunches, did the Marcottes pay?

A I would assume they paid. They invited us. So I would assume they paid.

Q Okay. And do you know an individual, an attorney by the name of Robert Rees?

A Yes.

Q Okay. And did Mr. Rees come by the chambers -- come by Judge Porteous's chambers on a fairly regular or frequent basis?

A Yes.

Q Okay. And do you know if Judge Porteous and Mr. Rees would go out to lunch on occasion?

A I do recall that they have gone to lunch -- they had gone to lunch before.

Q Okay. And you had mentioned that after you had worked for Judge Porteous when he went on to the federal bench, you had worked for Judge Rothschild; is that correct?

A Correct.

Q Okay. And while you were working for Judge Rothschild, would he deal directly with the Marcottes?

A No, he would not.

Q Okay. He would not?

A He would not.

Q Okay. What was his practice? In setting bonds?

A He would set bonds. He would -- the same practice. I would call, get the priors. He would set the bond. He would occasionally split bonds. He generally did not talk to bondsmen at all.

Q He wouldn't deal with the bondsmen?

A No, he would not.

Q And are you personally aware -- you've been in the 24th Judicial District for a number of years. Are you personally aware of other judges in the courthouse who refused to deal with the Marcottes?

A I don't -- I wouldn't say specifically the Marcottes. Some judges just didn't deal with bondsmen.

Q Who are those judges?

A We're talking many years ago. Judge

Sessing. I don't think Judge Horner ever did. Judge Labron. I'm at a loss right here. We're talking a long time ago.

Q Would those judges set bonds but work with the lawyers rather than the bondsmen? Is that the procedure that they followed?

A Correct.

MR. DAMELIN: Thank you, Ms. Griffin.

I have no further questions.

THE WITNESS: Thank you.

MR. SCHWARTZ: We have no redirect.

CHAIRMAN MC CASKILL: Any questions of this witnesses from the panel?

Thank you. You're excused.

MR. TURLEY: Madam Chair, the defense calls Henry Hildebrand.

CHAIRMAN MC CASKILL: In a moment of synchronization, both sides have exactly six hours and 14 minutes.

Whereupon,

HENRY HILDEBRAND

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you, Mr. Hildebrand.

MR. AURZADA: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. AURZADA:

Q Can you tell the panel your current position.

A I'm currently serving as the standing Chapter 13 Trustee in the Middle District of Tennessee, also the standing Chapter 12 Trustee in the Middle District of Tennessee, and I have a small private practice.

Q And how long have you held your position as the standing Chapter 13 Trustee?

A I was appointed Chapter 13 Trustee in 1982, the spring of 1982, and I've held it continuously since then.

Q By my math, that's about 28 years?

A That's about right.

Q How many cases have you handled in that time, do you think?

A It's probably in the neighborhood of 150,000 individual consumer Chapter 13 cases and then probably about 100 Chapter 12 cases.

Q On an amount that you distributed to creditors, how much do you, in gross, distribute, and how does that compare to other trustees around

the country?

A My trusteeship disburses -- we will disperse this year approximately $165 million, which is close to what we've dispersed annually for the past several years. It's grown since I became trustee. I started out with about 1,800 cases, and I'm now administering just under 14,000 active Chapter 13 cases. I distribute more money, according to the United States trustee records, more money than any other individual trustee.

Q And have you testified before Congress before?

A I have. I've been -- I've testified before both the House and the Senate subcommittees dealing with the bankruptcy reform. This started back in the 1990s, and I've testified about five times, I think.

MR. AURZADA: Madam Chair, I would request that Mr. Hildebrand be recognized as an expert.

CHAIRMAN MC CASKILL: Is there any objection to the recognition of this witness to give expert testimony?

MR. BARON: Madam Chair, could we define what his expertise is? On what?

MR. AURZADA: It would be with respect to

matters involving Chapter 13 bankruptcy cases, Madam Chair.

CHAIRMAN MC CASKILL: Do you accept him as an expert on matters in Chapter 13 bankruptcy cases?

MR. BARON: Yes.

CHAIRMAN MC CASKILL: He will be accepted for the purpose of giving expert testimony in the area of Chapter 13 bankruptcy cases.

You may proceed.

MR. AURZADA: Thank you, Madam Chair.

BY MR. AURZADA:

Q Just for general purposes, can you describe the Chapter 13 bankruptcy process from the trustee's point of view?

A Chapter 13 provides to individual debtors, individuals or joint debtors who are married, the opportunity as an alternative to Chapter 7. In lieu of the liquidation of nonexempt assets in a Chapter 7, a debtor proposes a repayment plan on a voluntary basis in which they repay creditors as an alternative to losing their property.

It gives them the opportunity to cure defaults. It gives them the opportunity to assume or reject contracts. It essentially was created starting in the '30s with the Chandler Act as an

alternative to the liquidation bankruptcy.

As such, it's designed to be a better alternative for both the debtor and creditors. A material and important part of that is the fact that Chapter 13 is the bankruptcy that is supervised by a trustee who monitors the process, both making -- just kind of shepherding the case through, presenting the case to the judge or sometimes opposing the case, sometimes supporting the case, and then if the plan is approved, then administering the case, administering the plan under the directive of the bankruptcy court.

Q You had mentioned this is a voluntary process. Can you describe what you mean by that?

A Chapter 13, by being voluntary, allows a debtor to drop the program at any time. I suppose it's an acknowledgment of the 13th Amendment. But Chapter 13 just essentially is committing a debtor's future income to repay debts, and as such, we're talking about the earnings that they make, their income, and rather than be compulsory, be mandatory for an individual, they can elect to participate, or they can elect not to participate.

Q And if the debtor fully participates, what's the end result?

A If a debtor proposes a plan which is confirmed by the bankruptcy court and then performs under the plan, at the conclusion of the plan, that is, only after the debtor has accomplished all of those things set out in the plan, the debtor can then receive a discharge, and that discharge, by the way, in Chapter 13 is really the only chapter where the debtor has to perform everything before they get the discharge. In the other chapters, it doesn't exactly work that way.

Q Is the Chapter 13 process an easy process?

A I believe that Chapter 13 is an extremely complicated process, and that's been borne out by the work and the effort that people undertake to do Chapter 13. I have a great deal of respect for the individuals, the families that successfully complete a Chapter 13, because it does involve sacrifice.

The initiation of the process in a Chapter 13 requires the completion of an enormous number of forms that are fairly complex. They are more forms for most people than they've even seen in a tax return.

They customarily will rely on assistance of a professional who, in 19 -- I'm sorry, in 2005, we designate those as debt relief agents under the

SIPA law. But ever since I've been trustee, the successful cases have been represented by professionals because it's very difficult.

Q And when you say "represented by professionals," who are you talking about primarily?

A Primarily attorneys and attorney generally that limit their practice to representing either debtors or creditors and do the consumer practice work. In doing so, they have become aware of the various provisions of the forms, the hidden parts of the forms, and can assist a debtor. So professionals are very important. In my experience, there have only been five pro se debtors that have successfully accomplished Chapter 13 from the start to the end, and that's out of that 150,000 cases. Of those, four of those were attorneys who filed their own cases.

Q So this is not a process for the ill-advised?

A That is correct; that is correct. But it's also -- as I mentioned, it's sort of the mulligan chapter in bankruptcy, because a debtor is allowed to leave. If a debtor decides they don't want to be in the Chapter 13, if a debtor decides the payments are not appropriate, if something

changes in the debtor's life, then the case can be voluntarily dismissed by the debtor. If the debtor can't make the payments, if the debtor is economically fragile, as most Chapter 13 debtors are, then the case is often dismissed as a result of the debtor's noncompliance with the plan. And that is why many cases do not reach a discharge when they start in Chapter 13.

Q And that's the second leg of the difficulties you talked about, the first being filling out the forms, the second being actually completing what you say you're going to do?

A That is correct.

Q Okay. One of the things you said is that debtors rely upon advice for the hidden parts of the forms. What do you mean by that?

A The forms are fairly complex. Most debtors, when they're preparing the forms, or working with a professional to prepare the forms, are under severe economic distress, usually facing a foreclosure, repossession maybe of an automobile, garnishment of wages, maybe a potential lawsuit.

And almost all of the cases have something that is a pressing issue that is pushing on the debtor. And as a consequence, they're very anxious

to get the relief afforded by the automatic stay, and by doing so, they're in a hurry.

And they often don't read all the words. They often do not complete the bankruptcy petition accurately. Sometimes the professionals do not complete the petition accurately. That's been sort of the bane of my existence as a trustee, but it is a fact that I've had to come to grips with.

Q Okay. Now, for purposes of today's testimony, you've reviewed Judge Porteous's Chapter 13 case?

A I've reviewed a number of documents, and that would include the petition, the amended petition, the notice that was provided to creditors -- there was a copy of that in the record -- his Chapter 13 plan, the amended Chapter 13 plan, the schedule that he submitted, the statement of financial affairs that he has submitted.

I read the House report which has the facts that I would rely on in making that determination -- in determinations, the transcript of the meeting of creditors, the Chapter 13 Trustee's brochure that was provided, the application for attorney's fees that was submitted

by his counsel, and then the order that confirmed the plan, I relied on that, the final order of the trustee. I think that's most of what I --

Q Is it your understanding that the plan was confirmed based upon a finding that the best-interest-of-creditors test was met?

A Yes. He could not confirm a plan if it hadn't been met.

Q Briefly, that means Judge Porteous, under his plan, paid more to unsecured creditors than they would have received in a Chapter 7 liquidation?

A That's what the code requires. A bankruptcy judge cannot approve a Chapter 13 plan where the unsecured creditors do not receive at least what they would receive in a Chapter 7.

Q And in your review of the file, did Judge Porteous proceed as anything other than just an ordinary U.S. citizen?

A I read the file without any regard to what the position he held or what his educational background was. I've never met Judge Porteous. I read it as one of the 150,000 debtor cases that I've seen.

Q No special favoritism?

A Trustees try very hard not to show any

favoritism and avoid it, I think. I certainly don't know Judge Porteous. I couldn't have afforded him any favoritism anyway. But I looked at this as if it were just a Chapter 13 debtor. It's a debtor whose income was high relative to the incomes that we see. About 80 percent, 70 percent of my caseload, 75 percent of my caseload is below median income, and Judge Porteous was well above median income.

Q Right. He was making the salary of a federal district judge. Do you understand that the name on Judge Porteous's petition was either misspelled or intentionally made incorrect?

A I understand, based on the record, that the original petition filed did not have his correct name, nor did it have his physical address, it had a post office box.

Q Okay. And you understand that that error was made on the advice of counsel?

A I read that in the record.

Q Okay. Let's talk about notice to creditors. From your review of the file, can you tell if creditors got appropriate notice?

A From the file that I read, the notice that was issued to creditors, their first information

about the case, had Judge Porteous's correct name and his physical address.

Q And did it have his correct Social Security number on that? You may not know that.

A I don't know his Social Security number, but it had a Social Security number on it.

Q So by filing the petition and having the wrong name on it, it was subsequently amended; is that right?

A That's what I understand, yes.

Q Do you think there was an intent to defraud the court?

A I think the result as opposed to the intent -- I am not sure what Judge Porteous or his counsel had in mind -- the effect of what happened is that the creditors received information concerning the correct name of the debtor, the address of the debtor, and, I assume, the accurate Social Security number for the debtor, which is disclosed.

So the important thing for purposes of a trustee is whether the parties who have a stake in the case, who have a vested interest in the case, the creditors, the other party for an executory contract, whether they receive adequate notice to

participate in the case, file a claim, assert a claim or contest the plan.

Q Is the -- well, are you, as the Chapter 13 trustee in your district, concerned with the effect that a petition has on the media?

A I'm sorry?

Q Are you concerned with notice to the media or to the news outlets?

A No, I do not concern myself with the newspapers. I've always found they can pretty well take care of themselves.

Q Now, do you have experience with petitions filed with incorrect names in your district?

A I do. I have seen a number of petitions that have filed with incorrect names or with not complete names in some cases, these deal with debtors who have been recently divorced, and all of their debt has been incurred under their married name, but they utilize a new name, which may be their maiden name, they go back to their maiden name, and they don't list on the petition the name that they used to have where all the debt was incurred. That's usually something we can correct and provide -- mandate new notice.

Occasionally, I've seen a situation where

an individual used only initials, even though they may be known by full names. And I'm thinking of one where a fellow was known as Charles, and his middle name was Henry, but nobody ever knew him as Henry. They knew him as Charles. But his petition was filed as C. Henry. We required that to be changed.

Q So the position you took for the remedial action, if you will, was just to have him amend the petition?

A It was -- well, amend the petition and provide specific notice to all parties in interest so that they knew the correct name and address of the debtor.

Q Did you feel that was sufficient?

A I did.

Q Did you notify the court that you did that?

A The debtor was required to amend that first page of the petition, and as such, that was notification of the court.

Q And that's what Judge Porteous did in this case; is that right?

A That's what the record seems to indicate. It seemed to me to be a long time between the initial filing and the time the notice went out, but

it was back in 2001 before we had bankruptcy noticing center.

Q And I think you will agree with me that the amendment was done 12 days later, but the actual first notice of creditors went out some time later? Does that sound about right?

A That sounds about right.

Q Okay. Now, I want to talk a little bit about the notion of the failure to disclose the pending tax return. Now, as you understand it, at the time Judge Porteous filed, he had filed his tax return and was waiting on an impending refund; is that right?

A That's what the record indicates.

Q Okay.

A He had completed his -- as I understand it, he had completed his tax return, had filed it, anticipating a tax refund. But at the date that the petition was filed, he hadn't yet received the tax refund.

Q Okay. Now, is this something you've seen Chapter 13 debtors do before?

A I've seen that quite a bit. That's a fairly common understanding by debtors. I've been trying to educate their attorneys that the

expectation of a tax refund is something that needs to be disclosed on schedule B.

The Chapter 7 trustees are also doing that by trying to intercept the tax refunds that aren't listed. If they're not listed on schedule B, they tend to not be exempted on schedule C, and as such, the trustees grab them, the Chapter 7 trustees do.

So we're following -- kind of educating the bar to do that. For cases that are filed generally between the 1st of January and the 15th of April, many debtors, many debtors do not list the tax refund.

Q And those are the same debtors that are represented by counsel?

A Almost always.

Q Okay.

A It does compel a follow-up at the meeting of creditors, and since the bankruptcy code was amended in 2005, the plan can't go forward. We're stuck until the debtor files that tax return and we can actually examine what they receive. So that gap where a lot of those discrepancies are present was cured by an act of Congress in 2005.

Q I'd like to look at Judge Porteous's Fifth Circuit testimony. We're looking at transcript

pages 83 to 84. I'm going to read you what Judge Porteous has previously testified about this tax return and see if you think this squares with some advice that may be given in certain districts, knowing there's a variety of -- the way these things are handled. The question was:

"Question: But nothing was mentioned on the return?" And that's referring to the 2000 tax return.

"Answer: No, I know I called my -- I called Claude when I got it. And by Claude, I met Mr. Lightfoot. I'm sorry.

"Question: You discussed that with Mr. Lightfoot?

"Answer: I did.

"Question: Did he tell you to put it on the return?

"Answer: No, no. I discussed that I received the refund, what should I do with it.

"Question: What did Mr. Lightfoot tell you?

"Answer: Said if the trustee didn't put a lien on it, put it in your account, but they may -- they may ask for it back.

"Question: But, Judge Porteous, that

schedule was signed under penalty of perjury?

"Answer: It was omitted. I don't know how it got omitted. There was no intentional act to try and defraud somebody. It just got omitted. I don't know why."

Do you think it's possible that there was a miscommunication with respect to how that tax return should be scheduled based upon that testimony?

A I believe that -- it certainly appears that way. In line 1, I'm assuming that "did he tell you not to put it on the return" was not on the schedules, I suppose, bankruptcy schedules.

If a debtor tells their attorney -- this is what most of us rely on, is that when you tell your attorney, your attorney will fix -- will cure the problem or try to cure the problem. And if he did tell his attorney that he had received a tax refund, it was the burden on the attorney, I suppose, to get that amended schedule B filed, which would put both the trustee and the court on notice that there had been an asset that hadn't been listed.

Q Let's talk about that. If there was an asset that hadn't been listed, what would -- and the

attorney brings that to the trustee's attention, what's the trustee's likely reaction to that?

A The trustee's response is to first examine, I think, the impact of 1325.A.4, which has to do with what you mentioned is the best-interest-of-creditors test. That is, assuming I recover this asset that wasn't previously disclosed, then what impact would that have on the debtor's plan.

Remembering that assets, property of the estate, doesn't necessarily have to be committed to the trustee in order to effectuate the plan, the debtor must propose a plan that requires, in the most part, future income to supplement or supplant, rather, the assets that the debtor has, so that they don't give up their house; they pay the equivalent of the equity in the house to creditors. They don't give up their car; they pay the equity of the car over a period of time.

And in the context of a tax refund, which happens for a quarter of my cases, the ones that are filed in the beginning of the year, the debtor doesn't necessarily give up the tax refund even if it's not exempt, but they have to pay their creditors the equivalent value of that tax refund.

Now, I may question as to whether their budget was correct or under the new law whether their disposable income was properly calculated based upon what their actual taxes were as opposed to their refund. But generally, a trustee will examine the best-interest-of-creditors test and the asset value for purposes of confirmation of a plan.

Q I want to talk about some other mistakes that were in this bankruptcy filing. Generally speaking, how often is it that you see a perfect Chapter 13 filing?

A I don't know that I've ever seen one. There may be several that are out there, but I know that the committee here, the Senators are aware of Judge Rhodes's study where he examined the bankruptcy petitions in the Eastern District of Michigan and discovered that nearly 99 percent contained errors of some kind. And I think that's fairly -- I would like to think that Tennessee debtors are not quite that erroneous, but there's quite a few. Most of them are immaterial.

Most of them just don't have the weight of materiality to them that makes a difference. But there are errors in virtually every petition.

Q Do you think if you drilled down and you

thoroughly investigated Chapter 13 filings beyond what judge -- not judge, but what Professor Rhodes did -- I guess he was a judge. In his study, if you drilled down beyond just his spatial inspection, that you could find additional errors in most of the Chapter 13 --

A Quite a few of them. I could give you some examples.

Q Please do.

A The debtor's budget indicates all of their expenses, and oftentimes, we would see $25 listed as vet and pet expenses. But when you look on schedule B where it says pets and animals, the box is checked none.

So they're spending money for pet food without having pets. That's an error, or they're supplementing their food budget with pet food.

Or they make regular tithing contributions to their church, and they have done this for a long time, and this is on their budget, they've made contributions to the church. But when you look at the statement of financial affairs, where it asks for gifts that had been made, there's none. Either they just got religion when they filed bankruptcy or they made a mistake on the statement of financial

affairs.

Most of the time, they've made a mistake on the statement of financial affairs, and they can produce records from the church that shows they've been a longtime giver or tither. Those are the kinds of mistakes we see.

There's quite a few of them, debtors that have miscalculated their income. Even when it's on a tax return, they put a wrong digit down.

Sometimes they will put down their net income instead of their gross income minus the subtractions, which I think happened in this case. That's a fairly common mistake. Is it material? Not if the net income is accurate.

Q In evaluating mistakes that are made in Chapter 13 filings, as a trustee, do you think it's your job to investigate the good faith or the sincerity of the debtor?

A At the time of the filing of the petition, yes.

Q How do you do that?

A The examination of the debtor is a critical part of that. The meeting with the creditors where we have face-to-face questioning of the debtor on the record under oath provides a good

basis as to whether the assessment of the debtor is the debtor is gaming the system or whether the debtor is up-front and accurate.

We also rely a lot on what I call the X files. That's information that comes from X family, X spouse, X partner, X neighbor, and they provide a great deal of information. But when we discover that, we will dig into that.

But for the most part, what we see are debtors whose mistakes have been made have been made because they're under incredible financial stress. And they're dealing with attorneys who are pretty much doing a lot of cases, and they're cranking through a lot of cases.

Q What does that mean?

A Many attorneys, and very good attorneys, will handle 50 to 100 bankruptcy petitions in a given month. They do good work, but they're also dealing with a lot of different people with different situations.

For a debtor, the Chapter 13 is the only case they have, but for the debtor's attorney, it's one of 75 this month, and they have to deal with all of them. They're under an obligation both under the statute and under the rules of ethics to require

certain information to be given to their clients, and sometimes, it's hard to remember who you've talked to and what you've said when you have that many cases.

So it is -- and especially when you're dealing with someone who comes in and their wages are about to be garnished or their house is about to be foreclosed upon and they don't have much time to -- I think that the image that most people have of the financial records of a lot of debtors are they come into the debtor's attorney with a brown bag filled with envelopes and checks and put it on the table.

Q Once the plan is confirmed, trustees don't like to see post-petition debt, do they?

A I think that's a fair statement. No, not at all.

Q Why not?

A It does two things. One, in most cases and certainly in my district, there's a prohibition on post-petition debt except for medical emergencies or that might be allowed under section 1305, which would be consumer debt approved by the trustee.

But principally, it jeopardizes the success of the plan. If the debtor is incurring

post-petition debt, then the threat is that the pressure from post-petition debt will jeopardize the ability of the debtor to perform under the Chapter 13 plan.

So post-petition debt is both a problem in terms of living the straight and narrow, and the other problem is that it jeopardizes the plan.

I also believe that post-petition debt is a manifestation of a problem that hasn't been solved. It is my desperate hope that a debtor that sits across the table from me is only there to see me once and doesn't come back.

And the only way we can accomplish that is if they can learn something through the process and they don't make the same mistakes they made in the past. A debtor who uses check cashing or they use a credit card or get a credit card after they've filed a bankruptcy petition is engaging in behavior that indicates it may be an ongoing and chronic problem.

Q Now, if you discover one of your debtors has obtained a charge card and is using it, what are you likely to do?

A I'm going to seek dismissal of the case. I've never really deviated from that. If a debtor incurs debt post petition, I would seek a dismissal.

Q And in seeking dismissal, if they came to the hearing and said I'm going to cure this problem, would you put them on a strict compliance order and give them a chance to finish their plan?

A Generally, if they have an explanation, at the hearing, I would agree to essentially a drop-dead order, strict compliance order, if they showed that they now understood the importance of complying with the court order and they understood that it jeopardized their future, their performance under the plan and their performance financially.

Q Are there actions that post-confirmation debtors take to take on debt that are hard to discern as being debt?

A A lot of debtors in Tennessee -- and I'm not sure where else in the country -- are drawn in by the payday loan and the title pawn. Many of them somehow don't think of it as debt.

A lot of them go to the rent-to-own industry and don't think of it as kind of incurring an obligation, because they're told by the rent-to-own people don't worry about it, if you can't pay it we just take back the TV. So it does create a problem, yes. In my district, which has a large military base, that was a severe problem

around the military base.

Q Now, there's been a lot of talk in this case regarding the use of markers post-confirmation and determination of whether or not those are debt.

I take it that your opinion is probably that they are debt; is that right?

A That is my opinion.

Q From reviewing the record, specifically the dissent from the Fifth Circuit judicial panel, do you understand that reasonable minds could differ on that point?

A And I listened to what Professor Pardo had to say, the nature of this and the nature of a contingent liability pending presentment. I understand how that hair could be split, yes.

Q I'd like to read you some testimony again from Judge Porteous. I'm looking at House Exhibit 10. I believe it's page 158 of the transcript. Starting with an answer by Judge Porteous: "Well, did I sign $8,000 worth of markers? We have records that suggest I did that. I agree with you" -- and the answer, the issue is that we haven't -- I have an issue with whether that's credit. The statement itself says it acts like a check against your account. Now, I did not have an $8,000 line of

credit at -- where was that? Treasure Chest?

"Question: Treasure Chest. I didn't ask you about a line of credit, though.

"Answer: I understand, but I'm explaining to you why that's misrepresentative.

"Question: Okay, well --

"Answer: Those are just repetitive 1,000. Had I written a check for 1,000, I do not believe I would have been in violation of any court order."

Is this indicative of someone who thinks there may be a reason to believe they're not taking out debt?

A I guess I would -- this is the kind of lack of sophisticated understanding of what it means to sign a check. Then I would take it that that would be consistent with someone that went to a we tote the note place or title pawn or a payday loan.

Q Those are exactly the types of post-petition debts you've seen debtors in your district --

A We do not have gambling casinos in Tennessee.

Q I was referring to the pawn loans.

A That's why I haven't seen a lot of cases with markers. But I equate that to giving the

payday loan a postdated check and then expecting that to not be debt for somehow -- some debtors do that. I have come in contact with that enough that my initial meeting with debtors includes on a video that I provide and slides that I show and in the booklet that I hand out that uses payday loans as debt and rent to own as debt -- and you can't do it.

Q Now, is it your understanding that in submitting a 2000 pay stub instead of a 2001 pay stub, there's a possibility that Judge Porteous understated his income on a net basis?

A I am aware of that.

Q It's a little bit less than $200 a month we're talking about; right?

A In the record I looked at, there was a schedule I, but there was also an older paycheck where the number corresponded to the number that was put on the schedule I. And from the House report where it indicated that he had been working with an attorney for several months and it provided information, it does show that the attorney took old data, old information and stuck that in the petition when he actually filed it. It's disappointing, but it's not surprising.

Q Do you think that was a material amount?

A $6,000 can be significant. It depends on the size of the case. But $6,000, which is about what it works out to over that 60-month period --

Q Is there a possibility that the judge could have asserted additional expenses equal to that amount?

A It's possible, but that would be pure speculation.

Q That would be speculation. But that would be a part of the negotiation process with Mr. Beaulieu, additional expenses could be --

A And remembering that Mr. Beaulieu objected to the confirmation of the plan because the debtor was not providing all disposable income to fund the plan. He opposed confirmation of the plan, which meant that there was going to be litigation in front of a judge as to what the expenses were.

Q So there was a cognizant decision to consider whether or not all of his disposable income was being contributed to the plan?

A That's correct.

Q Does the trustee have discretion in analyzing the schedule of income I against the schedule of expenses J?

A In 2001, the trustee always has the

decision to make as to when to bring something as a litigant to the court. Some trustees bring a lot of cases, and some trustees bring cases only where there's a material difference.

Sometimes, the cost of litigating the issue is far greater than the benefit that is derived. So in a cost/benefit analysis, a trustee has to make a business decision, a decision as to whether to pursue an objection to confirmation or to support confirmation or to take no position.

Q Now, Judge Porteous paid $52,000, a little bit more than $52,000 to his unsecured creditors. Is that a big plan?

A That's a pretty big plan.

MR. AURZADA: Madam Chair, may I have just a moment?

CHAIRMAN MC CASKILL: Yes.

BY MR. AURZADA:

Q Just a couple of wrap-up questions.

Mr. Hildebrand, you're not being compensated for your testimony here today other than reimbursement of your travel; is that right?

A That is correct.

MR. AURZADA: No further questions, Madam Chair. Thank you.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good morning, Mr. Hildebrand.

A Good morning.

Q My name is Alan Baron, and I'm special impeachment counsel for the House of Representatives in this matter.

Let me ask you this: You said that over the years you have had a supervisory role of about 150,000 Chapter 13 petitions and cases?

A That's an approximate number, but yes, sir.

Q Okay. How many times did you come across a case where the debtor and his counsel consciously agreed to use a false name -- we're not talking about typographical errors here. We're talking about a false name and a post office box in lieu of an actual residential address, conscious decision to hide who the debtor was, how many times did you come across that?

A Probably one or two.

Q In 150,000?

A Yes, sir.

Q Okay. What did you do about it?

A Made him do exactly as I said, had to renotice and refile the petition.

Q Now, you understand I'm not talking about somebody who used their maiden name or -- I'm talking about a conscious decision to lie under penalty of perjury in the choice of name and residential address that they gave down -- put down?

A When I asked the questions and when it came to the one or two cases that I can recall where they said we did this because we don't want the ex-husband to know or we don't want the bank to know or we don't want something to happen, my response was always fix the petition and renotify with the correct information.

Q Did you understand that -- or at least I understood you to say that your function is to focus for the purposes of the trustees, what effect would this have on a creditor; is that a fair statement?

A That's fair, yes, sir.

Q You understand, though, that this proceeding is an impeachment trial?

A Yes.

Q And its objectives may be quite different than to simply see whether a plan was confirmed?

A Oh, absolutely.

Q Would you agree with the Supreme Court -- I think the case was -- I think it's Local Loan Company, I think it's a famous case in bankruptcy circles, where they said that the protection of the bankruptcy process is for the honest but unfortunate debtor?

A Yes.

Q Do you agree with that concept?

A I do.

Q And you said in a given moment, you would have something like 14,000 cases?

A How many that are active right now that I'm administering.

Q Okay. Can you go back -- well, no, that's fine. Let's just use that.

Would you agree that without candor by the debtor, this fundamentally affects the operation of the bankruptcy law system?

A To the same extent of fundamental candor with the tax system, I suppose that's correct, yes. The history of the bankruptcy law that goes back to England recognizes that the discharge is the quid pro quo for assisting the creditors in obtaining the assets of the debtor, now I suppose the income of the debtor. So that still runs through bankruptcy

law since 1588 now right up until today, is that full disclosure is one of those key elements, as the quid pro quo for the discharge.

Q So the debtor who is not being candid with either assets or payments to -- who might want a preferred basis to other creditors, that person in a sense is corrupting the bankruptcy system?

A They should be denied a discharge.

Q With the principles in mind that we just talked about, the need for candor, the honest but unfortunate debtor, I want to run through some facts that I submit are established by the evidence, and I want to ask you a question about it.

First of all, the facts establish that Judge Porteous filed his initial bankruptcy petition on March 28th, 2001. Now, the day before, on March 27th, he paid off three markers in cash to the Treasure Chest Casino totaling $1,500. This transaction does not appear anywhere on his schedules, which he filed under penalty of perjury, and according to his bankruptcy counsel -- and by the way, he did have bankruptcy counsel throughout this -- he never knew about Judge Porteous's gambling activities.

Second, Judge Porteous, as we've started

to discuss, filed his petition on March 28th in the name of G.T. Ortous. The evidence establishes that this was suggested by his bankruptcy lawyer, Mr. Lightfoot, and Judge Porteous agreed, and he signed the original petition under penalty of perjury.

Judge Porteous also obtained a post office box, which he used as his residence address, not his mailing address, on that original petition, the March 28th petition, and this, too, was at the suggestion of his bankruptcy lawyer, and the evidence is Judge Porteous agreed to this and came back to his lawyer and give him the information about the P.O. box.

Now, Judge Porteous filed his year 2000 tax return, claiming a tax refund of approximately $4,100. That was on March 23rd, 2001, five days before he filed his original petition. That ultimately -- it does not appear on the schedules that he filed in his bankruptcy, which he filed somewhat subsequently, nine or 10 days later, and he never told his lawyer -- the testimony is from his lawyer that he never told his lawyer that he had filed for this tax refund.

And a few days after he filed an amended

petition, which was filed on April the 9th, he filed it on April the 9th. He gets this tax refund on April the 13th. He never tells his lawyer; it never appears on any schedule. This money just disappears.

Another fact, in conjunction with his amended petition, the pay stub that was submitted was from the year 2000. The pay stub at the time of filing in 2001 would have shown an additional $174 a month, but that current pay stub was never submitted.

Now, assuming the truth, that the evidence establishes what I have recounted here, in your view, is that consistent with the principles of candor, good faith, honesty on the part of the debtor?

A I think the question has to do with what would benefit the creditors in the case. If failing to indicate the existence of an asset would hurt the creditors, failing to list your income hurts the creditors, then absolutely oppose confirmation of the plan and seek dismissal of the case.

The question may be, though, is it possible to rectify any of those things, you know, whether they were intentional because they didn't

want a spouse to know or a bank to know or the press to know. I think that for the most part, most trustees would not oppose a debtor fixing the problem if they made a full disclosure.

The problem here, of course, is the disclosure wasn't made until the case was almost over.

Q I'm asking you for a slightly different perspective on this. Your professional perspective is, is it good or bad for the creditors?

A That's what I'm supposed to do, yes.

Q I understand that. But what I'm asking you, somewhat apart from that, is, you have to make the judgment of good faith and candor even as you're making the judgment of whether it's good or bad for the debtors. I'm asking for your judgment on the good faith and candor of the debtor, in this case Judge Porteous, given the facts that I've laid out for you.

A I'm missing -- one, it would trigger certainly questions whether the plan was proposed in good faith, and therefore, it would justify an opposition by the trustee for confirmation.

The second element of that, though, is confronting the debtor or questioning the debtor

with whatever information is available at the time of that meeting of creditors. If I were convinced that the debtor still was not coming up with candor, wasn't willing to come forward with the information -- if I found, for example -- take the example of the one the trustee clearly new about, which was the wrong name. Why was that done, and digging further into it -- and if, in fact, that demonstrated that the debtor was hiding other things deliberately and not coming forth with the truth to the trustee, then that would demonstrate you should oppose confirmation of the plan and seek dismissal of the case.

Q Is there ever an excuse for knowingly lying on a document that you're signing under penalty of perjury?

A No.

Q Thank you. Now, you know Judge Greendyke ultimately signed an order in this case confirming the plan. One provision of that order was that the debtor was not to incur additional debt thereafter.

A Paragraph 4 of the --

Q Paragraph 4. You sound familiar with it. Is that a form or a provision that you use in your --

A I have -- the judges have, in our form, confirmation or similar language. The debtor is enjoined from incurring post-petition debt except for emergency medical purposes or that may be allowed under 1305, which would require trustee consent.

Q Right. And you've been doing this for a long time. I assume you speak to your colleagues around the country. Is that a rarity, to have that petition in there, or is it fairly common?

A Fairly common.

Q Now, I'd like to put up Exhibit 10, is it, the excerpt from the Fifth Circuit. 5, sorry, Exhibit 5.

Do you see that?

A It's a little small to read, but yes.

Q Can we make it bigger?

A Thanks.

Q Do you see there that the Fifth Circuit concluded that a marker is a form of debt, no question in your mind?

A I agree with that.

Q Do you also understand that Judge Porteous agreed with that in his testimony before the Fifth Circuit?

A I'm aware of that, yes.

Q Okay.

A I didn't disagree with what he said to the Fifth Circuit when he acknowledged that.

Q Right. The evidence establishes that subsequent to the time that the order was entered by Judge Greendyke, Judge Porteous took -- I believe the number is 14, gambling excursions of various kinds to casinos and took out -- I believe the number again is 42 markers, involving thousands of dollars, some of which was paid back the same day, some of which was not paid back the same day.

In your view, is that a violation of the court order?

A Yes.

Q The evidence also establishes that Judge Porteous took out a new credit card subsequent to the order without getting permission.

Does that violate the court order?

A Yes.

Q Will you agree with me again that the basic principle of the bankruptcy laws is that it depends on full disclosure by the debtor, good faith?

A Oh, I do agree with that. It's clear that

in enactment of the law in 2005, Congress was responding to the kind of problem that this case represents, and that is the lack of veracity and accuracy in schedules and statements. That SIPA includes a provision where the tax return must be submitted to the trustee seven days prior to the meeting of creditors.

The new law requires that pay advises be given to the trustee prior to the meeting of creditors. The new law requires that the debtor receive information concerning credit counseling before filing the petition.

And now there's a mandatory random audit of one out of, I think, every 250 cases. That was in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It seems to me that that was in response to the kinds of things that we've seen -- that I've seen since 1982.

Q You've seen some instances where the Chapter 13 debtor was an attorney?

A Yes.

Q Did you ever have an occasion to report an attorney to the state bar for disciplinary action related to filing a false petition?

A A false petition, no. I've had occasion

to report attorneys for not adequately representing their clients, but not for filing a deliberately false petition. I have turned in a couple of attorneys for, I believe, deliberately misstating information on the petition, but I did that to the United States trustee and not to the disciplinary board.

Q So where an attorney deliberately misstated information on a petition, you felt that was serious enough for you to take action, and referring it, did you say, to the U.S. trustee?

A To the U.S. trustee, yes, sir.

Q Is that a penultimate step to ultimately referring it to the U.S. Attorney for prosecution?

A Yes. It's a step that I have to take before -- I don't have direct -- I don't make a referral directly to the United States Attorney. I had an occasion where one attorney forged my name, and we became very active in prosecuting that attorney, but that wasn't in -- it was tangentially related to a bankruptcy case.

Q That interests me.

A After 27 years, you see a lot.

Q I'll bet. Let me know more about that, if I may. The lawyer falsified your name on a petition

of some kind?

A No. It was on a check.

Q I'm sorry?

A It was on a check. There was an interpleader action by an insurance company in the United States District Court. When the district judge discovered that the beneficiary was in bankruptcy, he ordered the funds to the clerk be released to the bankruptcy trustee, since -- believing the bankruptcy court was in a better position to deal with who owned the money.

And the clerk erroneously sent the check payable to the bankruptcy trustee to the debtor's lawyer, who decided it was kind of found money and then endorsed the $315,000. And only when creditors began asking me for where their money was did I trace it back and discover that he had forged my name. He was subsequently disbarred and convicted, got a 36-month sentence.

MR. BARON: Thank you. Nothing further.

REDIRECT EXAMINATION

BY MR. AURZADA:

Q Mr. Hildebrand, honest debtors are entitled to a fresh start. I think that's the point; right?

A It's kind of a mantra that people have used. Congress has used it in the reviews. But that's the quid pro quo that goes back to the statute of Van back in the 16th century.

Q Right. But is that standard precaution?

A It can't be, because so many petitions are not perfect. The question again goes back to is it a material mistake or is it not.

Ignoring the fact of who a debtor is and just looking at did he tell the truth, or she tell the truth and you find no, then you have to dig further. And a lot of this is done just by the examination, the one-on-one examination done at the meeting of creditors to see if it's a mistake, just a mistake, or whether there's something else going on, deliberating concealing assets, deliberating hiding stuff.

One of the things that makes a trustee, Chapter 7 and Chapter 13, fairly effective, and it goes with prosecutors as well, federal and state prosecutors, is the ability to quickly discern whether somebody is being up-front with you or not.

And I think that in the brief time we have in meetings of creditors, coupled with the schedule of statements, documents prepared, and any history

that we have, we can do -- I think trustees do a pretty fair job of that.

Q So the panel is clear, when you're looking at your debtors, perfection is not the standard by which they are judged?

A If perfection were the standard, I don't think many people would have their plans confirmed.

Q And we're talking about millions of people a year; right?

A Approximately 1.5 million families will be filing Chapter 13 this year.

Q I want to show you another excerpt from testimony in the Fifth Circuit.

This is at transcript page 150, if we can blow that up, please.

When questioned by the Fifth Circuit:

"Question: Judge Porteous, if you had all this to do over again, would you have filed different financial disclosure statements?

"Answer: Likely, Judge. I mean, maybe now in hindsight some of it was -- should have been included. The debt was -- the failure to list the correct debt, that was right after the bankruptcy. It was like the end of the world. I mean, my wife was nervous, a wreck, upset. My finances were all

over the paper. Everybody in America knew my finances. It was just inadvertence, not any intent to hide my finances."

Does that sound like the testimony of a typical Chapter 13 debtor?

MR. BARON: I'm going to object. The document, I believe, relates to financial disclosure forms, not --

CHAIRMAN MC CASKILL: We can't hear your objection because the microphone --

MR. BARON: I believe that the document that's up there relates to the financial disclosure forms that he files as a judge rather than the schedules and other documents that are filed in connection with the bankruptcy.

MR. AURZADA: Your Honor, if -- I think I should withdraw the question on that. Thank you.

CHAIRMAN MC CASKILL: Anything else for this witness?

Any questions from the panel for this witness?

You may be excused. Thank you so much.

THE WITNESS: Thank you, ma'am.

MR. TURLEY: Madam Chair, the Defense would like to call Judge Ronald Barliant.

CHAIRMAN MC CASKILL: So the parties know the time, Judge Porteous has five hours, 35 minutes, and the House team has five hours, 58 minutes.

Mr. Barliant, would you raise your right hand, please.

Whereupon,

RONALD BARLIANT

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you, Judge.

DIRECT EXAMINATION

BY MR. WALSH:

Q Good morning, Judge Barliant. For the record, I'm Brian Walsh, one of Judge Porteous's attorneys.

A Good morning.

Q Could we call up Exhibit Porteous 1098, please.

Is that exhibit your CV or your law firm bio more particularly?

A Yes, it is.

MR. WALSH: We would offer 1098 for the record at this time.

CHAIRMAN MC CASKILL: Is there any objection?

MR. BARON: No objection.

CHAIRMAN MC CASKILL: The record will be received.

(Exhibit Porteous 1098 received.)

BY MR. WALSH:

Q You received your law degree from Stanford in 1969; correct?

A Correct.

Q And in 1988, you were appointed as a bankruptcy judge for the Northern District of Illinois; right?

A Correct.

Q Your chambers were in Chicago?

A That's right.

Q You served as a bankruptcy judge for more than 14 years; is that right?

A Right, 14 years, nine months.

Q And since leaving the bench, you've been a member of the Goldberg Kohn law firm in Chicago?

A That's correct.

Q You practice in the area of bankruptcy since leaving the bench?

A That's correct.

Q Are you a fellow in the American College of Bankruptcy?

A Yes, I am.

MR. WALSH: Madam Chair, we would offer Judge Barliant as an expert in matters of bankruptcy law.

CHAIRMAN MC CASKILL: Is there any objection?

MR. BARON: No objection.

CHAIRMAN MC CASKILL: The witness will be received as an expert.

BY MR. WALSH:

Q Sir, are you being compensated for your testimony here today?

A No, other than having travel expenses reimbursed.

Q Okay. Could you tell the committee, in general terms, what you reviewed to prepare for your testimony today?

A I believe I reviewed most, if not all, of the documents in Judge Porteous's bankruptcy case, the ones that were in the docket. I reviewed some testimony. I reviewed the -- the House pretrial statement, Judge Porteous's statement, the articles of impeachment, and I'm sure some other documents.

Q Okay. Let's talk about what a judge does in a Chapter 13 case. When you were a judge in

Chicago, you had Chapter 13 cases assigned to you; right?

A That's correct.

Q About how many Chapter 13 cases did you have on your plate at any one time?

A At a given time, it would be in the thousands, probably 2- to 3000.

Q And is it your understanding that's typical for judges in the larger cities?

A It is, yes, that is my understanding.

Q Does the judge in a Chapter 13 case have any role in the administration of the case?

A No.

Q In what -- what sort of circumstances would occur that would cause the judge to have an active role in a particular case?

A The Bankruptcy Code adopted in 1978 made it clear that the judge's role, primary role, was to resolve disputes brought before the judge. Other entities and persons had responsibility for administration.

So typically, with a couple of exceptions, the judge's involvement in any bankruptcy case, but in a Chapter 13 in particular, would be limited to disposition of a motion or some other kind of a

contested matter.

Q Is it fair to say that before the judge has something to decide, first one party has got to decide there's here that's worth fighting about?

A There has to be a dispute, so somebody has to decide there needs to be a dispute, yes.

Q And then the other party has to decide it's worth disputing rather than conceding?

A That's correct.

Q Do disputes frequently settle before they make it to hearing before the judge?

A Very frequently. A huge majority of them do.

Q From the perspective of the judge, how important is the judgment exercised by a Chapter 13 trustee?

A Well, I guess the answer is extremely important, because -- and because the judge doesn't get involved in the administration of the case, in the sense at least the judge is relying upon the trustee to bring issues, problems, to the judge's attention.

And clearly relying upon the trustee in confirming the plan, which is one time when the matter comes to the judge or at least the judge's

staff without a dispute usually. And the judge relies, in that instance, on the recommendation of the trustee.

So to the extent you might say the judge has a stake in the system, the judge is relying very extensively on the Chapter 13 trustee.

Q What happens if a trustee identifies an issue, reviews it and concludes that it's not material?

A Very unlikely the judge would ever hear about it.

Q Is that an inappropriate thing for a Chapter 13 trustee to do?

A No, that's a very important part of the job.

Q As a judge, did you want trustees bringing matters before you that were trivial or insignificant?

A No, I certainly would not have.

Q What would happen if trustees brought every issue to your attention?

A Well, if I found they were trivial, I probably wouldn't take any action with them and might not -- I might use firm words with the trustee, that this is the kind of thing that should

have been resolved before it was brought into court and before the debtor and the debtor's attorney were required to appear in court.

Q You mentioned the concept of a confirmation hearing in a Chapter 13 case. So let's talk about how that works.

Is it typical for a bankruptcy judge to schedule a number of Chapter 13 confirmation hearings on a single calendar?

A Right. Certainly -- I'll talk about my district, which I think is relatively typical. But certainly, that's correct in my district. There would be a fairly extensive confirmation call on what we call a Chapter 13 day.

Q About how many cases would be on the calendar on Chapter 13 day?

A For confirmation?

Q For confirmation.

A It could be dozens.

Q About how many cases of those dozens might actually percolate up to you to resolve, to make a decision?

A Well, in my case, my staff would have -- once the trustee submitted the plan and his recommendation and proposed order, if there were no

objections, they would have gone through my chambers. And we had -- those kinds of we look for. If we found those, the order would just be entered.

I think they're asking what kind -- how many actually came to my attention for purposes of resolving some sort of an issue.

Q Exactly?

A That would be very few. That might be three to a half dozen on a particular day.

Q Okay. We talked about how issues might resolve themselves, and I want to just cover a couple things that are in the record in this case.

Could we put up Porteous Exhibit 1100(h), please. And this is a copy of the amended schedule filed by Judge Porteous.

Is it typical for certain types of objections to confirmation to be resolved by the filing of an amended schedule by a debtor?

A Oh, yes. Bankruptcy rules permit the free amendment of schedules. Although I'm not on the rulemaking committee, I assume the reason is because it's very frequent that schedules are amended to correct some sort of a problem.

MR. WALSH: Madam Chair, I don't believe we have 1100(h) in the record, so we would offer it

at this time.

MR. BARON: No objection.

CHAIRMAN MC CASKILL: There is no objection. It will be received.

(Exhibit Porteous 1100(h) received.)

BY MR. WALSH:

Q Similar question, if we could look at 1100(i), please. This is a copy of the amended plan filed by Judge Porteous and his wife.

Is it -- is it common for certain types of objections to confirmation to be resolved by the filing of an amended plan?

A That's correct. The debtor files the plan, and if they're -- I take it from the record it happened in this case. If there is an objection by the trustee or somebody else, it's very frequent to just resolve that objection by filing an amended plan, which again is --

MR. WALSH: Madam Chair, we would similarly offer 1100(i) at this time.

MR. BARON: No objection.

CHAIRMAN MC CASKILL: It will be received.

(Exhibit Porteous 1100(i) received.)

BY MR. WALSH:

Q You mentioned the concept of a trustee's

recommendation regarding confirmation, so if we could put up 1100(o) on the screen. And that document is the trustee's summary and analysis in Judge Porteous's case.

And let's look at page 2 and zoom in on paragraph 8, please. And that's the particular recommendation at issue here.

If the trustee recommends confirmation of a plan, as happened in this case, and no other creditors object, would it be typical for a confirmation order to follow?

A Yes.

Q Can you recall during your time as a judge denying confirmation of a plan without an objection having been filed?

A No, I cannot.

Q In cases where there were no objections to confirmation, did you as the judge spend a lot of time digging into the file before entering a confirmation order?

A No, I would not have done that.

MR. WALSH: Madam Chair, we offer 1100(o) at this time.

CHAIRMAN MC CASKILL: Is there any objection to 1100(o)?

MR. BARON: No objection.

CHAIRMAN MC CASKILL: It will be received into evidence.

(Exhibit Porteous 1100(o) received.)

BY MR. WALSH:

Q At the end of a Chapter 13 case, after debtor makes all payments required under the plan, we get to a point of discharge; is that correct?

A That's correct.

Q As the judge, how would you learn that a debtor had completed all of the payments required under his or her plan?

A Discharge order is typically entered out of the clerk's office. So there would be a record that would appear on my docket showing that a discharge order had been entered.

But the reality is unless there was some sort -- again, unless there was some sort of dispute, in the case of a Chapter 13 discharge, that was very, very rare, I would not have particular knowledge that a debtor had received a discharge.

Q And you described the process -- you described that the clerk's office exercises that function. Is that process triggered by the filing of the trustee's final report?

A That's right. Again, the trustee triggers the process, as you said.

Q Would you as the judge again dig through the debtor's file to determine whether a discharge should be entered?

A No.

Q Let's talk about what happens when there are hiccups in Chapter 13, if I can use that term colloquially. As a judge, did you see creditors file motions for relief from the automatic stay, arguing that the debtor had missed a payment or two?

A Very commonly.

Q Did you see motions to dismiss Chapter 13 case filed by trustee or someone else because a debtor had missed a payment or two?

A Yes.

Q And what is the typical resolution of motions like that if the facts show that the debtor has missed one or two payments?

A Well, the most typical resolution is what you mentioned before, which is that they're resolved usually moments before the attorneys step up to the podium. But I'm assuming you're asking if they actually go to a hearing.

And if it's a first -- first occurrence of

the particular problem, failure to make a payment on the mortgage or failure to make a payment on the plan or whatever it is, most typically, if the debtor is prepared to cure that default, either the motion would be denied upon the cure of the default or the motion would be granted with conditions.

In other words, if the debtor cured that default and stayed current in the future, then the stay would remain in effect or the case would not be dismissed. I should amend myself.

I don't like those kinds of orders dealing with dismissals of cases. I don't think there should be a -- what you're getting to, a drop dead order. And I don't think there should be a drop dead order in the case of dismissal.

But in the case of modification of a stay, that's very common, to just say so long as the debtor stays current, the stay will remain in effect. If he defaults, then the stay would be modified.

Q And you mentioned the drop dead order, and Mr. Hildebrand mentioned that also. Can you tell the court what's the general concept of a drop dead order?

A If a debtor has -- this is probably the

second time, strike two. If it's strike one and the debtor cures, I'd probably just deny the motion or, more likely, the motion would get withdrawn.

If the debtor has done it again and it's not terribly serious, I would have very likely entered an order that says cure this default, stay current in the future, in other words make your payments on time in the future, and if you do that, fine. If you don't do that, then nobody has to come back to court again, something has to get filed but nobody has to come back to court, the stay would be modified and the creditor could exercise remedies.

So you have -- that last one would be strike three.

Q Okay. And if -- in the strike two phase, as you described it, as the judge, is it preferable to grant relief from the automatic stay upon strike two, or is it preferable to do the sort of drop dead order that you described allowing for the possibility --

A The answer to that is most creditors -- maybe most -- a significant percentage of creditors themselves propose drop dead orders. Don't forget, the idea behind Chapter 13 is to get creditors paid and debtors discharged.

So creditors have a stake. It's not as adversarial as I think some people believe.

So it is, in my view, frequently, if not most of the time, a good idea to give the debtor another chance to catch up and accomplish the purposes of Chapter 13.

Q Let's talk about some other issues. There have been some assertions in this proceeding that if a debtor gambles after a bankruptcy filing, that would violate Section 363(b) of the Bankruptcy Code, it would be outside the ordinary course of business. Do you agree with that?

A No, I don't. 363 is the section of the Code that deals with property of the estate and what the trustee, in the words of the -- of Section 363, trustee, may do or not do with property of the estate.

Although there's a cross-reference -- there are cross-references in the -- in Chapter 13, as a general matter, and specifically by statute in Chapter 13, it's the debtor who has possession of his or her assets. And the trustee has virtually no authority over property of the estate.

It's a long way of saying that the 363(b) really wouldn't have any significant application in

a -- in a Chapter 13 case.

Q Okay. Let's talk about another suggestion that we've heard in this and prior versions of this proceeding, and that is that the debtor has an obligation to update Schedule I, the income schedule, if the debtor experiences a change in income after the bankruptcy filing. Do you agree with that?

A No, I do not.

Q Did you ever have occasion when you were a judge to order debtors to update their income periodically or from time to time?

A That's a -- it would be -- yes. The answer is yes.

Q And in what circumstances would you enter an order requiring the debtor to provide some sort of update on Schedule I?

A Most frequently, after -- or as part of a confirmation dispute. And to give an example, it might be, for example, a salesman on commission or somebody whose income was, for whatever reason, not predictable or expected, by at least some people, to be increasing in the future. And there would be an objection to confirmation on the grounds that the debtor wasn't using all disposable income. That may

or may not be accurate.

But the possibility of a significant change in income in the future might be a reason to require the debtor to report, not necessarily on Schedule I, but one way or another report changes in income periodically, every year, every six months, whatever made sense, as a resolution of a confirmation issue.

Q And if the debtor were already obligated to provide updates, would it be necessary for you to enter an order to require that?

A No.

Q Let's go on to the issue of post petition debt. And if we could pull up Exhibit 1100(p) and zoom in on the fourth paragraph. This is the confirmation order.

Paragraph 4 has two sentences in it, and I want to ask you about the two sentences separately. The first sentence, if I can paraphrase, says don't incur additional debt except with approval of the trustee.

Is there authority in the Bankruptcy Code for an order such as that?

A No, there is not. Absolutely not.

Q And let me ask you about the second

sentence, which says, and I'm paraphrasing here, if you fail to obtain approval, the creditor's claim may be unallowable and nondischargeable.

Is there authority in the Bankruptcy Code for that sort of statement?

A There is. Prior witness mentioned Section 1305, and that's the authority. Section 1305 provides that if a debtor does not get, for certain kinds of debt, that debtor doesn't get written approval of the trustee, then that debt may not be allowed and may not be covered by the plan.

So that second sentence is a fair -- you know, a fair summary of that provision.

Q The Bankruptcy Code clearly contemplates that a debtor may incur debt without the trustee's permission?

A I think there's no other way to read 1305.

Q And let's make sure we understand the concept. If we say that a debt is not going to be allowed and not going to be discharged, what does that mean as between the debtor and creditor?

A It means the debt is fully enforceable by the creditor and fully payable by the debtor. It hasn't been fully discharged -- in fact, the discharge means it's fully enforceable. The

allowance part, that -- excuse me. That has to do with the treatment of the debt in the Chapter 13 case.

So what that's saying, is this debt is not going to be a part of the Chapter 13 case, meaning it's not going to be paid, whatever the -- whatever the plan says should be paid on such debt. That's the -- that's the significance of the word "allowed." Or "allowable."

Q Okay. Now, the record in this case also shows that the trustee, Mr. Beaulieu, mailed to Judge Porteous and his wife a pamphlet. If we can pull that up, I think it's House Exhibit 148. And let's zoom in on paragraph 6, I believe it is, which, again paraphrasing, essentially says can't borrow money or buy anything on credit without permission from the court.

What's the significance of this pamphlet in the context of this case?

A Well, the trustee is not a judicial officer, so the pamphlet, you know, or anything by the trustee has no legal effect. I mean, it's just the trustee's view of what the -- I assume it's the trustee's view of what the debtor should or shouldn't do and maybe the trustee's view of the

law, but it has no legal effect.

Q And let's go back, switching gears again, back to the confirmation order and in particular the language that says the debtors shall not incur additional debt. In your view is it practical or even possible for a debtor to comply with that language if read literally?

A If that first sentence is read literally and independently of the second, no, no, it's not. In the modern world, particularly for urban debtors, it's not possible.

Q What sort of things might a debtor do in the ordinary course of life that would technically be inconsistent with the first sentence of this confirmation order?

A Use utilities, you know, borrow -- borrow money from a friend, I suppose, for -- you know, to get -- to pay a bus fare or something.

The witness -- the professor mentioned you go into a restaurant and order food and you've incurred a debt. So any number of things.

Q Let me ask you to assume you're back on the bench and you enter an order like the one in this case, this confirmation order. And the trustee files some sort of motion and says I've determined

that the debtor incurred a debt without any written approval, please take action, Judge.

What would you do?

A Kick myself for having entered the order, and the first thing I'd want to do, I suppose, is vacate it, at least that first sentence. Assuming I couldn't do that, I would -- I would attempt to construe the order in a way that was consistent with the Bankruptcy Code.

That order -- the first sentence of that order is absolutely unauthorized by the Bankruptcy Code and was judicial error to have entered. So -- and there's good authority for the proposition that if it can be fairly done, an order should be construed so that it is a lawful order, that it is consistent with the authority of the judicial officer who entered it, authority and jurisdiction. So I would try to do that.

I would try to construe the order so that it became a lawful order.

Q What sort of construction would you place upon this particular order so that it would be lawful, in your view?

A Well, this order refers to only one consequence of the incurring of debt, which, as I

said, is, in fact, consistent with the Bankruptcy Code.

So I would construe this order to say that, in essence, unless the debtor obtains written approval of additional debt from the trustee, then that debt should not be allowed or discharged, words -- hopefully better words than those, but that's the idea.

In other words, I'd tie sentence one to sentence two and qualify sentence one so that its application is limited to the situation described in -- or the consequence described in section two.

If that were done, it would be a pretty good application of Section 1305 of the Bankruptcy Code. And I think it -- I think it can be fairly read that way. And as I say, there's plenty of law that says if an order can be read to -- fairly read to be consistent with the statutory authority, then it should be.

Q And if you held a hearing to determine whether the debtor, in fact, violated this order in the first place, what sort of evidence would you be looking to hear?

A Well, as in any other -- assume -- past the issue I just talked about, if I decided that I

needed to somehow enforce this order according to its term -- its more explicit terms, at least the first sentence, as in any other, you know, allegation of contempt, I'd want to know the circumstances. I'd want to know, you know, what the violation was, how serious and how material it was. And I'd want to know the intent and reasons for the alleged violation before I'd do anything.

Q Would you want to hear arguments from counsel about the issue that you just discussed, was this debt in the first place, how would this order be construed, those sorts of things?

A Probably, unless the parties agreed to the facts. I'd probably want to hear more than arguments of counsel. I'd want to hear evidence and arguments of counsel.

Q In your view, if a debtor violated a confirmation order written like this, would it be appropriate to dismiss the Chapter 13 case?

A This is now a post -- this is a confirmation order, so the situation is post confirmation. And I would be very reluctant, assuming, again, I were for whatever reason required to enforce that first sentence, I'd be very reluctant to dismiss this case.

That would be -- that would not be helpful. If the debtor, notwithstanding the additional debt, were -- was making the plan payments, complying with his obligation -- his or her obligations under the plan, dismissing the case and therefore putting an end to those payments would not help anybody, in my view.

Q Let's go back to the concept of the drop dead order we talked about a few minutes ago. As you said, an order of that sort provides that if the debtor fails to cure a problem within a particular period of time, the relief from the automatic stay would be granted. Is that a fair summary?

A That's correct, in that context, yes.

Q Did you ever have situations where debtors failed to cure the problem and therefore did not do what was provided in the drop dead order?

A Oh, yeah.

Q What action did you take when that occurred?

A Well, if the drop dead order was enforced according to its terms, a case just got dismissed. And I would see that it got dismissed or my staff would see that it got -- I'm sorry, the stay would be modified. As I said, I was reluctant to do that

in a dismissal context, but the stay would get modified.

If, for example, the creditor felt uncomfortable relying on the drop dead order and came to court look for what we used to call a comfort order, I would grant it. You know, if the conditions of the drop dead order had been -- had not been satisfied.

Q Would you -- would you pursue other remedies such as contempt of court for the debtor's failure to cure?

A No. No, no, no.

Q Judge Barliant, the Title XVIII, Section 3057 requires a judge to make a referral of a matter to the United States Attorney if the judge has reasonable grounds for believing that the criminal laws relating to bankruptcy have been violated. Is that right?

A That's correct.

Q And those underlying criminal laws that are referred to there generally require that the party at issue have acted knowingly and fraudulently; correct?

A That's correct.

Q In your 14-plus years on the bench, did

you make referrals to the United States Attorney under this provision?

A We actually -- I and, I think, the other judges in my court did, I did, make referrals to the U.S. trustee, who is a -- the U.S. trustee's office is an agency of the Justice Department. And the entity with direct administrative authority over the bankruptcy system.

So I would have made the referral to the U.S. trustee, with the expectation that the -- assuming the U.S. trustee agreed, it would go to the U.S. Attorney.

Q And about how often in your 14 years did you make a referral to the U.S. trustee?

A Very rarely. I'd have a hard time even thinking about a specific case. But I'm sure -- I'm certain less than -- less than five times.

Q Can you recall ever referring a matter to the U.S. trustee for potential prosecution of a debtor?

A I think actually I do. I think I did. Chapter 11 debtor who did -- did a series of things. As I vaguely recall, yes. But not a Chapter -- I do not recall doing that in a Chapter 13 case.

Q Can you imagine making a criminal referral

for potential prosecution for disclosure issues or for incurring post petition debt on a paper record without hearing evidence?

A No. I'm sorry if I'm repeating myself, but I certainly would not do that for incurring post petition debt under any circumstances.

But with respect to the disclosure issues, clearly I would have a hearing before I did anything.

Q And at a hearing, what sort of evidence would you be looking to hear about?

A Well, again, the circumstances, why did -- what is it that happened, why did it happen, what was the intent behind it, if we can determine that, what are the consequences, what's the materiality of the disclosure, you know, what efforts were made to repair the problem, that sort of thing.

Q Would you want to hear whether there might be an innocent explanation for a particular nondisclosure?

A Certainly.

Q Would you want to hear about potential miscommunication between debtor and counsel?

A Right. Obviously, the issue of who -- who made the decision, who actually is responsible for

this, would be -- would be critical as between counsel and the debtor.

Q And let me ask you about a more specific hypothetical. Let's assume that a debtor filed a bankruptcy petition using a pseudonym rather than the debtor's actual name, and let's further assume that the record showed that it was the debtor's attorney's idea and the attorney advised the debtor that no harm would come of it, and further assume that both the debtor and counsel intended that the incorrect name would be fixed before notices went to creditors and, in fact, that was done before notices went to creditors.

Given those facts, would you make a referral to the U.S. trustee or the U.S. Attorney?

A No.

Q Why not?

A Well, the fact that the problem was corrected before there could potentially be harm to creditors or any defrauding of creditors or any injury would indicate to me, and the fact that it was on advice of counsel, those facts would indicate to me that there wasn't an intent to do this in a fraudulent way.

Whatever the reason was, it wasn't to

defraud creditors. And also, it didn't have the effect of defrauding creditors because creditors got the correct notice before time to file claims or before anything -- anything had occurred.

MR. WALSH: Just one moment, Madam Chair.

Thank you. Nothing further at this time.

CHAIRMAN MC CASKILL: Is there cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good morning, Mr. Barliant.

A Good morning.

Q Alan Baron, here as special impeachment counsel for the House of Representatives in this matter.

Would you agree with the Supreme Court in Local --

A Local Loan versus Hunt.

Q Famous case.

A Very famous case.

Q Where the court said that the protection of the bankruptcy law is for the honest, but unfortunate, debtor?

A I --

Q Would you agree with that?

A Like almost everybody, I agree with it as a -- as a sort of a general statement of goal. So to that extent, I agree with it. But of course it has to be given content, which the -- which Congress has done.

Q As a working principle, though, you would accept it?

A Working principle? I'm not sure it rises to that level. It's dicta in that case, and it's -- it's a statement of an aspiration, I would say. I don't know that it's a working principle, because I don't know how to apply that.

Q Okay.

A Other than -- other than by doing what Congress has said we should do.

Q Would you agree that candor by the debtor is essential to the operation of the bankruptcy system?

A I would.

Q And would you agree that the bankruptcy statute requires that a proposed plan in a bankruptcy be presented in good faith?

A Yes.

Q Okay. And you understand that this proceeding is an impeachment trial and not a

question of whether a proper or improper discharge in bankruptcy was afforded to Judge Porteous?

A I do understand that.

Q With those earlier principles in mind, I want to go through some facts that I submit to you are established by the evidence. First, Judge Porteous filed his initial bankruptcy petition on March 28, 2001. Do you recall that?

A Yes, I do.

Q And the day before, March 27, he paid off three markers in cash to the Treasure Chest Casino totaling $1500. Now, this transaction does not appear anywhere on his schedules which he filed under penalty of perjury. Okay?

Second, Judge Porteous filed his petition on March 28 in the name of G.T. Ortous, and it was suggested by his bankruptcy lawyer. Judge Porteous agreed to it and signed the original petition under penalty of perjury.

Are you familiar with those facts?

A I am.

Q I want to come back to the issue of advice of counsel, but let's continue.

Judge Porteous also obtained a post office box, which he used as his residence address on the

March 28 petition. And this, too, was at the suggestion of his bankruptcy lawyer. Judge Porteous agreed to it, went out and got the P.O. Box. And his real home address on that initial petition is not found. And this too was signed under penalty of perjury.

You're familiar with that?

A Correct.

Q Okay. On March 23, 2001, that's five days before that initial petition, Judge Porteous filed his year 2000 income tax return and claimed a tax refund of approximately $4100. That does not appear on the schedules he filed in his bankruptcy, and he never told his lawyer about it.

Are you familiar with that?

A I've seen that, yes.

Q Okay. And a few days after he filed his amended petition on April 9, four days later, on April 13, he received that tax refund, but he didn't tell his lawyer, and the money went directly -- it was direct deposited into his bank account.

Also, in conjunction with his amended petition, the pay stub that was submitted was from the year 2000, and the pay stub at the time of filing in 2001 would have shown an additional $174 a

month, but that current pay stub was not submitted in conjunction with the filing.

Now, given all that, do you believe that those facts, if established, are consistent with the candor required of a debtor?

A Clearly, some -- there -- on those facts, there were errors, and some of which may have been intentional errors, in the filings. So it -- it's not -- the filings were not completely candid.

Whether it's consistent with what's required under the Bankruptcy Code is a different inquiry. So I'm not sure I know what you're asking exactly.

Q Well, under the Bankruptcy Code am I correct that it's basically the issue seems to be from all we've heard is good or bad for the creditors. Regardless of how we get there, whether he lied or didn't lie, is it good or bad for the creditors seems to be the overriding concern. Is that a fair statement?

A It's a reasonable statement. There is a systemic stake here. But it is also true that the Bankruptcy Code has a purpose, and the main function of the court, at least, is to carry out Congress's purpose in adopting the code. And that generally is

for the protection and benefit of creditors and debtors.

Q Right. And how you get there seems to be a lot less important than getting there?

A I guess as sort of like the local -- Local Loan versus Hunt statement, I guess as a general proposition, I'd agree with that.

Q Now, I want to go back to the advice of counsel issue. Do you find the fact that Judge Porteous received advice from his bankruptcy counsel about this false name, and let's not bandy it about, it is a false name, it wasn't by mistake, not a typographical error?

A That was my understanding, yes.

Q Do you find that exonerates him from filing that way under penalty of perjury?

A Under penalty of perjury?

Q Yes.

A I don't think that it -- it's not -- it doesn't -- that in itself would not exonerate, to use your word, exonerate Judge Porteous, if that were the only fact.

Q Well --

A I mean, I think what I said was in my direct examination, was that I would be looking,

before I did anything with respect to that, to the judge's -- Judge Porteous's intent and the materiality of the act, in this case filing under a false name.

So it's not so much a question of exonerating; it's a question of what the -- what the consequence should be.

And as I said, given the fact that he was relying on his attorney and, in addition, very important to me, the fact that they almost immediately corrected the document so that nobody -- essentially nobody -- none of the creditors would even know that there had been a false name given, those two facts combined, I cannot -- I could not -- I do not believe I could find that there was any intent to commit fraud or otherwise harm the creditors or otherwise even impair the system, which is much different than saying I condone what he did.

Q I want to ask you about a case that you decided involving advice of counsel. It's in very small print, so you have to bear with me. It's in re: Patricia K-a-d-e-m-o-g-l-o-u.

Do you recall that case?

A Vaguely.

Q Now, in that case, the woman was not a

lawyer, she certainly was not a judge, she failed to show up for some hearings. And her excuse was, and you accepted that for purposes of your decision, that she had been advised by her counsel that she didn't have to show up. And nevertheless, you said that she could not rely on advice of counsel and held her in contempt.

Do you recall that?

A If I -- yes. But if I recall the case correctly, there was -- there was some very material consequences to what she had done.

Q Well --

A Again, in this instance, if all there was -- and I think I answer this in your first question. If all there was was advice of counsel, that would be a different case than this case.

I vaguely remember that case, and I -- but I can't give you the details any longer.

Q Okay. Now, you took issue with the order that was entered in this case, the confirmation order; isn't that correct?

A That's right. I definitely did.

Q I'm sorry?

A I definitely did, yes.

Q And if I understood you, in particular, I

believe it's paragraph 4, which says the debtor shall not incur any additional debt without the written authority or permission of the trustee?

A Right.

Q Right. Now, you've heard from Mr. Hildebrand, he uses a version of that, it contains that language, and it's pretty widely in use?

A I did hear that testimony, yes, I did.

Q And do you disagree with that fact?

A Do I disagree with the fact? No, I have no basis for disagreeing with the fact.

Q Okay. Now, let's assume for the moment that the debtor finds the provisions of the order or a provision of the order to be onerous, for whatever reason, or disagrees with it, thinks it's unlawful. Are you -- are you saying it's okay to ignore the order?

A No, I'm not. I am not.

Q What are the remedies if a debtor believes the order is improper, onerous, for whatever reason? What remedy does he have, short of ignoring it?

A Opposing the entry of the order in the first place, moving to vacate the order later, which could be problematic, depending on timing issues.

Those would be the remedies, the ones that come to mind.

Q Now, the evidence establishes that Judge Porteous got credit at various casinos and during the year following the judge's order by sign -- and he signed various markers in conjunction with them.

Are you familiar with markers?

A I am not familiar with markers. I've listened to some of the testimony, and there seems to be a disagreement about whether that was getting credit or not getting credit. And I do want know.

Q You have no opinion on that?

A I have no opinion on that.

Q Assume for the sake of argument -- and I'm not asking you to assume it beyond that -- that in fact it is credit that's been testified to by a number of people that it is -- by the Fifth Circuit majority, by Judge Duncan Keir, so you may know, colleague of yours.

A Right.

Q Mr. Beaulieu, Mr. Hildebrand, they all conclude that it's debt.

Would that violate the court order?

A Again, if you -- as I would construe that court order, the answer is no. If you look at the

first sentence of that paragraph 4 and apply it literally, the answer is yes.

Q The evidence also shows that Judge Porteous obtained and used a credit card after the order was entered without getting permission from the trustee. Would you regard that as a violation of the court order?

A Same answer. If I were construing that answer -- that order so that it was consistent with the authority vested in the judge by the Bankruptcy Code, the answer would be no.

If we look at that first sentence and apply it literally, without regard to the second sentence, the answer would be yes.

MR. BARON: One moment, please.

BY MR. BARON:

Q What do you think would be the impact on the bankruptcy system if all debtors who may want to avoid the embarrassment of seeing their name in the paper as having filed for bankruptcy, if they all decided they're going to file in phony names? What would be the impact on the system?

A I suppose it would be a problem for the clerk's office. Let me back up a step.

Are we also assuming that the phony name

was corrected immediately or not?

Q Try it either way, either way you'd like.

A Well, the first way, if the petition is filed and there's not a correction, the effect would be very bad. It would impose an even greater burden on Chapter 13 trustees than they already have, which is pretty considerable, to uncover that sort of thing, which by the way, as Mr. Hildebrand testified, has been significantly addressed by Congress already and by procedures that are in place.

But the answer is if the -- if the problem is not corrected, it would have an adverse impact on the system.

Q Right. Because it might mislead creditors and --

A Exactly, mislead creditors.

Q And you'd never know who was filing for bankruptcy?

A It would mislead creditors. It would essentially render the first meeting of creditors, you know, not meaningless, but there would have to be a follow-up meeting because you wouldn't have given the proper notice to the creditors.

It would -- it would create serious

problems.

Q Isn't there a systemic interest in making it clear that intentionally false filing, let's say of the name, will not be condoned, whether the debtor believes it will affect the creditors or not or indeed whether it actually affects the creditors or not? Isn't there a systemic interest in not allowing this to happen?

A If I said I was going -- I would condone that, I apologize, because that would have been a misstatement.

What I said was, I think, that I could not find any fraudulent or other kind of malicious or wrongful intent in doing this.

Clearly, it was wrong for Judge Porteous to have used a false name, and it was wrong for the attorney to advise him of that.

If this came before me and I got this evidence, at a -- I am quite certain I would have sanctioned the attorney. I would have reduced his fee or I would have done something to make it very clear -- I very likely would have written an opinion to get it out there in the world of Chapter 13 lawyers that this was not -- could not be condoned, to use your word.

With respect to the debtor, a debtor of the sophistication of Judge Porteous, you know, I may have imposed some sort of a sanction or I may have just criticized him or something to that effect.

More typical Chapter 13 debtors who have no sophistication I would not have done anything to.

But I would not have condoned this conduct.

Q But of course you weren't sitting as a court of impeachment, were you?

A I was not and I am not.

Q Would you report such activity to the bar association?

A Probably not, if it were explained to me the way I've taken it from the portions of the record that I've read, that this was an attorney who was, you know, however misguided, was trying to do his best for a client who had public prominence. And also if I were to determine that it's not something he did repeatedly.

There are -- a prior witness talked about situations, and this happens, where debtors use misleading names, whether they're phony or not, they're misleading names, for purposes that affect

the creditors and the bankruptcy process.

This doesn't appear to be one of those situations. So if that was my finding, I probably would not refer this to the bar association. I would make it clear to that lawyer, both through sanctions and probably through a published opinion, that it was not -- that he shouldn't do it again and neither should anybody else who practiced in our court.

Q Are you aware that Mr. Beaulieu testified that Mr. Lightfoot called him up to say there was a typographical error in the name, as opposed to what we know are the real facts, that they consciously decided to file in a false name?

A No, I don't recall either hearing or reading that testimony, so no, I'm not aware of that.

MR. BARON: Thank you. Nothing further.

CHAIRMAN MC CASKILL: Anything further?

MR. WALSH: We will waive redirect, Madam Chair.

CHAIRMAN MC CASKILL: Any questions from the panel?

You may be excused.

THE WITNESS: Thank you.

(Witness excused.)

CHAIRMAN MC CASKILL: Let me check with counsel now. We have completed four witnesses and I count that we have three left. Is that correct?

MR. TURLEY: I believe that is correct, Madam Chair.

CHAIRMAN MC CASKILL: Okay. If -- it's my understanding that our vote now is at 2:30. It's also my understanding that the Foreign Relations Committee has something to vote on as soon as that vote is over.

Are you all doing more work on it, or are you just reconvening to vote?

Do you know, Senator Wicker?

SENATOR WICKER: Well, Madam Chair, there -- there isn't a real contentious issue before Foreign Relations, but because of the sheer number of the items, it may take 20 to 30 minutes, even to do a perfunctory --

CHAIRMAN MC CASKILL: I can't sweet talk you into proxies? No?

SENATOR RISCH: Madam Chairman, on some of them. But there are a couple we're going to want to express ourselves on. Briefly, but succinctly.

CHAIRMAN MC CASKILL: Okay. Well, it

would be my intention to try to go ahead and take the next witness and go only until 12:30 and then adjourn at 12:30 and come back at 3:15.

Will that accommodate the members of the Foreign Relations Committee appropriately?

SENATOR RISCH: The latter part I have no problem with. I have to leave a little earlier than 12:30, but I'm hoping we can get somebody else in here.

CHAIRMAN MC CASKILL: As soon as you have to leave, you should leave, Senator Risch. When you do, if we don't have anybody else here, we'll adjourn at that time.

SENATOR RISCH: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Call your next witness.

MR. TURLEY: Thank you, Madam Chair. The Defense would like to call Mr. Rees.

Whereupon,

ROBERT B. REES

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Mr. Rees, my name is Jonathan Turley. I'm one of the counsel representing Judge Porteous. Good afternoon.

A Good afternoon.

Q Can you start by simply giving your full name for the record.

A Robert Byrne Rees.

Q What is your occupation, sir?

A I'm an attorney.

Q And where do you practice principally?

A Southeast Louisiana.

Q And prior to becoming an attorney, what was your occupation?

A Before law school, I was a policeman, Lafayette city policeman, Louisiana state police.

Q And give us an idea of what percentage of your career have you practiced in Louisiana?

A Pretty much all of it. I think I got sworn in in '85.

Q Would you estimate 100 percent, then?

A Yeah.

Q You might want to pull the mic a little closer so the Senators can hear you a little better. It's a rather big room.

Before you became a private counsel, did

you serve as an assistant district attorney?

A I did, in the 19th JDC, and then went back into private practice and then I spent two years in the 22nd JDC.

Q And specifically in 1994, what were the areas of your practice?

A Criminal defense.

Q You were in the House report on page 75, and this is House Exhibit 444, I am quoting, it says, "on September 20, 1994, Robert Rees, an attorney who did occasional criminal work," and then goes on.

Is it correct to say that you did occasional criminal work?

A No, I did 100 percent criminal defense work. When I was not a prosecutor, I was a criminal defense lawyer.

Q So that statement is not true, you did all criminal work; is that correct?

A Uh-huh.

Q Okay. And did you do mostly state or federal practice?

A All state.

Q Now, what years did you practice specifically in the 24th Judicial District?

A From 1991 until 1997. And then in '97 I still did some work in Jefferson, but I moved about 30 miles away to north of Lake Pontchartrain, which is the 22nd JDC.

Q Just give us an idea of your practice. How busy was your practice in 1994?

A I was real busy. I had a full plate.

Q So, for example, how many matters would you handle in a given day?

A At that point in time, I was either in the first or second parish courts of Jefferson Parish, maybe Orleans municipal or traffic, for the 24th JDC. And seven to 15 maybe.

Q In one day?

A In one day.

Q Now, in the early 1990s, did you have occasion to meet Louis and Lori Marcotte?

A I did.

Q And just generally, what was your understanding of the percentage of bonds that the Marcottes were handling in Gretna?

A Well, when I first met them in 1991, it didn't really mean anything to me, but after being in -- in the Gretna area for a while, they pretty much had it monopolized.

Q So you say 90, 95 percent?

A I would say so.

Q Now, did you come to handle bond issues with the Marcottes?

A I did some, yes.

Q And did you know a man by the name of Mike Reynolds?

A I did. Went to law school with Mike Reynolds.

Q You were law school friends?

A Yes.

Q And did you have occasion in early or mid-1990s to sometimes come before Judge Porteous?

A I did.

Q Now, did you know a man by the name of Audrey Wallace?

A I did.

Q When do you think you first met Audrey Wallace?

A Sometime in the early 1994s, he was an employee of Bail Bonds Unlimited.

Q So in relation to your work with the Marcottes, you met Mr. Wallace?

A Correct.

Q And in 1994, did Mr. Wallace ask you to

assist him in having a previous sentence amended?

A He did.

Q And for his sentence to be set aside, I mean his conviction to be set aside?

A Correct. He asked -- well, when -- to amend it to get the Article 893, then the second step of that would be to invoke the Article 893, which would be a set-aside.

Q In fact, didn't he ask you several times about that matter?

A He did.

Q And is it true that Louis Marcotte also asked if you would assist Mr. Wallace?

A I believe Louis Marcotte asked me first, and then Mr. Wallace then asked me several times after that, until I got the motion filed.

Q Now, did you view it in any way strange or wrong that Mr. Marcotte would ask you to help one of his employees in such a manner?

A Well, he needed to clean up Mr. Wallace's record to be able to license him as a bail bond agent, and I believe that's why I was asked to do it.

Q So in September 1994, did you have occasion to file a motion to amend of Mr. Wallace's

sentence for burglary?

A I did.

Q And at the time you filed that, did you feel that the case law supported your motion?

A I did.

Q I'm going to show you a demonstrative to help us get through this rather complicated history. I don't know what your eyes are like, but you might have a better shot --

A My distance vision is good. The reading is what's bad.

Q Now, Mr. Rees, we've divided this demonstrative into two parts, and you'll see at the very top, the lighter portion deals with Mr. Wallace's drug charges, and the bottom portion deals with the burglary charge. Do you see how that's divided?

A I do.

Q Okay. Now, if you take a look over on the left side of the top, you'll see it says on December 15, 2008, Wallace was arrested on this drug charge.

Do you see that?

A Correct.

Q Okay. And technically, that was the first arrest shown on this demonstrative; correct?

A It is.

Q Okay. Now, if you look at the top, the next event that is shown is that February 26, 1991, it shows that he pleads guilty to the drug charges.

Do you see that?

A I do.

Q Is that your recollection of what occurred in the drug charges?

A I was not involved with the drug charges of Mr. Wallace.

Q So then let's go to the portion that you were involved with. If you look down at the burglary section, the darker section, it says "5/8/89 Wallace arrested on burglary charges."

Do you see that?

A I do.

Q It goes through an arraignment. It goes through some rescheduling. And then it shows on 6/26/1990, it says, "Wallace pleads guilty, Judge Porteous issues sentence, three years hard labor, suspension and two years probation."

Do you see that?

A I do.

Q Now, the next event I want to point you to is, if you go to the top, after that sentencing,

that is when Mr. Wallace pleads guilty, is it not?

A I saw -- I see that, yeah.

Q Okay. Now, finally I want to bring you back, on December 11, 1991, it says, "Wallace probation terminated because, as a result of his imprisonment, he cannot complete probation."

Do you see that?

A I do.

Q Now, is that an accurate representation of what you believe occurred on -- in terms of --

A From looking at all the records, I believe so.

Q Okay. Now, I just want to point out that the next event is 9/20/94, it says "Robbie Rees files motion to amend sentence."

Do you see that?

A I do.

Q Is that accurate as well?

A I believe so, yes.

Q I'm going to ask you to help us through this, because it gets a little bit complex between these provisions.

We're going to pull up House Exhibit 82, and although it's not Bates labeled, this is page 102 on the .pdf.

Do you recognize this motion?

A I do.

Q Is that the motion you were referring to earlier?

A Yes, that's the motion I filed.

Q Okay. How can you tell that you filed this motion?

A That's my signature.

Q Did you draft this motion?

A I believe I dictated it. I didn't type it myself, but I believe I told someone to type it. I don't remember who, but --

Q But you filed this motion on behalf of Mr. Wallace?

A I did file the motion.

Q And you inserted your name and address on it; correct?

A On one of the copies I did. That would have been the original that probably should have stayed with the clerk's office. The second copy when I file a motion, there's a courtesy copy that goes to the district attorney's office.

Q You filed two at the same time?

A I filed two of the same motion, but on the original that would go to the clerks and to the

judge, I would put my address and identifying information.

Q That's pretty standard to file two things like that?

A Yeah, but I probably also clock one for myself to keep it in my file.

Q Can you tell me what the date is shown as to when you filed it?

A September 20 of -- September 20 of '94.

Q Okay. Now, you mentioned that there was another copy that has appeared. I believe this is also part of Exhibit 82. And it's page 103 of the .pdf. I'd like to bring that up.

Is this the redundant motion that you were referring to earlier?

A It's a duplicate copy of the same motion.

Q And they were filed the same day?

A Same time. If you see the clock stamp from the clerk's office, it shows the exact same time and date.

Q Okay. So when you filed these -- particularly the second motion, it was to make the district attorney aware of the motion, is it not?

A Right. It was routine for the clerk's office, there was a basket, you put it in there, it

goes to the DA's office for that division to be notified that the motion has been filed and it's being asked to be set.

Q Now, this isn't a very long motion, is it?

A No.

Q Let's take a look at the top right-hand corner. Does that state what division it was filed in?

A Yes, that's division A.

Q Division A. Now, under number 1, I just want to look at a statement that says, "the defendant was sentenced on June 26, 1990 to three years in which said sentence was suspended and two years active probation."

Do you see that?

A I do.

Q Do you know what crime he had been sentenced for?

A Yes. I checked the record beforehand. It was for a burglary charge.

Q Who was the judge that sentenced him on that?

A Judge Porteous. It was in Judge Porteous's division.

Q So this was going back to the division and

the judge that handled the original offense?

A That's the way it's supposed to work.

Q Okay. Mr. Rees, I'd like to direct your attention back to the motion to amend. From this motion to amend, can you tell if Judge Porteous set it for a show-cause hearing?

A Go back --

Q This is back to the previous copy.

A Would you go back to the previous motion that does not have the identifying --

Q Yes. They're bringing it up now.

A Yes. I did not ask for a contradictory hearing on this, but Judge Porteous, in his own handwriting, scheduled it for a contradictory hearing or a rule to show cause, which would be a contradictory hearing.

Q So you didn't ask for it, but the judge went ahead and scheduled it for a contradictory hearing?

A That's correct.

Q What's the purpose of a contradictory hearing?

A To give the district attorney's office an opportunity to object to it.

Q Now, is it your understanding that

Mr. Wallace was essentially sentenced to two years' probation because his imprisonment had been suspended?

A That's correct.

Q So even if he had completed his full sentence of probation, it would have ended in 1992, would it not?

A Yes.

Q And that would be well before the date of your actual filing in this case?

A That's correct.

Q Let's look at the middle of the page, at number 2. And I want to direct your attention to a statement that says, "defendant desires to amend his sentence to give him benefit under Article 893."

Do you see that?

A I do.

Q What does that mean, benefit of 893?

A Okay. He was given the benefit of probation -- suspended sentence and probation. But Article 893 of the Code of Criminal Procedure provides that upon satisfactory completion of your probation period, it serves as an acquittal and the conviction can then be set aside, which would then allow you to use the expungement statute to remove

the request from your record.

Q Is that a common request?

A Yes.

Q Is that your signature at the bottom of the page?

A Yes, I filed that motion. That's my signature.

Q Now, in the course of your practice, do you have on occasion -- on occasion do you file motions to amend?

A I have one pending right now.

Q Can you give us that as an example, what's pending?

A Yeah, it's a -- a judge would -- when entering a plea agreement, a lot of judges routinely will say I'm going to give you a suspended sentence, I'm not going to give you the benefit of either 893 on a felony or 894 on a misdemeanor until after you satisfactorily complete the probation.

At that point in time, I will give you the right to reappear before me and ask for the invocation or amendment to include that to be able to invoke it to then get the benefits of the expungement.

Q I see.

A But they hold the probation, I guess, over their heads just to allow them to complete the probation, and then if they do satisfactorily complete it, they then agree to amend it to include that either 894 or 893.

Q So after you filed your motion to amend the sentence, did the court go forward and hold the hearing on the motion?

A They did. Actually, the next day.

Q Okay. I'm going to put the transcript up for that hearing, which I believe is House Exhibit 246. On the first page, is there a date?

A Yes, September 21, 1994.

Q Okay. I'm going to turn to the fourth page of this transcript. It indicates that Mr. Netterville stood in for you at the hearing. Is that your recollection?

A Yes. In reviewing those documents, that's -- that's what happened.

Q And does that often occur, where you'll have a colleague stand in on a hearing like this?

A Yeah, if you know that you're not going to be able to make it, you try to arrange -- if it is a set hearing, then you try to arrange to have someone cover it.

Q I'm going to direct attention to the top of that page.

I'm sorry, if you can bear with us for one second.

Do you see near the top of the page a line that says, "I've already spoken with the DA on this"?

A I do. I do.

Q This is what Judge Porteous is saying in the hearing; correct?

A Correct.

Q And so he tells you that -- and everyone else in the courtroom, "I've already spoken with the DA on this"?

A Right. This is an on-the-record statement.

Q And by "this" he's referring to the pending motion?

A Correct.

Q Was Mr. Reynolds in the room, to your knowledge, in reviewing this transcript?

A By looking at the first page, when it says the people that were present, it was Mr. Reynolds and Mr. Netterville, so I would assume that Mr. Reynolds was there.

Q Now, by the way, I want to step back for a second to ask you a question. Because we have these two provisions, 893 and 881.

A Correct.

Q Is it true that under Section 881 at the time, the judge was not even required to solicit the position of the district attorney on these matters?

A Correct. As I -- in reading the 1994 version of 881, there was no requirement for a contradictory hearing.

Q But Judge Porteous went ahead and said I want to have a contradictory hearing?

A Judge Porteous said that on his own motion.

Q Now, are you aware that later, when we're talking about these provisions and the discretion of the judge, that later there was an amendment of this law?

A I believe it was 1997 they amended it to include several other requirements for 881.

Q And was it your understanding that that amendment made it clear that the judge has discretion in this area?

A Yes, there's -- I think paragraph A says that after execution of sentence, it can't be

addressed. But then paragraph B says if it's a felony without hard labor or misdemeanor, he can address it again on his own volition. And then it goes on to say that if he wants to address it, it has to be set for contradictory hearing.

MR. TURLEY: I'm sorry, Madam Chair?

CHAIRMAN MC CASKILL: Yes, we are going to have to adjourn now. I apologize to the witness for interrupting him midstream. But we will adjourn. And we will reconvene at 3:15, when we will finish the direct of Mr. Rees, handle the cross, any redirect that is necessary, then go on to witnesses Tiemann and Mackenzie. And if everyone is helpful and is here, then we should be able to finish the evidence today.

So don't start setting meetings tomorrow, though, until we're sure we get finished. I don't want everyone to start scheduling things that would cause us not to be here tomorrow if we need to be here, we will certainly do so.

MR. TURLEY: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: We will adjourn until 3:15 this afternoon.

(Whereupon, at 12:31 p.m., the proceedings were recessed, to be reconvened at 3:15 p.m. this

same day.)

AFTERNOON SESSION (3:30 p.m.)

Whereupon,

ROBERT B. REES

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

CHAIRMAN MC CASKILL: We will come back into session, and the witness can once again take the stand. I believe, Mr. Turley, you were still in direct when we adjourned.

MR. TURLEY: That is correct, Madam Chair. Thank you.

DIRECT EXAMINATION (Continued)

BY MR. TURLEY:

Q Mr. Rees, you're already under oath, I believe. Thank you, Mr. Rees. I'm going to start where we left off. In fact, I'm going to step back a question and try to begin where we were last in discussion.

I want to go back to the hearing on September 21st, 1994, and to the transcript that we were looking at. This is a line that I pointed out in the middle of the page of Exhibit 246. This is a statement by the judge. I just want to read it again because that's where we, I believe, left off.

The judge says "subject was sentenced on 2/26/91 on 89-0001, to five years at hard labor for possession of PCP and cocaine. That conviction or that crime technically predates the crime for which he pled in my particular court."

In your experience, is that statement correct?

A Well, yeah --

Q You might have to turn your mic back on. I'm not so sure it's on.

A Correct. The arrest for the drug charge predated the arrest for the burglary charge.

Q Okay.

A And the arrest for the drug charge, I believe, was allotted to a different division than Division "A," but the burglary charge got allotted to Division "A."

Q Let me just ask you generally, instead of walking you through it. You have a lot more experience on this subject than I do. Can you just explain what the problem is that arose?

A Okay. The problem is the defendant has two arrests, so basically two pending charges in the same jurisdiction, basically the same courthouse. The second arrest for the burglary came to court

prior to the drug charge. He entered a plea to it, got put on probation, because at least at that point in time he had no convictions. He had the other arrest but no convictions.

Then after that, he entered a plea to the drug charge and was sentenced on that charge, didn't get probation. And I was uninvolved in that. I don't know why. But the second conviction, which carried the jail time, then caused the probation office to request a termination of the probation based on that conviction. Well, he didn't commit anymore criminal activity. So the probation shouldn't have been terminated, you know. The reason for termination is, first of all, to avoid criminal activity, to see if you stay out of trouble. The fact that he already had the arrest, there was no subsequent criminal activity to him being placed on probation because the first arrest predated the burglary charge that he was on probation for.

Q And so that was the problem, in your view, that the judge was raising in this comment?

A Right, to -- the judge had to go back and undo the unsatisfactory termination of the probation, all right, because it was based on the

prior arrest, which was not grounds to revoke the probation that Judge Porteous had placed him on.

Q And you know, we've heard the expression an "illegal sentence" or an "incorrect sentence."

Is it correct to say that when you believed a sentence had been incorrectly made, that this is the type of thing judges will do in amending a sentence of this type?

A Right. It was incorrect to terminate his probation based on that, the fact that he got jail time as a result of a prior arrest.

Q I see. Now, I know that you commonly invoke 893 at sentencing, but is there a division of opinion among attorneys that you know of as to whether the satisfactory completion of a suspended sentence allows you to get the benefits of 893?

A Again, I try to use the language that he's being sentenced under, either 894 for misdemeanors or 893 for felonies, because that's the article that controls whether a defendant has a suspended sentence and is placed on probation. Those are the two articles, one for misdemeanors, one for felonies. The only way to do that is to use one of those articles. Whether the language that he's being sentenced under that article number or not,

that's the only way to suspend a sentence and place him on probation. Misdemeanor would be 894; felony would be 893. And some lawyers think that just the fact that they're getting a suspended sentence and being placed on probation, that's the article they have to use to do it.

Q So those lawyers don't believe that you have to actually invoke 893? They really look at the satisfactory completion of the suspended sentence?

A Because under Article 893 or 894, the way to be able to use that article to then have the set-aside done is satisfactory termination of the probation or completion of the probation.

Q Okay. Now, in your view, under Louisiana Code of Criminal Procedure 881, was the judge allowed to do what he did here?

A I think because it was an incorrect thing to do on the termination of the probation, that's how he would have to go back to fix it.

Q Now, let me direct your attention to the end of this transcript, to a statement that I'd like to highlight where the judge says "if you want further relief, then file a petition to enforce 893, and then I'll execute that also."

Do you see that statement?

A I do.

Q I want to make sure we understand how this process works, because it seems to be different in Louisiana than many other states. Am I correct that the first step in this process is a motion to amend the sentence; correct?

A In the situation we're dealing with right now, yes.

Q Okay. And then the second step is a petition to enforce 893?

A Showing that the probation was satisfactorily completed. You invoke Article 893, and then the set-aside is done.

Q And that's the third step, is a motion to set aside?

A Well, yeah, and then the fourth step would be a motion to expunge the arrest.

Q If you go forward all the way to the end, the fourth step would be expunge?

A Right.

Q Okay. So when the judge is saying I've now done this, why don't you -- if you file a petition to enforce 893 I will execute that also, what was he telling the parties in the Court?

A That there had to be another hearing to invoke Article 893.

Q Okay. And that he was prepared to grant that as well?

A Correct. Because once the defendant is sentenced under 893 and has a satisfactory completion of probation, the next step would be just to say to come forward and show that, probation ended satisfactorily, he has an 893, we're asking it to be invoked.

Q And once a judge has amended a sentence, is there any doubt that he tends to enforce 893 in most cases?

A I wouldn't think so.

Q And so the second step is primarily sort of an administrative step in most cases?

A Yeah, that's probably true.

Q And as for that final step on expungement, would that also be more administrative or ministerial, that if you get to that point it's treated as largely administrative?

A Back in '94, I would say yes, but now, in the jurisdiction of the 22nd JDC, expungements require a contradictory hearing. So I don't know that that's anywhere in the statute. It's just the

rule that the DA's office is using. They want to make sure that whoever is applying for an expungement is entitled to it.

Q Now, in the hearing that we just went through, it's your understanding that there was an assistant district attorney in that hearing, was there not?

A According to the transcript, yes.

Q And who was that?

A Mike Reynolds.

Q And as far as you know, was there any objection from Mr. Reynolds during the hearing?

A No, not according to the transcript. I wasn't at the hearing, so I don't know, but according to the transcript, no.

Q Now, you mentioned that you went to school with Mr. Reynolds. Did he raise an objection with you before the hearing?

A Not that I remember, no.

Q And did he raise an objection after the hearing to you?

A Not that I -- I don't remember, you know. We had -- the second hearing was a month later. I don't --

Q I'm talking about outside the courtroom.

A I don't think prior to the hearing, I don't believe.

Q Now, as a former ADA yourself, if Mr. Reynolds had an objection, how would he go about making that objection to this type of proceeding?

A Go up his chain of command, go to a supervisor, or even voice it to the judge.

Q I want to direct your attention to that. You had mentioned the hearing that followed, and I would like to go to that hearing, which I believe is on October 14th. Is that the hearing that you were just referring to, October 14th, 1994?

A Correct. That's the hearing that I attended.

Q I would like to put that transcript up on the screen, and I'm specifically going to direct your attention to page 41 of the PDF. This is Bates labeled Porteous 625. Now, in this hearing, you appeared for the defendant, Aubrey Wallace; is that correct?

A That's correct.

Q And who appeared for the state?

A Mike Reynolds.

Q Okay. Let's turn to page 4 of that transcript, the Bates label PORT628. Now, is it

true that during this hearing you specifically asked to put comments on the record?

A Yes, I did.

Q Why did you do that? Why would you want to put comments on the record?

A Because I was going to ask for the invocation of the 893 orally.

Q So this was an oral motion?

A Correct. I was making sure that the -- at the hearing before, that everything I had asked for in the motion to amend the sentence had been done, which the Court did. And then at this motion, I was asking to invoke the 893, and I did that orally.

Q So this is precisely what you had discussed -- not what you had discussed, what the judge had indicated in the first hearing? You were now making that motion --

A This is the second step that we needed to do to complete that procedure.

Q Was there any objection from Mr. Reynolds?

A Not that I remember. It's not in the transcript, but if he had had one, he would have voiced it.

Q I see. And do you recall if there was any concerns that he raised outside the courtroom to

you?

A I don't remember, but I don't believe in between the two hearings I was.

Q And following this, Judge Porteous entered an order setting aside the conviction, did he not?

A Correct. I believe it was signed on the 14th also.

Q And once again, when Judge Porteous entered that order, was there any objection from Mr. Reynolds?

A No. At this hearing -- he signed the order also, but at the hearing on the record, he indicated he was going to invoke it. "Under 893, the dismissal will be entered," is what it says.

Q If an ADA had objections, say, after the hearing, was there something the ADA could do? Let's say after all of this the ADA says I have a lot of problems with this. What are the options of the ADA?

A Go to the appellate section of the DA's office and have something filed to have it brought back or overturned.

Q Can you actually appeal a ruling like this?

A I believe so.

Q Is that by filing a writ of some type?

A I would think so, yes. I don't do appellate work, but they have a special section of the DA's office that does that. If they had that much of a problem with it, that's what they should have done.

Q Do you know of any writ filed on this issue?

A No, sir.

Q How much time do you think you actually worked on this issue as an attorney?

A On this case right here?

Q Yes, sir.

A 30 minutes, if that.

Q Is that fairly standard in these types of cases? You said you handled as many as --

A Well, back then when the constraints weren't as tight as they are now, yes. I would say it was a very simple motion to do. Either they're entitled to it and it's granted, or they're not entitled to it and it's denied. I guess if he had not been entitled to it, the first motion would have been denied, and it would have been over with.

Q Didn't you say once that when it comes to the final stage of expungements, that you actually

just carry around forms of expungement in your briefcase?

A For different jurisdictions, I do. I did then; I don't now.

Q Did Mr. Wallace pay you for this assistance?

A No, he did not.

Q Did Louis or Lori Marcotte pay you?

A No.

Q So you didn't get paid at all for this?

A No.

Q So you had done work for the Marcottes prior, hadn't you?

A Yes. I had done some bond reduction work.

Q Did you view this as just a small administrative task that you did for one of your regular clients or their employees?

A I would say yes.

Q Now, from your personal knowledge, do you know of any conversation between Judge Porteous and Louis Marcotte about this matter?

A Personal knowledge, no.

Q And from that personal knowledge, do you have any knowledge of any conversation between Judge Porteous and Mister -- I should say Reverend

Wallace on this matter?

A No, sir.

Q Now, at some point did the MCC come and interview you about this matter?

A They did. It was in November of '94.

Q What's your opinion of the MCC? This is some type of citizens group, is it not?

A It's a watchdog group, I would say.

Q And what's your opinion of the MCC?

A I think they would like to have more subpoena power, stuff like that. But --

Q But they don't have that power?

A To my understand, no.

Q And are they -- they're not a governmental group, are they?

A No. I believe it's privately funded.

Q So basically, these are just citizens coming and asking you questions; is that correct?

A Correct.

Q Now, are you aware, in the write-up, the MCC stated that Rees also acknowledged that Porteous should have recused himself from the case because of his friendship with the Marcottes? Are you aware of that?

A I just saw that yesterday. I was not

aware that I said that, but again, this was 16 years ago.

Q Do you have any recollection of saying that?

A No.

Q Do you believe it's true?

A In my discussion with them, I did not know Judge Porteous's relationship with Bail Bonds Unlimited at the time that this case was in his court in 1990. I mean, I wasn't around then. I don't know that Aubrey Wallace even worked for Bail Bonds Unlimited in 1990. So I don't know why that would have affected the motion to amend the sentence, which again took all of about 15, 20 minutes.

Now, if Aubrey Wallace had worked for Bail Bonds Unlimited when he got arrested for the burglary charge and the relationship between Bail Bonds Unlimited and Judge Porteous was what they are portraying it to be, that probably would have been reason to recuse himself from the case. But at the late stage of '94 when all we did was amend the sentence, I don't think he needed to do that.

Q Now, did you mention anything to the MCC about the Senate confirmation hearing of Judge

Porteous? Do you recall?

A I don't remember. Again, it's 16 years ago.

Q Was Aubrey Wallace eventually able to become a bail agent, to your knowledge?

A Not to my knowledge, because he had the second conviction to deal with that was in Judge Richards' court. I believe he was on parole for that at the time we did the motion to amend the first sentence.

Q And is it true that you cooperated with the FBI when they asked you questions investigating this matter?

A I don't know that I ever did, but I indicated that I would. I don't remember being questioned by the FBI, but I believe I did indicate that if they wanted to talk to me, I would be more than willing to cooperate.

Q Just to wrap up, Mr. Rees, do you believe that the motion that you filed that was granted with the Court was improper in any way?

A No, sir.

Q And based on your experience as a seasoned Louisiana criminal defense attorney, do you believe that Judge Porteous's actions in amending the

sentence and then setting aside the conviction were incorrect legal rulings?

A No. They were well within his realm of jurisdiction to do that.

MR. TURLEY: Thank you very much. Madam Chair, that's all the questions we have for now. I'm sorry, with your indulgence, Madam Chair.

Madam Chair, just as a housekeeping matter, we wanted to move in Exhibit House 69D, Porteous pages 625 to 629.

MR. SCHIFF: No objection, Madam Chair.

MR. TURLEY: And we wanted to move in House Exhibit 246. This is the transcript that we've been referring to.

MR. SCHIFF: No objection.

MR. TURLEY: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: They will be received.

(Exhibits House 69D and House 246 received.)

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Mr. Rees, from time to time during this period, did you get referrals of cases from the

Marcottes?

A I did.

Q And the first one who brought the case of Aubrey Wallace to your attention was Mr. Marcotte?

A As I remember, I believe Mr. Marcotte asked me if I would file a motion to amend the sentence.

Q And you told Mr. Marcotte you would do that?

A Correct.

Q And in fact, you talked to Mr. Marcotte about the Aubrey Wallace case before you ever talked to Aubrey Wallace?

A Correct. Mr. Marcotte explained to me he wanted to get him licensed as an agent, and to do that, he had to correct the first arrest.

Q And this was important to Mr. Marcotte that Mr. Wallace would come to work in his bail bonds company as a licensed bail bondsmen?

A I guess so. I was not involved in the daily workings of the Marcotte Bail Bonds Unlimited, but I know Aubrey worked for them for a while, and they did a lot of work in Gretna. So I assume that's why he wanted to license him to help.

Q And the reason that you would agree to do

this for Mr. Marcotte is that he would send you cases, and he asked you to do it for him?

A Correct. Well, he asked me to do it for Mr. Wallace, but it would benefit Mr. Marcotte if Mr. Wallace was licensed as an agent.

Q So you understood it would benefit Mr. Marcotte?

A Yes, sir.

Q Now, you also understood at the time that Mr. Marcotte had a very close relationship to Judge Porteous, didn't you?

A Yes, sir.

Q You understood that they had lunches together?

A Yes, sir.

Q You understood that the Marcottes were a frequent presence in judge Porteous's chambers?

A Yes, sir.

Q That probably on a weekly, sometimes daily basis the Marcottes would meet with Judge Porteous?

A For sure weekly. I'm not sure about daily.

Q Are you aware that Mr. Marcotte has testified that he talked to Judge Porteous about setting aside or expunging the Wallace conviction?

A I watched Mr. Marcotte's testimony. So yes, sir.

Q And knowing what you knew about the closeness of the relationship between Mr. Marcotte and Judge Porteous, it wouldn't surprise you that Mr. Marcotte would talk with the judge about Mr. Wallace and his situation, would it?

A No, sir.

Q And in fact, when you filed the motion to amend Mr. Wallace's sentence, it was a pretty bear bones motion, wasn't it?

A Yes, sir.

Q You assumed, didn't you, that Mr. Marcotte had already talked with Judge Porteous about the case?

A I didn't assume that. In looking at the record, the reason for the bear bones motion, it didn't have to contain anything else. The record spoke for itself, and the record would accompany my motion to Judge Porteous's chambers. That's the reason it was a half-page motion.

Q It was your understanding at the time that Mr. Marcotte had already discussed this with the judge, wasn't it?

A Probably, yes, sir.

Q You say this is a fairly bear bones issue, but actually, the issue isn't very simple, is it?

A What, to amend the sentence and invoke the 893?

Q No, the situation in which someone is sentenced, not under 893, and then wants to amend their sentence after they've executed their sentence. That's not a simple issue, is it?

A Well, if the defendant realized that if he had been informed of the availability of 893, I didn't represent him for the plea. I believe Mr. Tosh did. If he wasn't informed that he had the availability of 893, I would see where someone that was not advised of it would want to go back and then try to get the sentence amended to have the benefit of it.

Q But here you have a case where Judge Porteous sentence him on the burglary conviction and doesn't sentence him under 893; right?

A Correct.

Q And he had the discretion not to sentence him under 893; right?

A Well, if he suspended his sentence and gave him probation, that's Article 893. He just didn't use the words "893."

Q And he had the discretion at the time not to sentence him pursuant to that section, not to give him the access to later having a sentence set aside, didn't he?

A He would have to put him in jail. He gave him probation. The only way to get probation on a felony conviction would be the terminology in 893. He didn't say the words 893" when he sentence the him. Otherwise, he would have had to go to jail.

Q And he wasn't legally required to sentence him under 93, was he?

A No. He could have given him jail time, which would not have had any benefits of 893, probation, or the ability to go back and take the arrest off his record.

Q And under the statute, at least on its face, if you don't sentence somebody under 893, they're not entitled to have a set-aside, are they?

A You would have to read code of criminal procedure 893. It's not a statute. It's a codal article. But if you read it, it's it is case where if you get a suspended sentence, you're placed on probation. If you terminate satisfactorily, it's a set aside as a first offender.

Q That's if you're sentenced under 893;

correct?

A Correct.

Q And he wasn't sentenced under 893; correct?

A The only way to get probation would be 893.

Q Mr. Rees, was he sentenced under 893?

A The terminology of "893" was not in the sentencing minutes.

Q And it's also a fact under the codes that once you've begun to serve your sentence, you're not eligible to have it set aside; right?

A Unless it's an illegal sentence.

Q The sentence wasn't illegal, was it?

A No, sir.

Q The judge had the discretion to do what he did; right?

A Correct.

Q So you had to basically overcome the two code sections on their face; right? You consider that a simple matter?

A Uh-huh.

Q And let's look at your motion to amend, if we could pull up the motion to amend on the screen. And this is exhibit 82. I describe this as a bear

bones motion. If you look at your argument in favor of the motion, paragraph 1 says "the defendant was sentenced on June 26, 1990, to three years in which said sentence was suspended and two years active probation. Number 2, the defendant desires to amend his sentence to give him benefit under Article 893." In your motion, you went through none of the facts of he had a drug conviction and a burglary conviction, and he could have done this, and he could have done that, and he should have asked for this. You just said he was sentenced and we desire to amend his sentence. That's all you said; right?

A Yes, sir.

Q And so this was all the facts you set out in your motion. Someone else steps in just because you got sick, right, steps in at the last minute?

A I don't know where I was at that morning. I don't know if I was sick or --

Q So you filed this motion on September 20th, this bear bones motion, and it's heard the very next day; is that right?

A Yes, sir.

Q That's very quick justice, isn't it?

A Yes, sir.

Q You file the motion one day; it's heard

the next day?

A Yes, sir.

Q The next day, you were not there; someone else is. Right?

A Yes, sir.

Q You haven't set out any of the facts here; right?

A No, sir.

Q But in a hearing the very next day -- let's call up the transcript of the hearing the next day -- the judge grants the order; right?

A Yes, sir.

Q Now, at the end of his first statement, the judge says "all right. I've signed the order"; correct?

A That's at the end of his statement, he said he signed the order.

Q Okay. So it's nowhere in your motion you have someone standing in for you. The judge is the one who raises his understanding of the facts, and he says I'm granting the order; right?

A Yes, sir.

Q You testified earlier that the handwritten notation at the bottom of your motion to amend was that the judge said he wanted a show cause hearing

on the 22nd of September; right?

A Yes, sir.

Q You filed the motion on the 20th?

A Yes, sir.

Q On the 21st, he grants the motion; right?

A Yes, sir.

Q The show cause hearing he's ordered on the 22nd never happens, does it?

A No, sir. It happened on the 21st.

Q And in fact, he grants the order before the show cause hearing on the 22nd, doesn't he?

A Yes, sir. I can't explain that. I wasn't given notice of either one of those hearings, the 21st or the 22nd.

Q You weren't given notice, so you don't know how this happened?

A I filed the motion, and the routine thing would be to file a motion with the clerk's office. It then goes to the judge. It is set for a hearing. I'm notified of the hearing date, and that's when the hearing is to be held.

Q So you don't know how, but somehow, the day after you file your motion, the judge says I want a show cause hearing on the 22nd, and on the 21st he grants it even before the show cause hearing

on the 22nd; right?

A According to the document, that's what it is.

Q Now, you said that if you had known about the relationship between the judge and Mr. Wallace, that the judge should have recused himself; is that right?

A I don't believe Mr. Wallace had any relationship with the judge whatsoever.

Q I'm sorry?

A I didn't say anything about Mr. Wallace's relationship with Judge Porteous.

Q I thought when you were asked about your comments to the MCC you said something to the effect of well, if I had known about these other facts of the relationship between, I guess, the Marcottes and the judge, that the judge should have recused himself from the Wallace case? Is that what --

A I don't remember saying that, but again, I explained that when the case went before Judge Porteous initially in 1990, I don't believe, according to Mr. Wallace's testimony, he even knew the Marcottes or worked for them. So there was no reason for Judge Porteous to recuse himself at that time because there was no relationship between

Wallace and the Marcottes.

Q But at the time you made your motion, Mr. Rees, at the time you asked the judge to set aside or to amend the sentence, did you know that Mr. Wallace was doing car repairs and home repairs for the judge?

A No, sir, I did not.

Q If you had known that, do you think the judge should have recused himself?

MR. TURLEY: Objection to the question. It is not in the record when those repairs specifically occurred, whether it occurred at this time or not.

CHAIRMAN MC CASKILL: If you would rephrase your question, Congressman Schiff.

BY MR. SCHIFF:

Q If you had known that the judge was doing car repairs or if a judge was getting car repairs and home repairs done for him by Mr. Wallace, do you think he should have recused himself from the motion to amend the sentence and set aside a sentence?

A Probably so, yes.

Q If the judge had a relationship with Mr. Marcotte, as the testimony has indicated, where he was getting trips paid for by the Marcottes,

where the Marcottes were paying for car repairs and home repairs and giving him gifts and the Marcottes asked him to expunge this conviction of another employee, do you think the judge should have recused himself from those cases?

A Probably so.

Q Now, in his ruling, exhibit 69 D, Porteous 623, in his ruling on September 21st, the judge writes -- or says "if you want further relief, then file a petition to enforce 893, and I'll execute that also."

Is that right?

A Yes, sir.

Q You never filed a petition to enforce 893, did you?

A No, sir.

Q You didn't have to, did you?

A No, sir, because I got notice that there was an October 14th hearing on the same petition that I had filed before.

Q So you never needed to file a notice; the judge just granted it? Am I right?

A No, sir. We orally moved to invoke 894 at the October 14th hearing.

Q So the hearing set up on October 14th, you

make an oral motion then?

A Yes, sir.

Q So when the judge told you to file a petition to enforce 893, you ignored that order; is that right?

A He didn't tell me that.

Q It's written in his --

A He told Mr. Netterville that.

Q Excuse me. In his testimony, in the transcript --

A I wasn't there.

Q It says "if you want further relief, then file a petition to enforce 893, and then I'll execute that"; correct?

A It does, but I wasn't there that day.

Q But the judge did instruct the counsel standing if for you that if you wanted to take advantage of that section, you needed to file something; right?

A He told Mr. Netterville that, yes.

Q Now, you testified that the subsequent step of actually setting aside the conviction, you described it as administrative -- or you mentioned you had forms in your briefcase at the time; right?

A For expungements, not for this motion but

for an expungement, which is the last step.

Q And did you consider a set-aside to be administrative in nature, too?

A Yes, sir, because if the probation has already been terminated satisfactorily, and he's been sentenced under 893, the only thing to do is show those things, and the 893 is invoked.

Q So at the hearing where he amends the sentence, that's all he needed to do in order to be able to set it aside; right?

A Yes, sir.

Q Everything was done that he needed to do to set it aside at that point; correct?

A Yes, sir.

Q So at that very hearing on the 21st, if the judge wanted, he could have set it aside right then; right?

A I don't know. I think that you have to -- the fact that the sentence was already completed, I think he could have at that point.

Q But he didn't, did he?

A No, sir.

Q He didn't set it aside on the 21st. He put that off until October 14th, didn't he?

A Yes, sir.

Q When he could have set it aside at that very moment in September; right?

A He probably could.

Q But that September moment was before his confirmation, wasn't it?

A I didn't know that.

Q You are aware that Mr. Reynolds went to the MCC to complain about Judge Porteous's action; right?

A Yes, sir.

Q And you're aware that he later talked to the FBI about it?

A Yes, sir. I didn't know that until yesterday, but I do now.

Q Were you aware also of Mr. Mamoulides, the district attorney's, relationship with the judge?

A I knew they had known each other for years and years.

Q They had a good relationship?

A Yes, sir.

Q And were you aware also that Mr. Mamoulides had a basic policy of letting the judge decide the sentences in the vast majority of cases?

A The sentencing is totally up to the judge;

it's not up to the DA's office.

Q So you understood that if Mr. Reynolds complained to the DA, the DA's position was essentially if the judge wants to do it, the judge can do it?

A I never worked for Mr. Mamoulides. I don't know that.

Q Do you have any reason to dispute that?

A I don't have any reason to dispute it, but I don't know it to be the fact, because I didn't work for that district attorney's office.

Q Now, the hearing where -- on October 14th where the judge sets aside the conviction, I'd like to pull up that transcript. Did you get the impression at that hearing that the judge was in a hurry?

A Judge Porteous's courtroom moved real fast all the time. So --

Q And in this particular case, the beginning of that transcript reads:

"MR. REES: Your Honor, Robert Rees on behalf of --"

You didn't get to finish telling the judge who you were representing, did you?

A No, sir.

Q The judge said "I'm going to grant that." Is that right?

A Yes, sir.

Q The judge says "I've already amended the sentence to provide for a 893." Mr. Rees, "yes, sir. I might want to put something on the record."

You had to step in to get something on the record; right?

A Yes, sir.

Q If it were up to the judge, he would have just said I'm going to grant that, and that would have been the end of the hearing; is that right?

MR. TURLEY: Objection. Counsel is asking for speculation as to what the judge would have done.

BY MR. SCHIFF:

Q Was that your impression, Mr. Rees that , if you hadn't interjected to put something on the record, the judge would have said I'm going to grant that, and that would have been the end of the story?

A Yes, sir. I don't know what he was granting, though.

Q You don't know what he was granting?

A I hadn't asked him to invoke the 893 yet.

Q But the judge knew what he was granting,

didn't he?

A It appears he did.

Q I'd like to pull up a chart, one of the defense exhibits entitled "floodgates." This is a chart that the defense has used earlier. It shows some of the bonds that were set for the Marcottes by the judge in the month of October. So this is after the September hearings that we've discussed.

Were you aware on October 6th the judge had his confirmation hearing?

A No, sir, I wasn't.

Q Were you aware on October 7th that the judge was confirmed? And you can leave both those entries up. On October 7th, were you aware that he was confirmed?

A I think I found out some time the next week that he had been confirmed.

Q And you have testified that on October 14th, he sets aside the Wallace conviction; correct?

A Yes, sir.

Q If you can highlight those additions to the chart for me. I want to ask you about that week of October 14th, the week right after his confirmation. Do you know why during that week there was this bevy of Marcotte bonds set?

A No, sir, I don't.

Q And that's the week culminating in the set-aside of the Wallace conviction, am I right?

A Yes, sir.

MR. SCHIFF: I have nothing further.

CHAIRMAN MC CASKILL: Redirect, Mr. Turley?

MR. TURLEY: Thank you, Madam Chair. We would like to use that.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Mr. Rees, I know you've had a long day. You probably care to be done. I just have a few questions for you just to clarify some of the testimony you gave to Mr. Schiff.

A Yes, sir.

Q You had -- Mr. Schiff had asked you a question, and your response was something along the lines, if I'm correct -- this is regarding the original sentence by Judge Porteous in the burglary charge, and I think you answered along the lines of -- let me take a step back.

Mr. Schiff was saying did he sentence him under 893, and you said something along the lines of if he suspended the sentence, he was acting under

893.

Could you just explain that? I'm not sure you were allowed to explain that fully.

A The only provision to suspend a jail sentence and place him on probation on a felony case is under Article 893.

Q So the only alternative, if he's not sentenced under 893, is to go to jail; right?

A Yes, sir.

Q So isn't that the reason why you were mentioning some attorneys treat this as necessarily being under 893? You don't have to invoke it, because it has to be under 893?

A Yeah, that's the sentencing provision to suspend a term of imprisonment and place you on probation.

Q I also wanted to ask you about this motion. Mr. Schiff showed you your motion and said this is a pretty brief motion, you don't go through all the facts of the case.

Are these usually brief motions like that?

A Yes, sir, because they accompany the record up to the judge, and the record is self-explanatory as to what happened in the case.

Q And indeed, when Mr. Schiff brought up the

hearing that you were at and he said, you know, Judge Porteous cut you off, and you said well, Judge Porteous tended to must have things along pretty quick in his courtroom. Do you remember saying that?

A Yes, sir.

Q Was that the general nature of Judge Porteous's courtroom, that there was a lot of these motions going through, that it moved pretty fast?

A Yes, sir.

Q And isn't it true that usually these motions are dealt with pretrial, so the judge knows what's coming up and wants to deal with them on the record and move on?

A It was routine for the assistant DA and the lawyer to meet in chambers prior to going into the courtroom.

Q Now, Mr. Schiff pointed out to you that the judge had said in the earlier hearing just file to get the benefit under 893, and he asked well, you didn't file a motion.

But isn't it true that you made the motion at the next hearing orally?

A Correct, I did.

Q Was there anything strange about that?

A No, sir.

MR. TURLEY: Just your indulgence for one second.

That's all of our questions. Thank you very much, Mr. Rees.

CHAIRMAN MC CASKILL: Does the panel have any questions of Mr. Rees? You are excused. Thank you, sir.

THE WITNESS: Thank you, ma'am.

CHAIRMAN MC CASKILL: Judge Porteous has 4 hours and 25 minutes remaining and the House has 5 hours and 23 minutes remaining.

MR. TURLEY: Madam Chair, we would like to call Professor Calvin Mackenzie to the stand.

CHAIRMAN MC CASKILL: Is it Alvin or Calvin?

MR. TURLEY: Calvin with a C, yes.

CHAIRMAN MC CASKILL: Thank you. Mr. Mackenzie will take the stand.

Whereupon,

G. CALVIN MACKENZIE

was called as a witness and, having first been duly sworn, was examined and testified as follows: I do

CHAIRMAN MC CASKILL: Thank you, and you may be seated.

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Professor Mackenzie, good afternoon.

A Good afternoon.

Q I thank you for your patience today. We've met before. My name is Jonathan Turley. I'm one of the counsel representing Judge Porteous.

Just to start out, would you, please, state your full name for the record?

A My name is G. Calvin Mackenzie.

Q And you are a professor, are you not?

A I am.

Q And where do you teach?

A At Colby College in Waterville, Maine.

Q And you hold an endowed chair at that institution?

A I do. I'm the Goldfarb professor of government.

Q I'm going to put your CV, which is Porteous exhibit 61, up on the screen, and I'd like to ask you a couple of questions. Could you briefly describe your education?

A Yes. I have a bachelor's degree from Bowdoin College and master's degree from Tufts

university and a Ph.D. from Harvard universities.

Q What are the areas 24 which you teach in?

A Political science. I teach about American institutions primarily.

Q And professor, have you published on the topic of presidential appointments?

A Yes, I have. My first book was published in 1980, "the politics of presidential appointments," and I've written five or six books since then on the same topic.

Q And have you served as a consultant in any administrations or Congressional committees?

A I have often consulted with personnel staffs of presidents, particularly during presidential transitions coming into office, and have testified here on a number of occasions about matters relating to the appointment process, right.

Q And were you a presidential appointee -- actually, did you play a role in the presidential appointee project at the national academy of --

A I was director of that project, right, for almost three years in the 1980s, yes.

Q And what was that project?

A It was a comprehensive study of the entire presidential appointment process, funded by

foundations, to look at a process that seemed to be failing and to recommend ways to improve it.

Q Did you also serve as a senior advisor on the presidential appointee initiative?

A I did. That was from 2000 to 2002, a similar kind of project. We never got this processed fixed. So we keep coming back at it from different directions, and that was another effort.

Q Then in 2002, you were senior advisor again, weren't you, to a national commission?

A Yes. What's usually called the second Volcker commission, chaired by Paul Volcker, the National Commission on Public Service, yes, sir.

Q And have you previously testified in Congress about the presidential appointments and ethics issues?

A Yes, I have, on a number of occasions over the last 30 years. Most recently, this spring I testified before the Senate Rules Committee on a proposal by Senator McCaskill to end secret holds in the Senate.

Q Were you a senior research analyst for the U.S. House at some point?

A Yes, I was, in 1977 for most of the year.

Q And can you tell me what you were working

on on that occasion?

A There was a commission chaired by Congressman David Obey to examine the entire internal operations of the House of Representatives following a scandal in the previous year, and I was the senior research member of that staff, yes, sir.

Q So just to wrap this up, how long have you been studying the presidential appointments process, would you say?

A I wrote a dissertation on the Senate confirmation process at Harvard beginning in the fall of 1973. So 37 years.

Q All right.

MR. TURLEY: Madam Chair, I'd like to move Professor Mackenzie's CV, which is Porteous exhibit 1061, into the record, please.

CHAIRMAN MC CASKILL: Is there any objection?

MR. SCHIFF: No objection.

(Exhibit Porteous 1061 received.)

MR. TURLEY: Thank you, Madam Chair.

SENATOR KLOBUCHAR: I have one question. Did you testify in favor of senator McCaskill?

THE WITNESS: Absolutely.

MR. TURLEY: And there was no coaching, I

want you to know, in defense of that question.

Madam Chair, I would like to tender Professor Mackenzie as an expert in the field of presidential appointments, the appointments process, and on governmental ethics.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Okay. I think he is an expert, and we will take his testimony as such, although I find it a little strange that we're hearing an expert on confirmations in the Senate in front of the Senate. I find that is a weird twist, but we will certainly accept his expert testimony as such for the record.

MR. TURLEY: As the Chinese curse goes, we're living in interesting times, Madam Chair.

BY MR. TURLEY:

Q I'd like to turn now to the general subject of FBI background checks that are featured in this case.

Professor, let's use the Clinton Whitehouse, which is relevant here, in the mid 1990s. When they decided to nominate someone for federal judge ship, can you just outline the process that occurs in relationship to the background check for nominees?

A Well, it's an elaborate process involving a lot of paper. The first step usually is completing the Whitehouse personal data statement, which over the years has grown like top see. Each new administration tends to add its own questions to that. To my knowledge, questions are never removed from that. So there's an accumulation of questions. I think that personal data statement is up to 63 questions or something like that right now.

And then the -- normally the next step is to -- you have to fill out a lot of forms saying you're authorizing people to get into your records and to do a computer search and to look at your taxes and authorizing an FBI background check. And then you would fill out SF 86, and that would usually be the initiation of the FBI background check would follow that. Sometimes there's a supplement to SF 86. Some administrations have those and others don't tend to use them very much.

Q Do you know when this process of FBI background checks began?

A In 1953, President Eisenhower, which is, of course, the McCarthy period, President Eisenhower issued an executive order authorizing background checks for appointees who were doing national

security work in the government.

That executive order stands today, and over the years, those background checks have been expanded to cover virtually every position in the government. Nobody can serve, certainly not as a presidential appointee, and certainly not as a Senate-confirmed presidential appointee, without enduring an FBI background check.

Q Just to make sure we get where we began in the process, what was the purpose originally of those background checks during the --

A To make sure nobody was holding an important position in the national security establishment of the government who was a security risk.

Q And by "security risk," would that generally mean Communists?

A Well, it certainly did at the time, but anything that would be a threat to the security of the United States certainly.

Q Now, you've talked about the sort of snowball effect on these questions. Has there been any studies that discuss the quality of the FBI background checks?

A Well, there hasn't been, to my knowledge

at least, a specific study of the quality of the FBI background checks, but over the years there certainly have been inquiries about those. I've been involved in some of those. Whether the background -- the background check takes time, and because it takes time, I think the average now is about 44 or 45 days as sort of best case without any great complications to do a background check. And that slows the process of getting people into their jobs once the president has decided to appoint them to those jobs. So there's been some concern about the FBI background check, particularly for positions which don't seem to be national security positions, and over the years, there's an accumulation of evidence that suggests that these background checks are not very useful to most people in the process. So that's been a part of what people have looked at.

Q Now, Professor Mackenzie, you have a book called scandal proof" which is often cited in the area. I want to direct your attention to something that we read in that book where -- which we're highlighting now, where you refer to what you found in FBI files as full of, quote, nonsense, quote very poor jobs and second rate efforts.

Could you explain what you meant by that?

A That's nothing I found in FBI files because I haven't looked at FBI files.

Q I'm sorry.

A People who I have interviewed over the years, people who have worked in the White House counsel's office, people who have worked in the presidential personnel office, and people who have worked here, including some Senators and staff directors of Senate committees, who have said get this accumulation of unverified information in these files, and it's a little overwhelming sometimes.

Q And based on that question of the quality of material going into FBI question investigations, have there been calls to actually just eliminate or dramatically alter FBI background investigations?

A There have been a variety of propose over the years, the most common of which would be to limit the number of positions which require the full field investigation. You certainly probably want to look through people's records and so on -- to only those that are really national security positions -- that's been the primary qualification.

Q Are you aware of a question that is asked during FBI background checks regarding whether there's anything that could be used to influence,

pressure, coerce, or compromise a candidate in any way?

A Yes, sir, I am familiar with that.

Q Now, is that a question asked of just the nominee or other people interviewed?

A No, routinely it's asked of virtually everybody who has interviewed. I've had scores of former students who have taken government positions. So I've been interviewed myself many, many times by the FBI or contractors to the FBI about this, and I'm always asked that question.

Q Now, are you aware also of a question asked as to whether a candidate is aware of anything that might negatively -- might impact negatively on his character, reputation, judgment, or discretion?

A Yes, I'm familiar with that.

Q Now, in your interviews, have you -- in your experience, how do candidates tend to view that type of question?

A For candidates going through this process, it is extraordinarily burdensome and frightening. With very few exceptions, these are terrific people, they're the best our society produces, which is why they rise to the level of visibility where a president chooses them for an important position in

government. They have accomplished things in their life of which they're proud and should be proud, and they find themselves -- the most recent book I wrote about presidential appointments is titled "innocent until nominated." They find themselves suddenly feeling like their integrity, their life's work, all of that is being questioned and challenged, and there's a long list of very specific questions about things they may have published, things -- now everybody is required to give copies of every speech you ever gave. And of course, many of these people have been giving speeches for decades. More recently, we've added questions about your face book site and handles you might have used in e-mail and intemperate e-mails you might have sent to people. I think for mows people who go through this process, after they have answered all these questions, which now to about 200, the sense is it's all there, what could possibly be left to say, and when they get this kind of catchall question at the end, I think foremost of them, the answer is I've covered everything. The answer is no.

Q Well, indeed, in your experience, do you personally know of any candidate that's ever responded in the affirmative to that question?

A No, I don't, but I suspect they wouldn't have completed the process if they added something different to that question.

Q With regard to this question, are you aware of anyone who has ever been prosecuted or removed from their position because of the answer to that question?

A No, I'm not. Nobody has been removed from their position. There was a prosecution of Secretary Henry Cisneros at the end of the 1990s for -- the matter involved, as I understand it, a former mistress and some payments to that mistress to not reveal that relationship, and he was not truthful about that in answering questions to the FBI and was charged with lying to the FBI. And I think he pleaded guilty to that and paid a $10,000 fine, but he continued to be a cabinet member and completed his term and was not impeached or removed from office.

Q In this matter, Article IV alleges -- and I will quote it -- that during his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, and compromise

him in anyway or that would impact negatively on his character, reputation, judgment, and discretion.

Are you familiar with that language?

A Yes, I am.

Q And that's taking the language out of the questions we just discussed, is it not?

A Yes.

Q Let's take a look at the first one of those, which is part of House Exhibit 69(b), and in particular, pages Porteous 292 through 296.

MR. TURLEY: And this has already, Madam Chair, been put into evidence.

This is a 302 of Judge Porteous dated July 6, 1994, and July 8, 1994.

If we can specifically pull up Porteous 294, which is page 74 on the PDF, if that will help.

BY MR. TURLEY:

Q And focus on the first paragraph. You'll see a quoted section that we'll highlight on the screen. It says, "Porteous said that he's not concealing any activity or conduct that could be used to influence, pressure, coerce or compromise him in any way or that would impact negative on the candidate's character, reputation, judgment and discretion."

Do you see that?

A I do see that, yes, sir.

Q Let's bring up the second interview. Porteous pages 491 to 494. And it's at pages 272 to 273 on the PDF.

Let's specifically look at the page marked 493, and it continues into 494. And I'm going to highlight language that says, "Judge Porteous denied that he had ever signed any bail bonds in blank and stated 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."

That's sort of a compound question. And I wanted to ask, in your experience, is that often how questions are asked in these interviews?

A Well, that one seems to contain two different types of questions. The -- most of the questions that are asked are substantive and focus the nominee's attention to specific areas, what have you written, what speeches have you given, have you done X and Y.

And then the more general questions of what else, you know, is there anything else that you

ought to mention here.

This one seems to combine those two things.

Q Is it normal for this type of question to be asked of other --

A I don't know what normal is, but I'm not familiar with that kind of combination question. I don't think I've seen that before.

Q Let me ask you, you did have a chance to review one -- what's called a 302 involving an attorney named Bob Creely, did you not?

A Uh-huh. Yes, I did.

Q I'd like to bring up that interview. This is Creely's interview that took place on August 1, 1994, and can be found at Exhibit 69(b) and the page marked Porteous 476 to 77. And to assist, it's on pages 255 to 256 of the PDF.

And if we highlight, this contains almost the identical question on page 477.

Do you see that?

A I don't see the question, but if you can highlight that, I can --

Q There it goes.

A Right, I do see that.

Q That's basically the same question, is it

not?

A Well, it's the general question, yes.

Q Now, would it surprise you that an additional 60 individuals interviewed as part of Judge Porteous's background investigation were similar -- answered -- similarly answered that question and said they did not know anything of that kind in his background?

A As a general rule, it doesn't surprise me, because I think that would be normal in virtually every background investigation of this sort.

Q And when you say it's normal, why is that, in terms of the people you've interviewed?

A Well, I think that the people who get through the appointment process and are confirmed by the Senate obviously haven't run into these kinds of things along the way that most of the people who have been interviewed to judge their character or specifics in their life have found nothing that either the White House or the committee in the Senate or full Senate has found objectionable enough to prevent them from taking public office.

Q Now, did you have a chance to watch the testimony of an FBI agent named Bobby Hamil?

A I saw some of it, yes.

Q During his questioning, I'll represent to you, and perhaps you saw it, when asked in his 25 years as an FBI agent, he was asked whether anyone had ever responded affirmatively to this question, and he said he couldn't recall a single incidence of someone answering in the affirmative.

Did you see that testimony?

A I did see that part of the testimony, yes, sir.

Q Does that surprise you?

A No, it doesn't.

Q As an expert in this field, do you have any serious concerns about this question being used as the basis of a prosecution or removal of a federal official?

A I -- why does somebody spend decades studying something like this and writing about it? My answer to that is that I think it's very important who we get into this government. And this is a complicated government to run, and it takes good people to do it.

And we have a system for recruiting and transitioning people into government in this country that's the worst in the world. And it gets worse all the time.

I now often say I wish I could go back to what I was complaining about 35 years ago because that was much better than what we have now.

And one of the reasons it gets worse is we keep adding deterrents to good people coming into government. Even somebody now who runs into no significant problems in this process, averages about six months from the time the president says you're the person I want to the time you can actually get confirmed and take your position, a time during which people are often in limbo and they don't know what's happening and nobody can tell them and their appointment may have come up here and they don't know what's happening up here. Sometimes it's 12 months, sometimes it's longer than that.

And if we keep adding deterrents, it gets harder and harder to recruit the kinds of people we really need to make this government operate effectively.

And I think it's a concern that if -- if the legacy of this process is that anybody who neglects to mention something in response to one of these broad, general questions at the end of these questionnaires that might later come back to be used against them, maybe even to impeach them a decade or

more later, that that -- that's a lesson people are going to take to heart and they're going to be even more concerned about coming into these positions.

I am concerned about that, I do think there's a cost in all of this. And that cost is in terms of whom we can recruit to this government in the future.

Q You mentioned the general wording of the question. When you ask someone whether there's something embarrassing, for example, is there any guideline in these questions as to what constitutes embarrassment and what should be reported? Don't most people have embarrassing things in their background?

A I suspect we could all find some things in our background we'd be embarrassed if others knew about that. It's -- yeah, it's an ambiguous concept, and very difficult to apply. The history is replete with examples of people who have answered no to this question, gone into the confirmation process or sometimes even gone through successfully the confirmation process, only to have information come out later which was embarrassing to them, sometimes embarrassing to the president. And, you know, it happens.

They weren't always held accountable for that, and many in cases were not held accountable for that.

We had a circumstance of a nominee to be surgeon general in 1995, Henry Foster, an obstetrician I believe from Tennessee, who had gone through the background vetting and had answered that he didn't think there was anything in his background that would be embarrassing.

When his nomination came up here, information came out as an obstetrician, he had performed abortions. Those were legal abortions, and he didn't see anything embarrassing about that, but it caused his nomination to be filibustered and withdrawn when it got up here.

We've seen G. Harrold Carswell when nominated by President Nixon on the Supreme Court went through this process and successfully went through the vetting process, and when he came up for his confirmation hearing, information came out that he had made segregationist statements when he was a candidate for state legislature earlier in his career, and some other things that raised questions about bias on his part.

So those things -- those things happen

with regularity, yeah.

Q Now, to further understand the process before we get to some of the issues and specifically into this case, how many different forms does an individual who is nominated for federal judgeship need to fill out, at least in 1994?

A Well, personal data statement, SF 86, if there's a supplement to that, supplement to SF 86. SF 278, which is the personal financial disclosure form, which is another very complicated form, and then all of the powers you have to give to investigate your records and tax returns and so on.

Q And isn't there also a release of medical information?

A Right, right.

Q Tax check waiver?

A Tax check waiver, right.

Q So does that add up to seven of those forms?

A We're getting up there, yeah. I don't know -- I haven't been over there in the last few years, but it used to be used go over and visit with the counsel in the White House, and there was usually somebody on the counsel's staff who on the way out would go into the files and just hand you

this bag full of paper that you would take with you.

One of the things we worked on over the years was to put a kind of booklet together so at least you had something that you could carry out of there without papers flying around. It was a pretty messy process.

Q Now, actually, didn't you at one point try to develop some software to help nominees so they kept their answers consistent?

A The Presidential Appointee Initiative, which existed in the early part of this most recent decade, we did, in fact, raise some private money to put together what we thought was something like TurboTax, where you'd get a CD and it would have all of the questions that all of the forms required, and including the Senate questionnaire that you might get from the committee that had jurisdiction over your appointment.

And you could -- you could go ahead and once you filled in your name, that was the last time you had to fill in your name. When you put in your Social Security number, you only had to do that once. If there were redundant questions, of which there are a great many in those forms, you could answer that once and it would fill that in all of

the others.

In fact, we got that working and contracted out to India the software development of all of that. And for a while that was -- that was useful to some nominees. The trouble was the process changes very quickly, and new questions keep getting added and so on. And it was hard to keep up with that, and there was no government funding for it.

Q Let me address that. You said the process has changed over the years. Does it continue to change with this administration?

A This administration has added a number of questions. There are now questions about gun ownership that weren't there before. There are questions about your Internet presence, have you had a Facebook or a MySpace site, have you ever used a different name on the Internet than you do normally, have you ever sent intemperate e-mails to people.

So yeah, this accumulation of questions continues, for sure.

Q And so this process, when you refer to a sort of snowballing, it's become more cumbersome and stringent; is that correct?

A A very powerful force in this process is

inertia. Nothing ever seems to go away. Once it's in there, it stays in there.

At the beginning of the Clinton administration when there were some nominees that had problems with nannies for whom Social Security taxes hadn't been paid, that set of questions, and there were several questions about that, about household help, is in there and I suspect will be in there long after I'm dead.

And so every layer of questions that each new administration puts on, every time a nominee seems to go askew somewhere, that adds new questions to the process to make sure it never happens again, and so it gets complexer and complexer.

Q And the Senate also has the ability to ask its own questions; correct?

A It does routinely, yeah. Most committees have questionnaires.

Q So just to understand the foundations for the allegations, how many questions does a nominee in this process now have to answer?

A I would say it's about 200.

Q 200?

A 200.

Q Is it fair to say that many of these

questions are redundant, or ask questions -- the same questions in different ways?

A Absolutely, yes, sir.

Q Do all of these forms require the nominee to sign the answers under penalty of perjury?

A I think that's correct, yes.

Q Now, we're talking about the SF 86.

A Right.

Q How many people do you think complete the SF 86 every year?

A Do you mean the SF 86 or the SF 278? The SF 86 you would do when going through the process. 278, which is the personal disclosure form, you file every year. We now have 21,000 people in the government who file that every year. That is a public financial disclosure form, which is required, not necessarily that many, but the presidential appointees were required by the Ethics in Government Act of 1978 to do those and then that has expanded to others in the government.

We had an additional 250,000 senior government employees who file a confidential financial disclosure form every year.

Q All right. Let's take a look specifically at SF 86.

A Right.

Q Article IV, I believe you're aware, has said that Judge Porteous gave materially false answers to the SF 86. Are you familiar with that allegation?

A Yeah.

Q All right. Let's take a look at the specific supplemental SF 86, which is part of House Exhibit 69(b). And we're talking about page 7778 of the PDF. Let's turn to the second page of this form and look at question 10S. We're going to write that for you.

It says if there's "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 the president if publicly known? If so, provide full details."

Do you see that?

A I do see that, yes, sir.

Q Professor Mackenzie, first, there's a number of questions within that question, isn't there?

A Yes, sir.

Q By my count, there's maybe four. Is

the -- is that question unique in comparison to the other questions put to a candidate?

A Well, I think the concept of personal life is a little more detailed than some of the others. But that's -- that question covers just about everything, doesn't it?

Q In your experience, how have candidates treated or viewed that question?

A Well, I -- it's hard to get hold of people's SF 86. That's not a public document. So I haven't seen a lot of those. I have interviewed a lot, hundreds of people, who have gone through the appointment process over the years. And my sense from those interviews is that the typical answer to that question is no.

Q In fact, are you aware of anyone that has been removed or prosecuted for their answer to that question?

A For what they specifically said in answer to that question?

Q Yes.

A No, I'm not.

Q And do you know of anyone who has ever answered that question in the affirmative?

A I don't know of anyone, no.

Q Are you aware of any cases where a court has examined this type of question?

A Well, again, the Cisneros case, which we talked about, although it's not really appropriate to say that a court examined it, because he copped a plea, he pled guilty to that. So there was never really a trial there.

There was a trial involving Bernard Kerik quite recently.

Q Is this the 2009 case?

A That's the one I'm referring to, yes, sir.

Q Can you tell us what that was about?

A He was charged with lying to the FBI, as I understand it, for several -- for not -- for answering no to this question. I think in one case when he was asked this question, he said no, everything is in my book.

And the court ruled that the question was simply too ambiguous to prosecute him on, is my understanding of that.

Q And the statement "nope, it's all in my book," was that in response to whether there's something the public would want to know about, asked by a White House official?

A As I understand it, yes, sir.

Q Now, wasn't he also asked whether there was other information that could be considered a possible source of embarrassment to him, his family or the president, and Kerik said not to my knowledge?

A Yes, sir.

Q And it turns out there was embarrassing information?

A Yes, sir, there was.

Q What was the outcome in terms of those allegations?

A On those outcomes, the court -- he was not convicted on those.

Q Now, once again, as an expert in the field, do you have serious concerns about reliance on this type of question for such proceedings?

A Well, as I said before, I think it -- this is a -- the language -- all language is ambiguous in some sense. It seems to me the language here, when you're talking about what I might do that somebody else might find embarrassing, I find it very difficult question for people to answer.

If -- if I'm a female appointee, nominee, and I had an abortion at some point in my life, that's a very personal kind of intimate matter.

Those questions ask about in your personal life.

Is that relevant to my position in government? Is that going to embarrass the president? Well, it might embarrass some presidents and it might not embarrass other presidents.

Can I judge that? If I'm gay, is that an embarrassment to me? It's probably not an embarrassment to me. Is it an embarrassment to the president? Well, it might be at some times but not at other times.

I think we could go -- if something I've done was taken out of context, we had a good example of that recently with Shirley Sherrod. I suspect it's very likely she did not say that she had made a speech that would be embarrassing to the president. Then there was a videotape made that took it out of context that was very embarrassing to the administration.

So I think it's very difficult for people to know how to answer that question. And when you compound that with the reality of human life that we're all probably not very good judges of our -- our ethical towing the line.

Am I -- I was chairman of the state ethics commission in Maine for some years, and I often got

asked advice by state legislators in Maine and others about whether they had an ethical problem with something. And my first answer was always, consult with somebody else. Don't trust your own judgment on this, because we're not good at judging our own behavior.

Well, if you're a nominee sitting with an FBI agent and you're being asked these questions, it's not that easy to consult with somebody else, and you sort of run through the catalogue of your whole life, and you think I've lived a good life, I don't think I've done anything that would embarrass me.

Would that embarrass somebody else? Would you be subject to blackmail? I think in that context, it's not surprising that people typically answer no to that question.

Q Now, once again, I'm trying to explore where these questions came from and the context, we're going to get to the allegations in this case.

But you're also aware that the Senate Judiciary Committee has a questionnaire for judicial nominees; right?

A I am aware of that, yes, sir.

Q So let's turn to the United States Senate

committee on judiciary document. This is House Exhibit 9(f). This is a 36-page document. But I'd like to turn to page 34 and look at question 11, which is also cited in Article IV.

And it states, and I'll read it to you, and you can certainly look at it on the screen, "please advise the committee of any unfavorable information that may affect your nomination."

Now, in this case in response, Judge Porteous writes, "to the best of my knowledge, I do not know of any unfavorable information that might affect my nomination."

Do you see that?

A I do see that, yes, sir.

Q Now, I'm going to direct your attention to the last page of the document, to look at the date that Judge Porteous signed this document.

Do you see the date?

A I do.

Q What is the date?

A It's September 6, 1994.

Q Now, based on your experience, how do candidates generally treat this question?

A Well, I would give the same answer I gave to your other questions on this line. I think this

is -- again, it's the catchall question at the end. And typically, by the time that a judicial nominee would get to this in the Senate confirmation process, he or she would have answered similar kinds of questions many, many times going through the vetting process and the SF 86 and background check and so on. So one would assume they would answer the same way here as they did in those others.

Q I have to ask this question just so we have a consistent record. Do you -- do you know of any candidate who has ever responded affirmatively to that question in your experience?

A I don't, no.

Q Once again based on your experience, do you know of anyone who has been prosecuted or removed from their position based on their answer to this question?

A No, I don't.

Q And do you share -- from your answer, I take it you have the same concerns that you had with these other questions about how this is worded?

A Yes, sir.

Q Now, Professor Mackenzie, are there executive orders or other general regulations that direct federal employees to avoid appearances of

conflict?

A In 1965, President Johnson issued an executive order, I believe the number was 11222, which advised all presidential appointees, all government officials I believe, to avoid the conflict of interest, yes. I'm sorry, the appearance of a conflict of interest.

Q By any chance, did you see the testimony of Professor Ciolino in this case?

A I saw a good part of that, yes, sir.

Q Do you recall when Professor Ciolino was speaking about a different standard, the appearance of impropriety?

A Right.

Q Do you recall when Professor Ciolino mentioned that the appearance of impropriety standard has been removed from legal ethics codes because of its ambiguous meaning?

A Uh-huh.

Q Would you view this appearance of a conflict the same type of ambiguous meaning that is problematic to apply in cases?

A I would, yes. Yeah.

Q Because there's no -- there's no guidance, correct, as to what, you know, that appearance would

be to one person as to another?

A I believe when President Johnson issued the executive order, the intent was to be aspirational, to hope that people would be cautious about how their actions appeared.

But in terms of specifically defining what would be the appearance of a conflict of interest, there's never been any language in that executive order or in any subsequent executive order or legislation that I'm familiar with.

Q Once again, do you know of anyone who has been removed or prosecuted on the basis of an appearance of conflict of interest?

A No, sir.

Q Have you spoken with government officials in your research about this issue?

A Oh, often, yes. I -- the presidential appointee -- the Presidential Appointee Project at the National Academy of Public Administration, which I worked on in the 1980s, at that time the president of the national academy was Jack Walter, J. Jackson Walter.

He had been the first director of the Office of Government Ethics. He was appointed by President Carter and then reappointed by President

Reagan.

And Jack and I got to be very good friends over -- Jack died about a year ago, but we got to be very good friends over the years that followed. And we had many conversations about this.

He was the -- as the first director of the Office of Government Ethics, which was created by the Ethics in Government Act of 1978, he was primarily responsible for the development of what has become a significant body of case law involving ethics. And Jack's view very strongly was that this was a good standard to have, it was nice to have the words that said avoid the appearance of a conflict of interest, but there was no way you could bring a prosecution under that.

And I've had conversations with his successors in that office, and I've never had anybody say anything other than that in those conversations.

Q Now, in "Scandal Proof," did you have any occasion to speak in depth with David Martin?

A No, I didn't speak in depth -- I have talked to David Martin, but I quoted him -- I took a quote that he had given to a reporter and included it in "Scandal Proof."

Q Let me raise that question that you referred to. In here he is quoted as saying, "take a look at the language in the executive order. Might result in or create an impropriety. You can hang anybody on that language. That's my problem with it. A guy who wants to screw you can screw you. It's not a good enough standard for me."

Do you remember that quote?

A Yes, sir, I do remember that.

Q Do you agree with that sentiment?

A I do agree with that sentiment. And I agree with that sentiment primarily because I've heard it so often from people that have actually been in the position where they would be charged with bringing prosecutions or legal actions and felt they could not do that.

Q Professor Mackenzie, I want to be clear. And that is I've been asking you generally about -- all these questions and the background checks, et cetera. But you're not advocating for nominees not to be truthful in their responses.

A Absolutely not. I -- I have a certain amount of visibility because I've written a lot about this. And over the years I've been contacted dozens of times by people going through the process,

to just sort of ask -- pick my brain, is what they usually say, and ask for advice. And my advice is always be as open and honest as you can be.

Q Indeed, I want to be clear that if Judge Porteous had come to you in 1994 and asked if he should disclose that he had borrowed money from Bob Creely and Jake Amato, you would have told him to disclose as much as possible, would you not?

A I would have, yes, sir.

Q Because you generally believe that nominees should disclose anything and everything to avoid problems here, don't you?

A I do, yes.

Q But they usually don't, do they?

A Well, they disclose what they think is relevant to the case, I think would be the answer I would give to that.

Q Now, if you accept what the House has said, if you accept the allegations that there were kickbacks and money being handed over, certainly, that should have been disclosed; correct?

A Absolutely.

Q But that's if you accept what the House is alleging?

A That's correct.

Q Now, if the judge didn't believe that there was any relationship with his official duties, is it clear why he should report that?

A He -- I think every nominee is obligated to report anything which they think they might have done which could, under the language of these questions, be embarrassing or used to influence them or something like that.

Q Now, in 1994, if he had come to you and said should I reveal lunches that I've had and gifts that I've received from lawyers, would you say that that's something that he would have to disclose?

A Only if there was something improper about that. I -- if every nominee had to disclose every lunch they had ever had with anybody who they might do business with or appear before them in a regulatory hearing or something like that in government, we'd have a lot of very long answers to these questions, I think.

Q So, for example, there was a controversy involving former Senator Tower, when he was seeking confirmation for Secretary of Defense; correct?

A That's correct, yeah, yeah.

Q Would you expect that Senator Tower would have to reveal all the lunches that he might have

had with lobbyists or others?

A He'd been in the Senate for several decades by that point. I think that would have been an impossibility.

Q Professor, in your research you've come across cases of other presidential nominees that had embarrassing information revealed about them; correct?

A That's correct.

Q One of them was former Senator John Tower?

A That's correct.

Q Can you tell me what happened in that case?

A Tower had served in the Senate for several decades, he had been chairman of the Senate Armed Services Committee. And he was nominated by the first President Bush to be Secretary of Defense early in 1989.

And I -- I haven't investigated the paperwork that was part of that, but I assume that was satisfactory to the Bush administration, his answers to the questions.

When he came up here for confirmation, stories began to -- I don't think everybody up here was a friend of his. Stories began to appear that

he drank heavily, that he was a womanizer, that on trips that Senators were taking, that he had engaged in embarrassing behavior and things of that sort.

And the weight of that ultimately led, I believe, to the withdrawal of his nomination.

Q Also were there not allegations of questionable financial dealings with a defense contractor?

A There was some of that too, yeah, with defense contractors, yes.

Q And wasn't there a similar case involving a former Senator Daschle?

A Oh, recently, yes, right. And all the evidence I've seen suggests that he did not, when he was asked specific questions about his taxes, did not believe that there were problems in his -- in his taxes that would embarrass the President or cause any difficulty for him or for the administration.

And then, of course, information came out that there were such things and his nomination was withdrawn.

Q That he had not disclosed?

A That he had not disclosed, right.

Q And to be fair to these people, a lot of

the answer depends on whether you believe there's a problem; right?

A Right, right.

Q I mean, for example, there was a controversy involving justice Clarence Thomas, was there not?

A That's correct, right.

Q Involving an individual named Anita Hill; correct?

A Right.

Q But Justice Thomas always denied the underlying facts, didn't he?

A Yes, absolutely.

Q So for Justice Thomas, there was no reason for him to report this incident; correct?

A No, he didn't think he'd done anything wrong, no. Right.

Q And in your research, I'm not going to go through all these examples, but in your research, you have found many such instances of embarrassing facts that have come up in judicial nominations; correct?

A Most of the questionnaires we've talked about are part of the vetting process and the background investigation process that takes place

before a nomination actually sent to the Senate.

So anybody who had gotten to the point of having their nomination sent to the Senate would be on record in those questionnaires, typically as saying no, they didn't think there was anything else in their background that would be embarrassing to them or the president.

Then this -- this body does now these days a very -- used to be criticized for being -- just sort of rubber stamping these nominations. It doesn't rubber stamp anything up here anymore, and they have their own investigative staffs and they dig into these things. People sometimes come forward when they finally see that a nomination has been made with information that they didn't come forward with, and often these things come out in the confirmation process that hadn't come out prior to that, and sometimes they're embarrassing to the nominee and to the President.

MR. TURLEY: Instead of going through each of these cases, Madam Chair, I would like to move Porteous Exhibit Numbers 1115 through 1130 into the record as evidence.

MR. SCHIFF: I'm sorry, Madam Chair, what are those exhibits?

MR. TURLEY: These are -- we previously submitted them. These are the accounts of other controversies involving nominations.

MR. SCHIFF: These are the newspaper accounts?

MR. TURLEY: Yes, they are newspaper accounts.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Are they -- are they all newspaper accounts?

MR. TURLEY: Yes, I believe they are.

CHAIRMAN MC CASKILL: Are they just narratives that have been written by someone?

MR. TURLEY: No, they are all newspaper accounts.

CHAIRMAN MC CASKILL: They will be received.

(Exhibits Porteous 1115 through 1130 received.)

MR. TURLEY: Thank you, Madam Chair.

That's all my questions right now for the professor. I can pass the witness. Thank you very much.

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Professor Mackenzie, Mr. Turley asked you about a number of different cases involving people who had been nominated, people who withdrew their nomination, a lot of hypotheticals about potentially embarrassing facts.

As I recall, there were only two questions he asked you about the facts underlying this case, and that is if the judge had been receiving kickbacks from attorneys, was that required to be disclosed, and the answer to those questions, and I believe your testimony was yes, it should have been disclosed?

A If he had asked my advice, I would have advised him to reveal that information, yes, sir.

Q And that was clearly called for by those questions, wasn't it?

A I'm sorry?

Q That was clearly called for by those questions, wasn't it?

A In the sense that if you have -- if there is something that you believe would be embarrassing to yourself or the President or a source of influence or blackmail that has not come out in any of the other questions you've answered, yes, this would be the appropriate place to provide that

information.

Q And you would put kickbacks in that category, wouldn't you?

A Yes, I would.

Q Professor, you have studied and written a great deal on the presidential appointments process, the transition to new administrations, the need for reform. That's been a focus of your work for about 30 years. Am I right?

A That's correct, yeah.

Q And is it fair to say that you have been fairly sharply critical of the appointments and confirmation process?

A I think that would be a fair characterization, yes, sir.

Q You've described it as a national disgrace, you've said it encourages bullies and emboldens demagogues, nourishes the lowest forms of partisan combat, uses innocent citizens as pawns in politicians' petty games.

You've basically said it's malignancy, and that's just in your most recent work. Am I right?

A I'm not sure that I've used the word "malignancy," but I'm familiar with all those other words.

Q I could call it up for you.

A No, I'm sure. If you say it's in there, then I won't disagree.

Q In connection with that, you've made a lot of recommendations on how to reform the process, am I right?

A I have. I have served on commissions and panels and staffed commissions and panels that have offered recommendations, often composed of former members of the Senate and executive branch officials, yes, sir.

Q And among other things, you've recommended making fewer appointments subject to confirmation?

A That's correct, yes.

Q As we've already heard, you've recommended limiting holds?

A Secret holds, yes, sir.

Q You've recommended ending filibuster of judges?

A I would reshape the filibuster. I haven't recommended ending it. I would put time limits on it, yes, sir.

Q Now, you've also acknowledged in your works that there are significant differences between what has I think been the primary focus you've had,

and that is executive branch appointments, and judicial branch appointments. Am I right? There are significant differences?

A There are some differences. They are significant in some ways, yes.

Q One of the most significant is the judge is appointed for life; right?

A That's correct, absolutely, yes.

Q If an Undersecretary or Deputy Secretary of Transportation is later found out to have committed misconduct, what generally happens to them? They get fired; right?

A They can be fired, yes, right.

Q Or they're told resign or you will be fired?

A That sometimes happens too, yes, sir.

Q And sometimes they say they want to leave to take more time with their family, right, but they're forced out, am I right?

A Yes, sir, I've heard that, yeah.

Q But the executive branch can't force out a judge, can they?

A That's correct.

Q And, in fact, the judicial conference, Fifth Circuit in this case, they can't even cut a

salary, can they?

A No. That's right.

Q The most significant sanction against Judge Porteous in this case thus far by the Fifth Circuit is that he has to take his full salary and he's not allowed to do any work. Am I right?

A Uh-huh, uh-huh, that's correct.

Q And I would imagine that in this economy or any others, most people would think that's not a very bad sanction, to get $174,000 a year and not go to work. Am I right?

A I agree with that, yes.

Q I think in your work, you've also acknowledged that one of the other distinctions with judicial appointments as opposed to executive appointments is that there may be a very broad range of issues that go before a particular judge; right?

A That certainly is the case that there are a broad range of issues, yes.

Q So as compared with a Deputy Secretary of Transportation that just focused on transportation issues, a judge might get issues on guns or abortion or any number of very controversial issues; correct?

A Yes, sir, yeah.

Q And some of the actions of the judge may

not be subject to immediate or even any review by the Congress, in the sense that if a court holds that precedent requires a certain thing, that's not always subject to overturn -- being overturned by the Congress, am I right, if it's based on a constitutional principal?

A That's certainly the case. If it's a district court judge, there would be an appellate process for that, sure.

Q But the Congress can't step in and overturn what the judge does if he bases it on constitutional principle, can they?

A Well, we have -- probably we have examples of the Congress doing -- trying to do that or doing that in the case of moving constitutional amendments. I don't think that's an impossibility. But it's very difficult.

Q But contrast that with the Deputy Secretary of Transportation. If the Deputy Secretary of Transportation does something that the Congress doesn't like, Congress can basically overturn them; is that right?

A Absolutely.

Q Not so easy with a judge, would you say?

A I would say that's right.

Q So these are all reasons why judicial confirmation and appointment is somewhat different than an executive one?

A Oh, absolutely, yeah.

Q Isn't it all the more important, therefore, to elicit all relevant information on a potential judge's fitness for office when the only way to get rid of them is through this very process, the impeachment process?

A I would argue it's important for every appointee, whether it's in the executive branch or the judicial branch.

Q But isn't it all the more important when you can't remove them from office, except through impeachment, when there's no other -- there's no other safeguard?

A I -- I don't disagree with that, but I don't -- I don't think it's a lesser obligation for people who are going through the executive branch process.

Q You want them all to be truthful no matter what they're applying for; correct?

A Absolutely, yes.

Q Now, judges also have access to classified information in cases that come before them from time

to time; correct?

A I think that's probably correct, yes.

Q If the judge is hearing an espionage case or terrorism case, they will be entrusted with classified information?

A Uh-huh, correct, yeah.

Q And so it's all the more important -- you discussed earlier that, you know, is it really necessary to do FBI background checks of people that don't deal with national security issues.

A Right.

Q In the case of a federal judge, who may very well get a national security issue before him in a case involving espionage or terrorism or what have you, it is important to do the FBI background check, is it not?

A That's correct, I agree, yeah.

Q Now, you've suggested, I think, in some of your reform proposals and your testimony today that we should eliminate some of the redundancy in the forms that nominees fill out.

A Yes, yes, sir.

Q Now, this is an issue that you write about in your most recent book, Innocent Until Nominated; right?

A Uh-huh.

Q Correct?

A I suspect you're going to quote something, and I'd be happy to respond to that.

Q I just -- but it is something you wrote about; correct?

A In many venues over the years, I've recommended we eliminate redundancy in these forms to the extent it's possible to do that, yes, sir.

Q Now, in your most recent book, you don't recommend eliminating these questions by the FBI and in the SF 86 because they have "substantial institutional justification."

Am I right?

A I'm not sure -- it sounds like a pretty short quote. It was probably in a longer paragraph. But I have no doubt that I wrote that, yes.

Q Well, you'd agree that these questions do have a substantial justification --

A The question of redundancy is quite different from the question of the validity of the questions. I think there are a lot of valid questions. It's just that nominees get asked these same questions over and over again and get asked to repeat the information.

Often they're asked in slightly different ways. In the financial questions, for example, the way you fill out SF 278, which is a very complicated form that asks you to specify your -- the value of each of your assets in different categories, which, of course, is a moving target for most assets.

And then typically, when you come up here, you will get a different set of questions to specify your assets, often in different kinds of categories.

So we're all getting at the same question, which is are you going to have a conflict of interest because you own stock in IBM, and we make it much more complicated to get that information, I think, than we need to. That's why I've recommended that we try to eliminate duplication in some of these things.

Q And I appreciate that. But my question is about your observation in your book that there's a substantial institutional interest/justification for these FBI questions about whether you might be the subject of coercion or influence, because a judge may get classified information; right?

A I -- I don't think I specified those questions that you're -- that you just referred to as having a substantial institutional influence.

But there's certainly lots of questions in all of those forms that are valid questions, and we should be asking those of candidates for these high-level jobs.

Q Including judges?

A Including judges, yes, sir.

Q And, in fact, you go on to say in your book that the FBI may need this information to "discover security risks"?

A That's correct.

Q In your book, in fact, you develop a model questionnaire in an effort to eliminate the redundancies you talk about and preserve the questions you think are necessary; right?

A That's correct.

Q Could we pull up page 230 of your book, Innocent Until Nominated.

A This is not -- I was the editor of this book, and what you're pulling up is from a chapter written by Terry Sullivan, not written by me.

Q Are you suggesting you don't agree with --

A I'm suggesting when you edit a book -- I wrote a long chapter at the beginning of this book about an overview of the process. But when you edit a book, you don't censure what other people put in

that book. I made no objections. I tried to recruit the best people I could find to write the chapters of this book. Terry was one of those good people.

Terry is a professor at the University of North Carolina and he worked -- I worked closely with him. It was his initiative to develop the software questionnaire we were talking about earlier. But I did not develop this questionnaire.

Q But you respect him?

A I respect him, yes, but that doesn't mean I agree with him about everything.

Q And he's done a lot of research in this area?

A Yes.

Q And developed the software you testified about on direct examination?

A Yes.

Q In his recommendations for what questions should be included in the model questionnaire, he writes, "please provide any other information, including information about other members of your family, that could suggest a conflict of interest or be a possible source of embarrassment to you, your family or the President."

So in Terry Sullivan's opinion, in your book --

A I don't object to that question. I just don't think that that's a question that elicits much valuable information. And we had testimony earlier from an FBI agent who said that. And that's been my -- I don't have a value judgment to make here.

I'm just reporting on what my experience as a scholar has been, and my experience as a scholar has been that we don't find people providing answers to that question other than no, the vast majority of the time.

I don't object to asking the question. I don't think -- I just don't think it's a very useful question.

Q You not only don't object to asking the question, your book that you edited suggests this as a model question?

A That's fine. I -- good.

Q And it further suggested another question, "have you ever had any association with any person, group or business venture that could be used even unfairly to impugn or attack your character and qualifications for a government position?"

That's another of the model questions --

A Those are largely questions that do get asked now. Wording might be changed slightly, but those questions absolutely do get asked now. And again, I don't have any objection to those questions. I just don't think that those kinds of questions are easy -- I don't think they're easy for nominees to answer, because I think the question about a group you might have been associated with is a relatively easy question to answer.

But the kind of just broad catchall question that says is there anything else that you've done, I think most nominees, as I testified earlier, have thought by the time I get through all these substantive questions, I've said everything I have to say that might lead to a problem here.

Q You would agree with me, Professor, wouldn't you, that you're under the same obligation to answer a written question honestly to the best of your ability as you are to an oral question?

A I would agree with that, yes, sir.

Q So the fact that these questions are in writing, is no different, at least some of them, in the SF 86 or the supplement, it's no different than if any of the Senators had asked these questions during a confirmation hearing?

A I agree with that.

Q And if a candidate for office or appointment objected to a question on a policy basis or because he thought it was too violative of his private interests, he doesn't have a right to lie in answer, does he?

A No, no one has a right to lie.

Q And so the candidate could say, well, I don't have to answer this question, and I'm out, I don't want to go through with the confirmation process. Am I right?

A They don't want to answer this question and they're going to withdraw from the process?

Q In other words, if they disagree with a question or they don't want to answer it, they don't have the right to lie in it; right?

A No, I agree, they don't have a right to lie.

Q Even if they thought it was a bad policy reason to answer the question, they still have to answer it honestly; correct?

A That's correct.

Q No one is forcing a gun to their head to take the appointment; right? They could say I want out?

A Absolutely. And many people do.

Q And many people do. In fact, wouldn't you say that the reason why most people answer this question no is by the time they have gone through the vetting process and things have come out they don't want to be public, they withdraw? That happens frequently, doesn't it?

A "Frequently" may be too strong a term, but it certainly happens with some regularity, there's no question about that. And even more so, I think there are people who don't want to go through -- who never enter. They might be asked and they decline.

I mean, it's quite commonplace now for a president to have to go to fourth, fifth or sixth choice before they get anybody who will agree to take the job, not necessarily because they have skeletons in their closet, they just don't want to go through this.

They don't want people poking around and misconstruing something they might have done that they don't feel badly about, but it becomes a cause celebre in this process. It's frightening to many people.

Q People -- I don't have any question that there are good people who are discouraged from

pursuing the confirmation process because they don't want to go through it. But you also have a lot of people who begin the process, negative information does come out, and they withdraw. Am I right?

A Again, I'm not sure "a lot" is the right characterization, but certainly that happens, yes, sir.

Q Now, you also commented in your book, didn't you, and you described sort of the thickening of the process?

A Yes.

Q Multiplying of the questions, multiplying of, you know, who is asking for what. You described it as a thickening of the process; right?

A Yes.

Q You did point out that one of the positive things of the thickening of the process is that it made it harder for the rogues to hide; right?

A I -- I would agree with that. I don't remember that I wrote that, those words like that. But I -- yeah.

Q If information came out before confirmation that a candidate for judge took kickbacks from attorneys in exchange for the official act of sending them curator cases, would,

in your expert opinion, that be unfavorable information that would affect that nomination?

A If it were true, yes, it would be.

Q It would kill the nomination, wouldn't it?

A I think it probably would, yeah.

Q And a reasonable person would understand that, wouldn't they?

A Yes, I think so.

Q That wouldn't require a level of insight of which no ordinary person is capable?

A No, I agree with that. Yeah.

Q If information came out before a confirmation that a candidate set bail in amounts to maximize the profits of a bail bondsman who was paying for their trips and their meals and their car repairs and their auto repairs, would that be unfavorable information that would affect the nomination, in your opinion?

A If there was a connection there and it was factually proven, yes, sir, it would.

Q And, in fact, would kill the nomination, wouldn't it?

A I suspect that's the case, yeah.

Q And a reasonable person would understand that?

A I think so.

Q Doesn't require any dramatic insight into human nature?

A No, I don't think so.

Q If information came out that a candidate expunged convictions or set them aside at the request of a bail bondsman who was doing all these things for the judge, that would also be negative information that would affect their nomination?

A If that were factually accurate, yes.

Q And a reasonable person would understand that?

A Yes.

Q And again, no superhuman level of insight necessary?

A No, I don't think so.

Q Are you aware of evidence in this case that's been presented that Judge Porteous told a bail bondsman that he would set aside the conviction of a bail bonds employee, in this case Mr. Wallace, but only after his confirmation because he essentially didn't want to blow a lifetime appointment? Are you aware of that evidence?

A I -- I have -- I have a day job, so I haven't been able to watch as much of this on C-SPAN

as I would have liked to.

So the facts I've picked up one here and one there, or at least testimony here and there. And I'm not confident in my characterization of that.

Q Well, if the evidence was that a bail bonds employee said that he discussed setting aside convictions with the judge and the judge said in one case he would do it but only after his confirmation because he didn't want to blow a lifetime appointment, would that, in your expert opinion, indicate that he was aware that the set-aside or expungement would negatively affect his confirmation?

A Are you asking me a hypothetical or are you asking me to reflect on testimony in this case? I'm not quite --

Q You said you're not aware of the evidence in the case, so treat it as a hypothetical.

A Hypothetically, I think anything one does which violates the law or violates the legal process in some way that were to be raised as part of the confirmation process would be a problem in the confirmation process, if it were true.

Q But my question, Professor, is a little

different than that. My question is if there was evidence that a judge said I'll do this, set this aside for you, bail bondsmen that are helping me out here, I'll do this, but only after my confirmation, because I'm not blowing a lifetime appointment, wouldn't that indicate to you that they had knowledge that this would affect their nomination if it came out?

A It would indicate that to me, yes.

Q I want to ask you about one of the arguments the defense has made in this case in their motion to dismiss Article IV.

"Article IV," if we can pull up motion to dismiss, page 15, "Article IV is an open invitation to the Senate to substitute its collective judgment for Judge Porteous's evaluation of what he found to be embarrassing or inappropriate. It invites the Senate to aspire to levels of insight of which no ordinary person is capable."

Do you agree with that claim?

A Well, it seems to me there's several things in that statement.

Q Let me rephrase that. Do you believe that the Senate would need to aspire to levels of insight to which no ordinary person is capable in order to

conclude that a judge would understand the disclosure of his receipt of kickbacks would negatively affect his confirmation?

A I think it's hard to see inside another person's mind and their assessment of their own situation. I think that's the -- that's the root problem with this question about embarrassment.

I mean, what -- what a reasonable person might say ought to be embarrassing may not be embarrassing to a person who says it's not embarrassing.

Q We're not talking abstractly now, Professor. We're talking about the situation where a judge has received kickbacks.

And my question is, do you agree with this defense argument, that in the case of a judge who receives kickbacks prior to his nomination, that it would require some -- it would require -- invite the Senate to aspire to levels of insight of which no ordinary person is capable in order to conclude that a reasonable person would know receipt of kickbacks would negatively affect their confirmation?

MR. TURLEY: Madam Chair, two objections. One, the congressman is now asking the witness to comment on a motion to dismiss that the committee

itself is not going to rule on, but more importantly, he's assuming a fact in evidence of kickbacks that we obviously contest.

CHAIRMAN MC CASKILL: Well, I will overrule the objection in that I don't think that the witness is an expert in issuing opinion on the defense's strategy as it relates to the impeachment.

I think there are ways you could reword the question, Congressman, that would get at the point you're trying to make.

BY MR. SCHIFF:

Q Let me just ask you this way. Do you think it requires a level of insight of which no ordinary person is capable to recognize that someone up for confirmation for the lifetime appointment of judge would understand if they disclosed the receipt of kickbacks, it would kill their nomination? Does that require some superhuman level of insight?

A Not if they understood that they had received kickbacks for -- for something they had done, no, that doesn't require extraordinary insight.

Q I'd like to ask you to comment on some of the testimony of the constitutional law and appointments experts that testified in the House.

This is testimony that will be a part of the record in this case or already is a part of the record in this case. And I'd like to see whether you agree with what the experts testified to in the house.

I'd like to start with Professor Akhil Amar, constitutional professor at Yale law school.

If we could pull up page 17 of his testimony in the house. And Professor Amar testified, "in this particular case, it is not even clear the removal from office is really punishing Judge Porteous by depriving him of anything that was ever rightfully his. Rather removal from this office simply undoes an ill-gotten gain. It ends a federal judgeship that he should never have received in the first place and never would have received but for the falsehoods and frauds that he perpetrated while being vetted for this position here on Capitol Hill."

Would you agree with that?

A I'm not sure what you're asking me to agree with here, Congressman.

Q Would you agree with that testimony?

A I think that requires an understanding of the facts of the case that I don't possess to make a judgment on that.

Q Let me ask you about his testimony further on that page.

"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 immunize the briber from impeachment or removal.

"Had the bribery not occurred, the person would have been an officer in the first place. This is a view, as is almost everything I'm saying here, that I committed myself in print to long before these hearings. And my written testimony contains more of the details of what I and other scholars have written before on this matter."

MR. TURLEY: Objection, your Honor -- objection, Madam Chair. There was an understanding that we would not be soliciting testimony on the standards or meaning of impeachment.

This material goes into these standards. We agreed that it was up to individual Senators to decide what was an impeachable standard.

CHAIRMAN MC CASKILL: But Mr. Turley, in your opening statement, you said -- you, in fact, argued that this case did not rise to a level that would support an impeachment. So I think you have

injected what standards we should use as it relates to impeachment. You -- in fact, the very essence of your case, you have argued that this case does not reach a certain standard that we must achieve.

So therefore, I think that the door has been opened for this witness to testify, if he can, and if -- as to whether or not he agrees with evidence that has been placed in the record by another law period of time.

MR. TURLEY: Madam Chair, if I can simply add to this objection, the -- the discussion we had was that we would not solicit testimony from witnesses, not that we would not argue the merits of the case, but that we would not solicit testimony from expert witnesses on the meaning of impeachment.

And if we don't have that, then we would have -- obviously, we would have called witnesses on the standard of impeachment.

But the differences between argument and soliciting testimony from experts on what the Senators should believe or understand is an impeachable offense.

CHAIRMAN MC CASKILL: Why doesn't counsel approach for a moment, both of you.

(Discussion off the record.)

BY MR. SCHIFF:

Q If I could direct your attention to page 18, third full paragraph, I want to ask you if you would agree with this testimony of Professor Amar before the House.

"And in the case of Judge Porteous, as I understand the facts, here are some of the things I would stress. He gave emphatically false statements to direct albeit broad questions. These emphatic falsehoods concealed gross prior misconduct as a judge in a vetting proceeding whose very purpose was to determine whether he should be given another judicial position with broadly similar power."

Would you agree with that?

A Again, if you're asking me to reflect on the facts of whether his answers to those questions were as they are alleged to be here, I -- I simply don't know the facts well enough to answer those questions.

Q Professor, that's fine. If you don't know the facts well enough, then that's all you need to say.

A Right.

Q If we could turn to page 34, turning to the second-to-last full question. "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."

Would you agree with that?

A Yes, I would.

Q He goes on in the last paragraph of this page 34, "so I don't think the hearings Michael," he's referring to one of the other experts, "is absolutely right. It would be really unfortunate if you had to ask specific questions of a Green Eggs and Ham variety. Were you a crook in a box? Were you a crook with a fox? Were you a crook in the rain? On a train? You know, we know what those questions at their core was about. And he lied at the core. There was a vagueness at the periphery, but this was really central."

Would you agree with that?

A I'm happy to stipulate as a general matter, people should tell the truth and that judges

should be honest people.

When we get into the facts of this case and whether, in fact, the answers to these questions were fraudulent in some way, because the judge was not being truthful, I think that's a fact question, and I'm -- I just don't have the facts.

Q Let me turn, if I could, to Professor Michael Gerhardt, University of North Carolina, has also written a book on this process. Are you familiar with Professor Gerhardt?

A I don't know him personally, but I know his work, yes, sir.

Q And you respect his work?

A I do.

Q On page 42, he talks about the no answer to these questions in the third full paragraph.

"That no is quite problematic, and I would analogize it in two different ways. I mean, the first is I do think there's an obligation to answer that question and to answer it honestly. The honest answer would be forthcoming with information. And there's no secret about what that question is seeking. Common sense alone I think would suggest to us what's the kind of information that ought to be revealed.

"But I'd go a step further. But all of us have studied the process of judicial appointments, and the other thing to keep in mind is that the question gets asked not just in writing, but it's going to get asked in person, over the phone. It's going to get asked more than once in the process of being considered for nomination. So seen if it doesn't up in a form like that, there's a problem and there's a failure to disclose. This just makes it all the more problematic because there's a formal requirement, and the failure to answer is clear evidence of the defrauding of the Senate in this circumstance. Based on what you know of these facts, are you able to express an opinion whether you agree --

A I don't have an opinion on the on the last part of that, on the general part, but again as people ought to answer questions as honestly and fully as they can, I've testified to that. But I've also testified this is a question that most commonly elicits the answer no.

We can all speculate on what the reasons for that are, but I think as I've testified, I think it's because people think they have answered the specific questions that Professor Gerhardt mentions

here over and over again and the catch-all question at the end, and I use the term "catch-all" because I've so often heard it referred to in that way, is one that doesn't yield much useful information.

Q Let me ask you further down on that page. Professor Amar testifies immediately after this, "and it's not -- the no covered up not just mere private failings, you know, back in the third grade I dipped Suzie's pigtails in an ink well. This isn't just private. It's misconduct as a judge, it's taking cash from envelopes from lawyers who have cases before you. And the only reason, and don't be too tender, he was not in some trap here. All he had to do was simply say I do not wish to be considered for this position.

"This is not like some independent counsel going after you and now you're in kind of a perjury trap or anything like that where there's the exculpatory no doctrine, which the Supreme Court has rejected, by the way. It's nothing like that at all. If you don't want to put yourself in an awkward position, don't put yourself forward in this way."

Do you agree with that?

A I agree that you have the option, if you

don't want to answer questions that might be embarrassing to you, that you can withdraw from the process or never enter the process, yes, sir.

Q Finally, let me ask you about something professor Gerhardt says on page 43. Middle of the page, Mr. Gerhardt says, "If I may, I just want to add one more thing that reinforces what's been said. Just imagine what happens if you don't act here. What kind of precedent does that set? It says to people that you may take this road in the nomination process and confirmation process, that is to say you may undermine the integrity of those processes because it's okay. That's a level of corruption we can tolerate.

"It seems to me that the answer here is quite clear. That's not a level of corruption we should tolerate."

Do you agree with that?

A Well, I don't agree that that's the legacy of -- of this process, and I testified earlier that I think the opposite legacy is equally worrisome, and that is that people will read this -- this process as one that says oh, my God, there might be something that I've done that I don't think is embarrassing or is subject to influence me and

somebody else later says they think it is and I can be prosecuted or impeached on that basis and I'm not willing to take that risk so I'm not going to take this appointment, that's part of it.

I don't think anybody could reasonably understand the 200 questions you have to answer here to get through this process and think that it tolerates a level of corruption.

Q Well, we're talking not about in the hypothetical now. We're talking about this case.

In a case involving kickbacks, isn't the lesson people are going to walk away with, well, is that a level of corruption that we can accept?

A Kickbacks, a level of corruption we can accept?

Q Yes.

A Are you asking me to reflect on the facts of case or are we hypothetical? It's a little hard to follow where we are here.

Q If you're -- make it hypothetical since you -- you're not familiar with the facts fully.

In a case where a judge has taken kickbacks, do you think that's a level of corruption that we can accept?

A No. And I think I testified to that

earlier. I don't think any of the specifics you asked me earlier are acceptable.

Q Do you think 200 questions is too much to ask someone for a lifetime appointment?

A Well, I think some of those questions are redundant, and that's -- and I want to reduce that redundancy. I don't know that there's a magic number of questions. I'm not sure we need to know your in-laws' addresses when they were growing up and those kinds of things that we ask these people.

But I -- you know, I think a full examination of the backgrounds of people who are going to hold positions of significant decisionmaking in our government is appropriate.

Q Finally, Professor, you mentioned the Cisneros case and I think you testified that he pled guilty and nonetheless continued to serve out his term as secretary.

A Right.

Q Were you aware he finished his term in 1997 and pled guilty in 1999?

A He was in -- I'm sorry, the facts on that?

Q Yes, that Secretary Cisneros finished his term in '97 and pled guilty in 1999?

A If I testified that he continued in

office, what I meant was he was not sanctioned, he was not impeached for doing that, in fact was pardoned by President Clinton later for doing that.

Q He hadn't pled guilty until after he left office; right?

A I -- I would have to review the timing of that. I'm not certain.

MR. SCHIFF: Nothing further, Madam Chair.

MR. TURLEY: Madam Chair, we just have a very brief redirect, I promise.

CHAIRMAN MC CASKILL: Okay. I'm smiling.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Professor Mackenzie, you're very close to being done with us, not necessarily the panel. I just want to clarify one thing. Mr. Schiff had initially attributed a model series of questions to you that were contained in your book Innocent Until Nominated.

Now, I just want to be -- to just be clear. You were the editor on that book; correct?

A That's correct, right.

Q And the way that academics do edited books is that you don't endorse the individual chapters that are submitted to a book of that kind, do you?

A In fact, often you try to get conflicting chapters, right.

Q And in this case, while you have a lot of respect for Professor Sullivan, you don't agree on everything, do you?

A That's correct.

Q And I just want to confirm something that you said. You told Mr. Schiff that you don't object to questions like embarrassment questions; you just don't rely -- you don't think you can rely much on those questions; is that correct?

A Right.

Q Can you explain briefly why?

A Well, I -- I guess there's no great harm in having those questions. I just think -- I'm just recounting my long time of looking at the results of those questions, and the results are -- are tiny. There's just nothing of consequence that comes out of those questions. And maybe that says to us that these are not very useful questions. Should we keep asking them? I think if people want to ask them and with the possibility that they might yield some valuable information, I'm not terribly troubled by that.

But historically, they haven't yielded

much valuable information.

MR. TURLEY: Thank you for your time today, Professor Mackenzie. Madam Chair.

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q Professor, I understand that you are looking at this from the broad public policy perspective of, you know, who is being attracted to government.

A Right.

Q And what kind of water torture, I shouldn't use the term "water torture," what kind of problems are we causing them that are discouraging them from serving.

But I'd ask you for a minute to look at the other side of that public policy question. And let's assume that someone gets called by the White House and is told that they are going to get an appointment they want very, very much.

And at the moment they get that call, they know they have done things that if it comes out, they won't get the job.

Now, let's walk down the public policy path of that scenario. As opposed to the flurry of questions and the paperwork and the duplications and

the redundancies, let's look at that scenario.

Someone wants a job very badly and they know that if certain information comes out, they won't get it.

In that circumstances, the person who wants that job has to make a choice.

A Absolutely.

Q They have to answer the catchall question honestly and not get the job or they have to lie on the catchall question and hope that they get through the process without anyone discovering the information that would disqualify them. Would you say that's a fair assessment?

A If -- with a small caveat. If they believe that they have done something wrong that would disable their nomination, yes, I think they have to make that choice.

Q I'm asking you to assume that they know they have done something wrong that would disable their nomination.

A Then they have to make a choice, right.

Q Or they have done something that is so full with the appearance of impropriety even that it would ruin their nomination, either one.

A Right.

Q And I would assume that taking money from lawyers for cases that you'd given them in order -- that would probably be a category that would be a fact that would be disqualifying?

A I would think a reasonable person would think that, yes.

Q So the catch-all question, there are catch-all questions in many interviews.

A Right.

Q There's catch-all questions when detectives interview witnesses, there's catch all questions when journalists interview public figures.

A Uh-huh.

Q And one of the reasons the catchall questions is there is to make sure someone after the fact said, well, you never asked me that. Well, if you would have asked me that question, I would have told you.

Well, if somebody had just posed that question to me, of course I would have been forthcoming.

So in that context, can you not see any validity -- I mean, what I'm worried about a little bit from your testimony today, I admire your work, I think -- I mean, is there any doubt in your mind

that if someone skated through that process, didn't disclose information and there was no catchall question, don't you think their defense would be, well, no one ever asked me something like that, no one ever asked me that specific question, no one -- there was no specific question that addressed that?

A I suppose that could be a defense, yes, ma'am.

Q And that's -- that's the thing that I find troubling about this -- you know, believe me, I understand, as someone who is -- has been very involved in looking at the process and the problems we have internally with the confirmation process, you're not going to get any argument from the chair about the problems we have with the confirmation process.

But I worry that if we just look at it, the barriers of good people coming to public service, and don't look at it as the process has to be a cleansing one also.

And I would point out for the record I think in both Senator Tower's instance and both Senator Daschle's instance, in both those instances, the information came out and they withdrew.

A Right.

Q And in the third example, I believe, that Mr. Turley gave you, Clarence Thomas, the information came out and it was then incumbent on the Senate to determine which set of facts they wanted to believe. And the Senate made a collective judgment and Justice Thomas was confirmed.

A Right.

Q But in all of those examples, the damaging information became public.

A Right. I believe I answered that question in response to a question about whether they had been sanctioned for not answering anything other than no to the question during the process. And while that -- the information came out that they had done things that were embarrassing enough for that -- for those nominations to be withdrawn or very closely combative in the Senate, none of them were sanctioned on that.

I would just -- if what I said is misinterpreted, I want to clarify that. I'm not opposed to the catchall questions. I was just reporting the results of my scholarship over the years, which suggested those have not yielded significant information during this process.

Q I would say most people that -- with the

catchall question, if they answered it completely and truthfully, if it was going to disqualify them, they probably don't answer it. Wouldn't you assume?

A I would, yeah.

Q They probably would just say I'm not interested in the appointment?

A Right, yeah.

CHAIRMAN MC CASKILL: Okay. Any other questions from the panel?

EXAMINATION

BY SENATOR RISCH:

Q Professor Mackenzie, I've been sitting patiently through this lengthy testimony here. To be honest with you, I don't think I'm any smarter than I was when I sat down, and I want to find out if I missed something.

The only thing I got out of your testimony -- this committee has heard that Judge Porteous was involved in a couple of conspiracies, one of which was that he knowingly, willfully, and intentionally entered into a corrupt scheme to get kickbacks from a bail bondsman and then the same thing with handing out cases.

And you testified, I think I heard you say, that should have disqualified him from getting

the job in the first place. And it should have disqualified him from continuing on in office.

Is that your testimony?

A I answered that question hypothetically. If the facts were correct, my answer was yes to those questions.

Q If you didn't follow the facts -- have you read about the facts of this case, what the judge is charged with?

A You've sat here and listened to the testimony, and I haven't had the opportunity to do that, sir.

Q So if that's what we got out of the testimony, you would agree with me that the conclusion is that he shouldn't have been confirmed in the first place and he shouldn't be holding his office any further?

A If those facts are true, yes.

Q Have I missed something else -- I appreciate all the esoteric discussions about the questions that are asked and all that sort of thing. I got all that. But what does that tell me about how I'm supposed to reach a decision in this case? Am I missing something here?

A I don't know if you're missing something.

I would say that historically, two things. Number one, that the questions about which I was asked here, which I guess relate to Article IV of the impeachment, that he's charged with lying to the FBI because he answered no to these questions, I was called as an fact -- as an expert witness because I've studied this question. And my evidence -- my testimony was that that's the common answer to these questions, that it is the norm.

The other thing I was asked about was whether this was -- whether anybody had been sanctioned for that, and my answer was that people are not sanctioned for that.

Q I gathered from your testimony, you also felt that these questions shouldn't have been asked of him in the first place, they don't get to --

A I didn't testify to that. I didn't have any objection to these questions. I just testified that my findings were that these have not yielded useful information most of the time.

Q But you would agree, if it turns out that they're false, that's a problem?

A Absolutely.

SENATOR RISCH: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Senator Kaufman?

EXAMINATION

BY SENATOR KAUFMAN:

Q To follow up on Senator Risch's comments, which I think is on point, isn't it possible or probable that most of the people answer no because they don't have anything in their background that's embarrassing to them?

A We would hope that's the case, yes, sir.

Q Isn't that probably the reason why they say no? Looking back on our history -- we've done thousands of these, and we can come up with some few cases of people who have lied on that question, and most people say no, and it turns out to be no.

So isn't the relevant thing exactly what Senator Risch said? In this specific case, if, in fact, the hypothetical is true and if we reach that judgment, then this question is a good way for us to say clearly the judge knew at the time he was confirmed, he answered this question no. If he answered this question yes -- and therefore, that's the reason why we should proceed with what we're doing?

A That's certainly a judgment you could make, absolutely.

Q We could go to the other questions on the

200 questions or whatever we've got and say you didn't answer that properly. You're an expert on Congressional hearings. Isn't one of the biggest reasons we have financial disclosures is so people don't -- on financial disclosure, if they don't put in the financial disclosure, we know it's kind of evidence that maybe they've done something wrong?

A If they don't disclose?

Q Yes.

A That's a crime.

Q Yes, it is.

But they have to make that decision. So they have to either state publicly I got the condo from the guy down in the Virgin Islands, he's got to either put it in there, or if they don't put it in there and we find the condo, they can't say gee, everybody knows I have a condo in the Virgin Islands.

Isn't that the reason for this question here, that the reason we have this question here is so that after the fact we can come back and say you didn't answer that question right, and isn't that cause for concern?

A If a person didn't answer that question, yes, it is.

SENATOR KAUFMAN: Thank you.

CHAIRMAN MC CASKILL: Any other questions from the panel?

The witness is excused. Thank you for your time.

THE WITNESS: Thank you.

MR. TURLEY: Madam Chair, Professor Mackenzie is our final witness, and the Defense rests.

CHAIRMAN MC CASKILL: Okay. I think that we have just about everyone here, and I think if everyone will remain for a moment after we adjourn -- first of all, does the House have any rebuttal witnesses?

MR. SCHIFF: No, Madam Chair. We do have the remaining issue of all of the exhibits.

CHAIRMAN MC CASKILL: I was going to get to that. I would ask the members not to run off, because we're going to try to take a photograph in five minutes. Oh, they're gone. The photographer's gone. Never mind. We're not going to take a photograph. We will try to take one when we reconvene to vote on the report.

We do have the remaining issue of the exhibits, and I've got to gently scold the House,

because I had hoped that you would have submitted the list to the other side on Friday or Saturday or Sunday and that there would have been an opportunity for the Porteous defense team to look at the list of exhibits you want to put into evidence.

Let me ask this: Mr. Turley, do you have all of the exhibits for the judge in evidence that you want in evidence?

MR. TURLEY: Your indulgence of one second, Madam Chair.

Madam Chair, we believe with the exception of one or two documents, we've moved all the documents we need to move in. We wanted to check the list against a couple of documents that we thought had been moved in but is not currently on the list. And so I think that would be one or two documents at the most.

CHAIRMAN MC CASKILL: I'm going to charge the two of you to get together and come up with a final list of exhibits that you object to, that one side objects or the other side objects. In other words, I think we've been pretty open and I think you should assume, Mr. Turley, that, you know -- I'm not saying every exhibit will come in, but we clearly have been fairly liberal about the kinds of

exhibits we've let come into evidence, and I think there have been fairly few objections on each side.

I hope we don't get bogged down with objections in terms of the list of exhibits that the impeachment team from the House wants to put in, and vice versa. But if you all -- it's my understanding you just saw the list from the House today?

MR. TURLEY: At 3:10, we were given a list of, I think, 480 new documents that they wanted to move in.

MR. SCHIFF: Madam Chair, can I raise an issue?

CHAIRMAN MC CASKILL: Sure.

MR. SCHIFF: I think that -- and I may be proved wrong, but I don't think that my colleague will object to probably the vast, vast majority of the exhibits we wish to introduce. There is one issue, though, I think they may object, I don't know, but it may be worth raising this issue now. I think it may be the only serious issue that is in contention, and that is this: We believe that since the Defense has maintained that the Senate knew all this information already, that the Senate knew all these facts about the judge at the time of confirmation and, therefore, it's some kind of form

of estoppel, we think that the Senate ought to have access to the FBI background file in this case.

We're basically being asked to prove a negative, that the Senate didn't know. The only way to prove a negative is by showing what was in the file.

Now, that file contains 302s, and I understand the Chair has expressed a view on the 302s, we would not be offering the 302s for the truth of what's in them, but we would be offering all the contents of the file for the purpose of showing that, in fact, the Senate did not have the information that has come out during this trial.

And I expect there may be an objection to that. I don't know. I would hope that the Defense would similarly want the background file in to show what they think, which is that the Senate did know. But I wanted to flag that issue, because I think all the others are fairly minor and nonexistent.

MR. TURLEY: Madam Chair, indeed, I think we can reach an accommodation. I do think that the committee needs to look at some of those, but the document that Congressman Schiff is referring to is about 311 pages, and we just want to be able to look at it and work with the House on it.

CHAIRMAN MC CASKILL: I think that's great. I think if you can come to an agreement -- I'm going to ask you all -- we're going to give you a week, a week from today. I would expect you all to come with the final list of documents that you all are agreeable about coming into the evidence and those that you may want to put in that the other side objects to.

And if, for example, you have one where you're saying Congressman Schiff, we're not offering it for the truth of the matter asserted, but, rather, to go to the body of information that the Senate did have not in its possession at the time of confirmation, you should note that. In other words, I don't want motions on all of them.

I just want you to note for what purpose you're offering the exhibit, if there is an objection. Then staff will take those, and they will do a preliminary, and everything will come in that you all don't object to. And then if there's anything else that we need to decide, we will call the members together and go over those issues then.

You should assume, unless we get back in touch with you, that the next part of this case will occur after Thanksgiving. It is the intention of

the committee to -- oh. It's the intention of the committee that the report will be prepared by the staff and distributed to the members of the committee prior to us returning after the October work period so that we would meet on it some time the week of November 15th to vote on the report so the report can be printed.

And I think what might be best so that I don't have to try to get seven people together next week, I would entertain a motion that the committee delegate to the Chairman in consultation with the Vice Chairman the duty of admitting any additional documents into the evidentiary record.

(So moved.)

CHAIRMAN MC CASKILL: Not everybody at once here. Is there a second?

(Seconded.)

CHAIRMAN MC CASKILL: Discussion on that motion? Any discussion? All those in favor?

(Unanimously agreed.)

CHAIRMAN MC CASKILL: Opposed?

The Chair and the Vice Chair will consult on any evidentiary issues that remain after you all have a week to fight to sort them out.

Let me defer now to the Vice Chairman, who

has been such a great support for me during this entire process.

VICE CHAIRMAN HATCH: I'm very grateful for your leadership as well on this committee. You've done a terrific job. But so have the attorneys on both sides. I've been very impressed with the way you've handled this.

I have some reservations about disclosing the questionnaires of any judicial person. The fact of the matter is, I've seen a lot of them and reviewed a lot of them. And I have to say, for Professor Mackenzie, the reason everybody answers no is because the ones who have answered yes are not nominated and don't have a chance of getting nominated.

I'd just like to reserve some judgment on just exactly whether or not we should allow background reports into evidence, although we will probably rule in favor of doing so in the end, but maybe not. And I'm very concerned about that because with the experience I've had in the past on these. Not everybody gets to see those. Members of the committee do not always get to see those, unless we have a major, major -- but if there's a major problem, good chairmen make sure that everybody is

briefed.

So let me just say, Madam Chairman, I want to reserve judgment on just how we handle that particular exhibit or those particular exhibits. I'm a great believer that you both ought to have full opportunity on something as serious as this to present the best cases that you can.

And I think Madam Chairman has done an excellent job in allowing almost everything you've wanted in on both sides, and I think that's the way this ought to be. But thank you. I just really appreciate the way you've handled this.

CHAIRMAN MC CASKILL: Thank you.

I think we can -- and I will let you all know that if Senator Hatch and I don't agree, then we would go the next step of pulling the entire committee in for discussion. But I think so far -- we've really worked at finding some place to disagree, and we haven't found it yet.

(6:00 p.m.)

VICE CHAIRMAN HATCH: I expect we will agree.

CHAIRMAN MC CASKILL: And I expect we will agree also.

I want to thank both teams of lawyers and

all of the witnesses for their cooperation. I particularly want to thank the members of the committee for giving us an incredible amount of time in incredibly busy schedules.

Finally, I want to take a moment to thank the staff of the committee. They have worked very long hours. I would bet they've worked almost as long of hours as you all have in preparation. I'm getting a signal that no, they haven't. I know they were here very, very late many, many nights preparing for this.

This is harder than it looks to make all this work smoothly, from keeping track of the exhibits to keeping track of the time to keeping track of the Senators. This has been a difficult job, and I want to thank the staff for their hard work.

I think we have conducted a proceeding that will stand the test of time, and I think everyone on the committee should be proud for the commitment they've made in this process. I think it's an important one for our democracy.

Unless the parties have anything else to add --

SENATOR WHITEHOUSE: Madam Chair, I just

wanted to remind the House I have a request pending, and I hope that has not been overlooked.

MR. SCHIFF: No, Senator. You preempted me. There were two points I was going to make. One was we're going to respond to the request you made for the information that's come out since the Fifth Circuit, and we will provide that at the same time, if that's all right, with the agreement on exhibits.

CHAIRMAN MC CASKILL: That's fine.

MR. SCHIFF: The only other comment I wanted to make is I think Senator Hatch's point is very well taken. I don't know if there's a mechanism where part of the record can be in camera or whether we can redact part of the record. It's certainly not our desire and intention to expose people who have been questioned as a part of background checks to any kind of invasion of their privacy.

So if there's a way that we can make sure that the Senate has the information it needs and protect those legitimate interests, we will work with our colleagues and with the committee to do that.

CHAIRMAN MC CASKILL: That's great.

Anything else? All right.

This hearing is adjourned. Thank you all.

(Whereupon, at 6:03 p.m., the hearing was concluded.)

C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
JOHN M. MAMOULIDES				
by Mr. Turley	1745		1824	
by Mr. Schiff		1796		
DARCY GRIFFIN				
by Mr. Schwartz	1827			
by Mr. Damelin		1839		
HENRY HILDEBRAND				
by Mr. Aurzada	1847		1889	
by Mr. Baron		1877		
RONALD BARLIANT				
by Mr. Walsh	1893			
by Mr. Baron		1921		
ROBERT B. REES				
by Mr. Turley	1937		1992	
by Mr. Schiff		1973		
G. CALVIN MACKENZIE				
by Mr. Turley	1996		2074	
by Mr. Schiff		2039		
by Chair McCaskill	2076			
by Senator Risch	2081			
by Senator Kaufman	2084			

-- continued --

C O N T E N T S (Continued)

E X H I B I T S

NUMBER DESCRIPTION	RECEIVED
Exhibit Porteous 1134	1768
Exhibit Porteous 1098	1894
Exhibit Porteous 1100(h)	1901
Exhibit Porteous 1100(i)	1901
Exhibit Porteous 1100(o)	1903
Exhibits House 69D and House 246	1973
Exhibit Porteous 1061	1999
Exhibits Porteous 1115 through 1130	2039