II. COMMITTEE ACTIONS AND FILINGS OF THE PARTIES PRIOR TO THE AUGUST 4, 2010 HEARING ON PRE-TRIAL MOTIONS

a. Discovery Matters

iii. Motion to Compel

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INFORMATION
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In The Senate of the United States
Sitting as a Court of Impeachment

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

JUDGE G. THOMAS PORTEOUS, JR.'S MOTION TO COMPEL INSPECTION OF NON-PRIVILEGED MATERIALS COLLECTED AND MAINTAINED BY THE HOUSE OF REPRESENTATIVES AND REQUEST FOR EXPEDITED CONSIDERATION

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, by and through counsel, and files this Motion to Compel the House of Representatives (the "House") to Allow Judge Porteous Inspection of Non-Privileged Materials Collected and Maintained by the House[1] during its investigation and impeachment of Judge Porteous. In support, Judge Porteous respectfully submits as follows:

Through previous counsel, Judge Porteous moved for the production of certain discovery from the House of Representatives. (*See* Motion, filed by Judge Porteous on May 28, 2010.) In response, the Senate Impeachment Trial Committee (the "Committee") ordered the House to "provide all information in its possession that is relevant to, or likely to lead to new evidence on, the adopted Articles of Impeachment." (*See* Disposition of Discovery Issues, dated June 9, 2010, hereinafter "June 9, 2010 Order".) Based on their review of documentation and communications with Special

[1] During its investigation, the House acted through its Special Impeachment Counsel. As such, those terms are used interchangeably in this motion.

Impeachment Counsel, Judge Porteous's new counsel has determined that the Special Impeachment Counsel have failed to comply with the June 9, 2010 Order and are continuing to withhold relevant non-privileged materials. In fact, they not only have failed to produce to Judge Porteous non-privileged materials responsive to the June 9, 2010 Order, but the Special Impeachment Counsel have also refused even to describe the categories or sources of these withheld documents, so that Judge Porteous can seek a ruling as to the discoverability of specific documents or categories of materials.

For years, state investigators, federal investigators, the Fifth Circuit, and Congress have collected documents and statements regarding the allegations against Judge Porteous. It appears all of these files have been provided to the Special Impeachment Counsel for the purpose of informing the House's prosecution of Jude Porteous. Special Impeachment Counsel have confirmed that they are withholding from Judge Porteous's counsel a portion of these files but have failed to articulate the basis for that withholding other than the fact that they have not been ordered to provide the material.

This gamesmanship directly contradicts the Committee's stated goals regarding evidence and the prior practice of the House and the Senate (and, indeed, of Mr. Baron himself as previous counsel for the House) in Impeachment trials. Moreover, this is particularly inappropriate and ironic in light of the fact that the Articles of Impeachment against Judge Porteous are based in significant part on Judge Porteous's alleged failure to disclose fully all relevant facts.

Accordingly, Judge Porteous moves the Committee to compel the House Impeachment Counsel to allow Judge Porteous inspection of the non-privileged materials in the House's possession or, in the alternative, to provide a list of the materials in its

possession for further consideration and review by the Committee should Judge Porteous seek specific materials from the list and Special Impeachment Counsel continue to refuse such access.

In light of the relatively short trial schedule (and the lack of any prior criminal indictment or trial record in this case), the timely and full provision of such discovery to Judge Porteous is a vital component to a fair process.[2] As such, Judge Porteous requests an expedited ruling on this matter.

Factual Background

Judge Porteous was impeached by the House of Representatives on March 11, 2010, on the basis of four articles of impeachment. Of these four articles, three are based on his alleged failure to disclose information concerning conflicts of interest, including one article specifically based on Judge Porteous's alleged failure to disclose information to Congress. Witnesses called by the House Judiciary Committee in advance of voting on those articles also testified that a critical issue in this case would be determining what Congress knew at the time of Judge Porteous's confirmation. In all four articles of impeachment, the House charges that certain alleged misconduct was concealed by Judge Porteous.

In response to the Committee's June 9, 2010 Order, the House provided Judge Porteous with a compact disc containing a variety of exhibits, which are largely a replication of the materials used by the House Managers during the House impeachment

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[2] As further evidence of the need for expedited consideration, earlier this month the Committee disqualified the only defense counsel who has previously worked in the case and had knowledge of the underlying claims and witnesses. New counsel has moved to secure files from the prior counsel while avoiding exposure to material that may be tainted by the representation of witnesses in this case. That process is continuing and not yet complete.

proceedings. On June 24, 2010, Special Impeachment Counsel also made available for review, but has not produced, approximately eleven banker boxes of material. This material contains obviously relevant documents that were not included in the House's earlier productions, which counsel for Judge Porteous are working with House counsel to obtain.

During Judge Porteous's counsel's review of this material, the Special Impeachment Counsel confirmed that they were withholding other files from both production and inspection. On Friday, June 25, 2010, Judge Porteous's counsel demanded inspection of this withheld material. Special Impeachment Counsel responded by stating that they would not allow such inspection because it was not ordered by the Committee. Special Impeachment Counsel also refused to identify or list the material that they are withholding from the defense. Thus, the Special Impeachment Counsel have insisted that they will unilaterally decide what material in possession of the House can be used to challenge the articles of impeachment voted out of the House.

ARGUMENT

1. The Documents That Special Impeachment Counsel Are Withholding Are Relevant.

The House of Representatives established the Office of the Special Impeachment Counsel specifically for the sole purpose of investigating and impeaching Judge Porteous. The materials collected by Special Impeachment Counsel relate only to the House's investigation and impeachment of Judge Porteous. Thus, unlike civil litigation where one party seeks a small subset of documents out of a wide universe of mostly non-relevant material, Judge Porteous's inspection of the non-privileged materials collected by the Special Impeachment Counsel does not raise concerns about privacy or irrelevance.

Outside of privileged materials, all materials in the Special Impeachment Counsel's possession logically should touch upon the investigation and/or impeachment of Judge Porteous, making them relevant or likely to lead to relevant or exculpatory evidence. Thus, there is no basis for limiting Judge Porteous from seeing all non-privileged documents in the possession of the Special Impeachment Counsel, including documents pertaining to uncharged offenses; in fact, documents of that type, if there are any, may well provide important exculpatory evidence critical to Judge Porteous's defense.

The Committee's own stated standard for the evidence that should be produced – namely, information that is "relevant to, or likely to lead to new evidence on, the adopted Articles" – is a broad and exacting mandate. Only Judge Porteous's counsel can determine what materials in the Special Impeachment Counsel's possession may lead to evidence relevant to Judge Porteous's defense. The suggestion by the House Managers that they will produce that which they determine is relevant is not a workable, appropriate, or necessary standard. The House Managers are not neutral participants in this proceeding, and they should be not be expected to act as such. If interpreted with any sense of reason, the Committee's stated standard should allow for inspection of all non-privileged materials in the Special Impeachment Counsel's possession.

In order to expedite the resolution of this issue, avoid needless costs, and avoid claims by the Special Impeachment Counsel that such a request would cause undue burden, Judge Porteous moves only for the immediate right of inspection as opposed to outright and full production. As such, Judge Porteous's request does not require extra work on the part of the Special Impeachment Counsel: all they have to do is make

available for inspection and copying the documents that have already been generated and collected by others. In fact, the burden will be on Judge Porteous's counsel.

It is unclear why the Special Impeachment Counsel opposes the relief requested, particularly since they have provided no basis for their opposition other than noting that they have not yet been instructed to provide the material. This is particularly alarming given the clear intent of the Framers to prevent easy or impulsive acts of impeachment. Critically, this is not some ordinary commercial litigation where lawyers skirmish for tactical advantage by resisting disclosures or delaying discovery. The removal of a federal judge is a serious constitutional matter – and one which has taken place fewer than twenty times in our nation's history. This constitutional process is designed to give members of the Senate a full and proper record upon which to render verdict. The Senators – as well as the accused and the public – have a right to see the full record of evidence assembled against the accused. Only with such full disclosure can the Senators and the public be satisfied that any conviction or acquittal was based on a fair and full disclosure of the facts.

2. Special Impeachment Counsel Are Breaking From Precedent By Withholding Descriptions of the Withheld Materials.

As an alternative to providing open access to the Special Impeachment Counsel's files, if they continue to refuse it, Judge Porteous has requested that the Special Impeachment Counsel generally describe the source, types, and volume of the documents being withheld.[3] Special Impeachment Counsel's refusal to do so directly contradicts the

[3] Counsel for Judge Porteous is cognizant that the Committee previously declined to order the House to produce a detailed index of all of the materials being withheld by the House, in response to a request by Judge Porteous's former counsel. (*See* Committee Order, dated June 9, 2010.) Special Impeachment Counsel appears to refuse to provide

House's (indeed Mr. Baron's) disclosure of the same information in prior impeachment trials.

In connection with the impeachment trial of Judge Alcee Hastings, in March 1989, the Office of Senate Legal Counsel for the United States Senate, in considering various discovery requests made by Judge Hastings, sent a letter to counsel for the House of Representatives that stated:

> In helping the committee to understand the parameters of the discovery issue, could the House describe the nature of the materials that were made available to it by the Judicial branch and the Department of Justice?

(Letter dated March 24, 1989 at 2, attached as Exhibit 1 to this filing.) In response, and apparently without needless litigation or other consternation, Special Impeachment Counsel for the House of Representatives, Alan I. Baron, submitted a letter which stated:

> In response to the March 24, 1989 letter from Senate Legal Counsel, the House Managers submit Exhibit A attached hereto, which is a description of the materials made available to the House in this impeachment proceeding.

(Report and Recommendation of the House Managers on Pending Pre-Trial Matters, dated March 31, 1989, page 3, attached as Exhibit 2 to this filing.) Exhibit A to Mr. Baron's March 31, 1989 letter listed seven detailed sources of information from which the House received information in the Hastings impeachment proceedings. (*Id.* at Exhibit A, attached as Exhibit 2 to this filing.) Even more explicitly, on April 4, 1989, the House

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even a more general description of the documents, which would allow the parties to confer reasonably about the documents in question. In light of the significance of these issues, their immediacy in terms of the trial, and the only very recent assumption of full responsibility for defending all of the Articles of Impeachment, Judge Porteous's new counsel urge the Committee to consider the request for full inspection or a general description of the documents, as opposed to a general index.

Managers, led by Mr. Baron, submitted three detailed lists to the Senate Committee and the defense with the following titles:

1. "Documents Provided Judge Hastings by House;"
2. "Documents in House Files in which Judge Hastings Has Been Granted Access;"
3. "Documents in House Files Not Made Available."

(Pages 197-199 of Hastings Report, attached as Exhibit 3 to this filing.) The third list is precisely the material that Judge Porteous seeks and has requested from the Special Impeachment Counsel in the current action, if House Impeachment Counsel will not permit a full and open inspection of all of the House's relevant, non-privileged files. Nevertheless, Mr. Baron's reasonable approach in the Hastings trial has seemingly been abandoned in favor of a more confrontational, uncooperative, and unfair approach in the instant matter. Because the Committee has relatively little precedent to guide its decisions in this trial, it should welcome and embrace such a clear parallel. Mr. Baron and his staff should, at the very least, provide the same type of information in this matter that they provided in the Hastings matter.

What is particularly notable is that the Hastings impeachment followed an criminal indictment and a full trial in a federal court. Substantial evidence had already been presented in the public record, and had been tested under the beyond-a-reasonable-doubt standard. Thus, as in the impeachment of Judge Walter L. Nixon, Jr., the House and Senate were able to benefit from a detailed trial record. In fact, during Judge Nixon's impeachment trial, the House Managers, again through Mr. Baron, opposed the defense's discovery requests and deemed certain requests as "inappropriate" because the impeachment trial followed:

> four years of contested proceedings including a criminal indictment, pre-trial discovery, a two-week jury trial, a post-trial evidentiary hearing, an unsuccessful appeal and petition for writ of certiorari, a motion to vacate the conviction, additional discovery in connection with said motion, a two-day evidentiary hearing on the motion to vacate . . .

(House of Representatives' Response to Judge Nixon's Discovery request at 2-3, attached as Exhibit 4.) In that case, Mr. Baron concluded that given the above described "circumstances," discovery should be limited but still stated that he would provide the same information provided in Judge Hastings's trial. (*Id.* at 3.) Notably, Mr. Baron agreed to make available for inspection "subpoenaed records produced by third parties" and FBI "investigative files." (*Id.* at 5-6.)

In this case – where there is no prior indictment, no Court-ordered discovery, and no previous trial – the material already available to Judge Porteous is substantially less than that which was available to Judges Hastings and Nixon. If anything, discovery in this matter, if it is to follow precedent and any notions of due process, should be broader than that afforded in the Hastings and Nixon proceedings. In this case, the Special Impeachment Counsel obviously will have a more difficult time convicting Judge Porteous in light of the questionable charges alleging a denial of honest services and conflicts of interest. As a result, they appear to be making up for evidentiary shortcomings through tactical maneuvers that would deny Judge Porteous access to evidence and time necessary for a proper defense. Such tactics would be condemned in a standard criminal case, and should be anathema in a federal impeachment trial. There is no public purpose to allowing such concealment. Accordingly, the Senate should order access – so as to guarantee that both the Senators and the accused are given a full record before the rendering of final votes on the Articles of Impeachment.

WHEREFORE, Judge Porteous respectfully requests that the Senate order the House to allow for inspection of all non-privileged materials collected and maintained by the House Mangers in connection with the investigation and impeachment of Judge Porteous.

Respectfully submitted,

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United States District Court Judge for the
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Dated: June 27, 2010

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

Alan Baron – abaron@seyfarth.com

Mark Dubester – mark.dubester@mail.house.gov

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Jessica Klein – jessica.klein@mail.house.gov

/s/ P.J. Meitl

Exhibit 1

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United States Senate

OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, DC 20510-7250

March 24, 1989

The Honorable John Bryant
The United States House of Representatives
Washington, D.C. 20515

Professor Terence J. Anderson
The University of Miami School of Law
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Coral Gables, Florida 33214

Dear Representative Bryant and Professor Anderson:

As you are aware, at its organizational meeting on March 17, the committee appointed under Impeachment Rule XI determined that it would meet with representatives of the parties during the week of April 10 to consider matters that should be addressed prior to hearing the testimony of witnesses. In order to make the committee's meeting that week as productive as possible, the chairman and vice chairman will meet with you on April 4 to review the status of outstanding issues in light of your prior submissions and the memoranda that each side should submit by March 31.

A review of the parties' prior submissions indicates that the following matters should be considered in your March 31 filings:

1. The Parties' Witness Lists

The House provided to the Committee on Rules and Administration, at the committee's request, a provisional list of 23 witnesses with a brief general description of the nature of the anticipated testimony of each witness. Subsequently, the House supplemented its list by adding six more names. Before the Rules Committee, Judge Hastings declined to provide a list of his witnesses, initially on the ground that the House should first be required to list its witnesses. Subsequently, he referred the Rules Committee to a provisional list that he had presented earlier to the House, and stated that he has "identified more than 200 witnesses who may have information that is relevant...." One question for Judge Hastings' side is whether he is now prepared to provide a provisional list and description of anticipated testimony so that the committee may have a firm basis for scheduling its hearings and acting on several pretrial matters, including the motion of the House in limine to exclude evidence.

2. The Motion of the House In Limine to Exclude Irrelevant Evidence

The House has moved to exclude evidence offered to prove motivations of persons who investigated and prosecuted Judge Hastings, the motivations of persons involved in the Judicial Branch investigations of Judge Hastings, and cumulative evidence on his general character and reputation. A response from Judge Hastings to the motion is needed.

3. Dredge

Judge Hastings has indicated an interest in calling William Dredge as a witness as part of a "rainmaking" defense. House counsel has offered to contact the F.B.I. for assistance in locating Dredge and obtaining his presence. Judge Hastings' witness list will indicate whether he proposes to call Dredge. If Dredge is on the list, can we confirm that the House will assist in obtaining Dredge's presence? Judge Hastings states that the testimony of an additional three to five witnesses would be required if Dredge testifies. Who are they?

4. Borders

Judge Hastings states that "William Borders is a central witness. If he agreed to and did testify truthfully, his testimony would fully exonerate the judge." Borders has previously asserted his privilege against self-incrimination. If Borders is on Judge Hastings' witness list, should the committee commence a proceeding leading to a grant of immunity? If immunity is granted, should it be determined early in the proceedings whether Borders will testify with immunity and, if he will not, should enforcement proceedings be authorized at an early date?

5. Judge Hastings' Discovery Request

Judge Hastings has requested extensive discovery. The House has responded by describing the nature of the documents that it would provide: materials that the House intends to use at trial; statements of witnesses to be called at trial that have been sworn, adopted, or approved by them; transcribed statements of witnesses who will be called at trial; and any exculpatory evidence. The House is asking for reciprocal discovery. What is Judge Hastings' response to the House's offer and request? In helping the committee to understand the parameters of the discovery issue, could the House describe the nature of the materials that were made available to it by the Judicial Branch and the Department of Justice? In conjunction with this request, it will be

Representative John Bryant
Professor Terence T. Anderson
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helpful for the parties to address any questions which should be considered in relation to grand jury material to which the House has been granted access.

6. Stipulations of Documents and Facts

The House, at the request of the Senate, has proposed stipulations concerning documents and stipulations of fact. Judge Hastings has declined to date to enter into stipulations. The House has proposed that the Senate adopt procedures by which stipulations of fact filed with the Senate would be accepted as true unless the opposing party files a written objection including a proffer as to why the proposed stipulation of fact should not be taken as true. The House suggests that a similar procedure be adopted concerning documents. What is Judge Hastings' response to those proposals? To help the committee understand the promises and the difficulties of the stipulation process, I would like to suggest that each party select, for illustrative purposes, ten of the proposed stipulations and an equal number of documents and be prepared to discuss the procedures that would be best suited to resolving any disputes about them.

7. House Depositions After Commencement of Senate Proceedings

Judge Hastings has objected to the use of the House's subpoena power to compel testimony after the exhibition of the articles of impeachment. The House should respond to that objection.

8. Rules of Evidence

Judge Hastings has filed a memorandum on rules of evidence. What is the response of the House, and can the parties now identify any significant evidentiary questions that the committee will need to resolve?

* * * *

This list is not intended to exclude the discussion of other evidentiary questions that either side believes should be addressed at this time. Pending the organization of the committee's administrative staff, please transmit to my office your communications to the committee, including your March 31 filings.

Sincerely,

Michael Davidson

Exhibit 2

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
)
)
IMPEACHMENT OF)
JUDGE ALCEE L. HASTINGS)

REPORT AND RECOMMENDATIONS OF THE HOUSE MANAGERS ON PENDING PRE-TRIAL MATTERS

On August 3, 1988, the House of Representatives presented to the Senate 17 Articles of Impeachment against United States District Judge Alcee L. Hastings. Since that time, in response to directives from the Senate Committee on Rules and Administration dated August 10, September 8, and December 12, 1988, the parties have had several opportunities to address issues which should be resolved pre-trial in order to facilitate the trial of this impeachment. The following is a summary of the issues raised by the parties, the position of the House Managers with regard to each of those issues, and the recommendation of the House Managers of an appropriate mechanism to resolve each issue.

1. **RULES OF EVIDENCE.** In a memorandum submitted to the Senate Rules Committee on September 6, 1988, Judge Hastings requested clarification on the application of rules of evidence in this impeachment trial. Respondent stated that either the common-law rules or the Federal Rules of Evidence would be appropriate and suggested that the Federal Rules of Evidence offered the advantage of providing a comprehensive and readily accessible body of materials.[1]

(a) Position of the House Managers.

The House Managers believe that the guiding principle for making determinations about the admissibility of evidence should be the relevancy of the proffered evidence to the charges in the Articles of Impeachment. Once relevancy is established, the Committee should then be flexible in its willingness to admit evidence into the record. Many of the rules of evidence that tend to exclude evidence are intended to prevent a lay jury from giving undue weight to unreliable evidence, a factor not applicable

[1] See Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered at 6, reprinted in S. Rep. No. 542, 100th Cong., 2d Sess. 106 (1988) (hereinafter "S. Rep. 100-542").

in a Senate trial.[2] Moreover, because the Committee is charged with the responsibility of preparing a record for the full Senate to review, the Committee should err on the side of admitting rather than excluding relevant evidence, for it will be easier for the Senate to disregard evidence which that Body feels was wrongfully admitted than to attempt to remedy an inappropriate exclusion of evidence. With these caveats in mind, the House Managers agree that the Federal Rules of Evidence are a useful touchstone to which the Committee should look for guidance in the conduct of the impeachment trial of Respondent.

In addition, it should be noted that it is unlikely that the distinction between the common law rules and the Federal Rules of Evidence will make any practical difference in the admissibility of evidence in this trial. The House Managers know of no significant evidence which would be affected by the selection of either set of rules as the preferred source of guidance in making evidentiary rulings.

(b) Recommendation.

The House Managers believe that this matter is ready to be resolved without further briefing by the parties and recommend that it be discussed at the April 4, 1989 meeting with the Chairman and Vice-Chair, and resolved at the meeting of the Committee during the week of April 10, 1989.

2. DISCOVERY. In his September 6th memorandum to the Senate Rules Committee, Judge Hastings also raised the question of discovery.[3] His position was developed in Respondent's First Request for Production of Documents and Other Tangible Material filed December 28, 1988. In that request, Respondent asked the House of Representatives to deliver to his counsel copies of all documents relating to the matters alleged in the Articles of Impeachment or the Answer to the Articles of Impeachment, which fall into the following six categories: 1) all documents received by the House of Representatives from the Judicial Conference of the United States or the Judicial Council of the Eleventh Circuit pertaining to the judiciary's investigations of these matters; 2) all documents and other materials, including rough notes,

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[2] S. Comm. on Rules and Admin., 93rd Cong., 2d Sess., Impeachment, 245-250 (Comm. Print 1974) (Professor Stephen R. Goldstein).

[3] See Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered at 7, reprinted in S. Rep. 100-542 at 107.

interview notes, memoranda, and transcriptions, which reflect statements by any person who could testify concerning these matters; 3) documents and other materials gathered by or submitted to grand juries in connection with inquiries into conduct of Judge Hastings which is the subject of the Articles of Impeachment; 4) all documents and other materials obtained by the House of Representatives from the Department of Justice or other Executive Branch sources, including the FBI and the Bureau of Alcohol, Tobacco, and Firearms; 5) all documents or materials gathered by the House of Representatives and its agents concerning these matters; and 6) all documents which are material to Judge Hastings' defense, are exculpatory, or which may lead to exculpatory materials.

(a) Position of the House Managers.

The position of the House of Representatives was initially stated in a memorandum submitted to the Senate Rules Committee.[4] It is fully set forth in the Response of the House Managers to Respondent's First Request for Production of Documents and Other Tangible Material filed with the Senate January 17, 1989. In summary, the House Managers believe that there should be no surprises at trial. Therefore, in spite of the fact that formal discovery is unprecedented in impeachment cases, the House Managers are prepared to provide to Respondent copies of materials falling into the following four categories: 1) any document, tape or other tangible evidence the House Managers intend to use at trial; 2) any statement of a witness to be called at trial that is sworn, or adopted or approved by the witness; 3) any transcribed statement by a witness to be called at trial which is a substantially verbatim recital of an oral statement by the witness and was recorded contemporaneously with the making of such statement; and 4) any exculpatory evidence. The overwhelming majority of the documents falling into these four categories has already been provided to Respondent. The House Managers' further production of materials, however, is conditioned on the imposition of a reciprocal rule requiring Respondent to provide to the House all documents or materials in his possession which fall into the first three categories listed above.

In response to the March 24, 1989 letter from Senate Legal Counsel, the House Managers submit Exhibit A attached hereto, which is a description of the materials made available to the House in this impeachment proceeding.

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[4] See Reply of the House Managers to the September 8, 1988 Letter from the Senate Committee on Rules and Administration at 9-12, reprinted in S. Rep. 100-542 at 109-112.

(b) Recommendation.

The House Managers believe that the issue of discovery has been fully briefed by the parties and is ready for resolution. The House Managers recommend that this matter be discussed at the April 4, 1989 meeting and argued at the meeting of the Committee during the week of April 10, 1989. At that time a date should be set for the parties to exchange pertinent documents and materials pursuant to the Committee's ruling on this matter.

3. STIPULATIONS. In an early memorandum submitted to the Senate Rules Committee, the House Managers stated their intention to request admissions as to matters of fact and the genuineness of documents.[5] This proposal was further refined in a later memorandum submitted to the Senate Rules Committee.[6] On December 15, 1988, the House Managers submitted their Proposed Stipulation of Documents and their Proposed Stipulation of Facts. Although Judge Hastings has not specifically responded to the proposed stipulations, his counsel has indicated in meetings with Senate Legal Counsel and in a memorandum to the Senate Rules Committee that he does not intend to agree to any stipulation of facts and that stipulations to the genuineness of documents cannot be made until the documents have been inspected.[7] Although the documents have been available for inspection since the end of January 1989, Respondent has declined to inspect any documents.

(a) Position of the House Managers.

The House has proposed two procedures to expedite the presentation of evidence at trial, one addressing stipulations of facts and the other addressing the genuineness of documents. The House proposal would require that any proposed stipulation regarding the admissibility of

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[5] See Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration at 13.

[6] See Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration at 2-3, reprinted in S. Rep. No. 1, 101st Cong., 1st Sess. 76-77 (1989) (hereinafter "S. Rep. 101-1").

[7] See Statement on Behalf of Untied States District Judge Alcee L. Hastings COncerning Procedures Necessary for a Fair Trial in the Senate in the Present Case of Impeachment at 8, reprinted in S. Rep. 101-1 at 105.

a document and any proposed stipulation of fact filed with the Senate will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true. It is the position of the House that such procedural rules should be adopted by the Committee, and a date set by which written objections must be filed. In the event that a party files written objections to proposed stipulations, a smaller committee, consisting of one or two Committee members, should be designated by the Chairman to review the matter and rule on whether there is a reasonable basis for the objection.

In the Proposed Stipulation of Facts, the House Managers list the facts in roughly chronological order. In the spirit of attempting to facilitate the stipulation process, the House has reorganized and reduced its proposed stipulations to those facts that, as far as the House is aware, are beyond any dispute. The House Managers' Revised Stipulation of Facts is attached hereto as Exhibit B. In brief, the revised stipulations are reorganized into 15 categories: facts based upon 1) airline records, 2) telephone records, 3) telephone messages, 4) hotel records, 5) court decisions, 6) the record of United States v. Romano, 7) the record of United States v. Borders, 8) the record of United States v. Hastings, 9) Judge Hastings' trial testimony, 10) geographical information, 11) Nagra body recordings, 12) other tape recordings, 13) FBI reports, 14) the 1985 wiretap application and progress reports, and 15) miscellaneous proof.

It has also been suggested by Senate Legal Counsel that the parties review and consider the system for facilitating an agreement on stipulations utilized in United States v. American Telephone & Telegraph Co.[8] In that complex and protracted litigation, Judge Harold Green required the parties to review each others' Statements of Contentions and Proof, and advise their opponents which portions of those statements might be stipulated to in their present form or with suggested language changes. The parties exchanged proposed language changes in an effort to negotiate an agreement on the stipulations. Where the party objected to a stipulation, the basis of that objection had to be stated. Where the objection was based on a need for further information, the precise additional discovery had to be indicated. Where the opposing party refused to provide such discovery, a Magistrate reviewed the matter. A Special Master was selected to oversee the stipulation process.

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[8] 83 F.R.D. 323 (D.D.C. 1979) and 88 F.R.D. 47 (D.D.C. 1980).

It is the position of the House Managers that such a process is ill-suited for the present case. This case is not nearly so complex. In addition, the stipulations proposed by the House are well documented and in most instances have never been contested. The present case does not require the sophisticated scheme utilized in the AT&T case and it is likely that the implementation of such a process would be time consuming and unnecessarily complicated.

The House Managers believe that their Revised Stipulations of Fact and proposed admissions in the absence of a reasonable objection are more likely to facilitate the process given the nature of the stipulations being sought, and Respondent's stated unwillingness to stipulate.

(b) Recommendation

The question of what procedures should be adopted to facilitate stipulations requires no more briefing and should be discussed at the April 4, 1989 meeting with the Chairman and Vice-Chair, and resolved at the meeting of the Committee during the week of April 10, 1989. If the rules proposed by the House are adopted, the Committee should then set a date by which any objections to stipulations must be filed.

4. SCOPE OF THE EVIDENCE TO BE PRESENTED. On January 17, 1989, the House of Representatives filed a Motion in Limine to Exclude Irrelevant Evidence and a supporting memorandum. This motion requested that the Senate exclude all evidence offered to prove the motivations of the persons in the Executive and Judicial Branches who investigated, prosecuted or considered matters which are the subject of the Articles of Impeachment, and that the Senate limit evidence on the topic of Respondent's general character and reputation consistent with the Claiborne precedent. Judge Hastings has not responded to the Motion in Limine.

(a) Position of the House.

By its Motion in Limine the House is attempting to exclude the presentation of evidence at trial that is irrelevant under any circumstances. The motion is not intended to address topics for which the determination of relevance would depend on the context in which they are raised. The Senate clearly has the power to limit the scope of the evidence presented in an impeachment trial and the exercise of that power is essential to a fair and expeditious trial of this impeachment. The request of the House Managers is supported by Senate precedent, and

particularly by the decision of the Rule XI Committee with regard to a similar motion made by the House Managers in the impeachment trial of Judge Claiborne.[9]

(b) Recommendation.

At the April 4, 1989 meeting with the Chairman and Vice-Chairman, a briefing schedule should be established for the submission of Judge Hastings' response to the House Managers' Motion in Limine. The House Managers suggest that Judge Hastings' response be filed in time for argument on the motion at the meeting of the Committee during the week of April 10, 1989.

5. SUBPOENA POWER. Although Respondent has made no formal request, he has indicated that he will seek authority from the Senate to issue subpoenas or to have subpoenas issued on his behalf. In his January 17, 1989 Memorandum to the Senate Rules Committee, Respondent indicated that he wishes to have witnesses subpoenaed for pre-trial discovery purposes as well as for trial.[10] In addition Respondent has questioned the propriety of the House's exercise of its subpoena power subsequent to the adoption of the Articles of Impeachment on August 3, 1988.[11]

(a) Position of the House Managers.

As a general rule, the House takes no position on the issuance of subpoenas on behalf of Respondent. The House would note that Respondent has made no showing that he has been unable to conduct pre-trial discovery prior to this time without reliance upon subpoenas. In view of the possibility that such pre-trial discovery may be used to delay the trial, or to delve into irrelevant matters, the House suggests that the procedure adopted for the issuance of subpoenas include an opportunity for the House to voice its objections prior to the issuance of any subpoena.

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9 See Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Comm., 99th Cong., 2d Sess. 690-91 (Part 1) (1986), cited in the House Managers' Memorandum in Support of Motion in Limine to Exclude Irrelevant Evidence at 4-8.

10 See Statement on Behalf of United States District Judge Alcee L. Hastings Concerning Procedures Necessary for a Fair Trial in the Senate in the Present Case of Impeachment at 5-6, reprinted in S. Rep. 101-1 at 102.

11 Id. at 4-5, reprinted in S. Rep. 101-1 at 101.

With regard to the continuing power of the House to issue subpoenas, the Managers believe that the House retains independent authority to issue subpoenas even after the adoption of Articles of Impeachment and their presentation to the Senate. Very recently, one court recognized the House of Representatives' authority. The House Managers applied to the United States District Court for the Southern District of Florida for the original tape recordings from the wiretap in the bribery conspiracy case in order to make the tapes available for the Senate trial.[12] Judge Hastings opposed the application on the ground that only the Senate could apply for the original tape recordings. On March 20, 1989, the Court granted the request of the House, finding that the Senate rules do not prescribe the exclusive procedure for the obtaining of evidence.[13]

Despite the independent authority of the House to issue subpoenas, however, the House Managers will request the Senate to issue any additional subpoenas needed for the presentation of documents and witnesses at the trial of these Articles of Impeachment.[14]

(b) Recommendation.

A schedule should be established for the submission of any requests for subpoenas and the filing of objections to such requests. Such a schedule should address both pre-trial and trial subpoenas, although requests for trial subpoenas might best be included in pre-trial statements submitted by the parties prior to trial. This schedule should be discussed and established at the April 4, 1989 meeting with the Chairman and the Vice-Chairman.

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[12] The House Managers already have copies of some of the tapes, to which Respondent has been granted access.

[13] See Order, dated March 20, 1989, attached hereto as Exhibit C.

[14] For the information of the Committee, the House has issued subpoenas subsequent to the adoption of the Articles of Impeachment in this case for two purposes. Senate Legal Counsel requested the House to undertake the gathering of original documents to be introduced at trial, and the House has used subpoenas to obtain such originals. The House also issued three subpoenas for the purpose of depositions. Ultimately, two depositions were taken. The transcripts will be provided to Respondent pursuant to category (2) of the discovery proposal of the House Managers referenced above.

6. **WITNESSES.** On two occasions the Senate Committee on Rules and Administration directed the parties to provide a preliminary list of witnesses with summaries of their proposed testimony. The House Managers provided such lists with specific proffers of testimony.[15] In his submissions to the Senate Rules Committee, Judge Hastings provided general descriptions of the categories of witnesses he might call.[16] In addition, he referred the Senate Rules Committee to lists of witnesses attached to his First Request for Production of Documents and Other Tangible Materials. These lists are of the witnesses called at Judge Hastings' criminal trial, at William Borders' criminal trial, before the Eleventh Circuit Investigating Committees, before the House Subcommittee on Criminal Justice, and of other persons "having pertinent information."[17]

The Senate Committee on Rules and Administration also requested that the parties identify any witnesses who might assert testimonial privileges and thereby require the implementation of procedures to grant immunity. The House has stated that it has no present intention of calling any such witnesses. Judge Hastings alluded to William Dredge and William Borders as potentially troublesome witnesses. However to date Respondent has not stated an intention to call either Dredge or Borders as witnesses.

In addition, in the March 24, 1989 letter from Senate Legal Counsel, the parties were asked to address whether the Committee should commence a proceeding leading to a grant of immunity for William Borders, and the timing of such a proceeding and any subsequent proceedings if immunity is obtained.

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[15] See Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration at 9-13, reprinted in S. Rep. 101-1 at 60-63. For further additions, see Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration at 3-4, reprinted in S. Rep. 101-1 at 64.

[16] See Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case at 17-20, reprinted in S. Rep. 101-1 at 65-68. See also Comments on Behalf of United States District Judge Alcee L. Hastings on the Views Expressed by the House Managers in their Memorandum Submitted on September 6, 1988 at 8-9, reprinted in 101-1 at 69.

[17] See Addenda C, D and E to Respondent's First Request for Production of Documents and Other Tangible Material.

(a) Position of House Managers.

The House suggests that the parties be required to provide to the Committee specific witness lists with proffers of the proposed testimony by each witness. A preliminary list should be submitted in the near future and a final list should be included in pre-trial statements from the parties. Witnesses who are not on the final witness list should be allowed to testify only if the party offering the witness makes a showing of "good cause" for failing to include the witness in the pre-trial statement. The House Managers make this proposal with the understanding that both the preliminary and final witness lists would not include those witnesses who may be called during rebuttal or surrebuttal.

In response to the inquiry posed in the March 24, 1989 letter from Senate Legal Counsel, if Judge Hastings indicates his intention to call William Dredge at trial, the House Managers will attempt, through the FBI, to locate and produce Dredge.

Finally, it is the position of the House Managers that if Judge Hastings intends to call William Borders at trial, he must indicate his intent in his preliminary witness list. If Borders is named on the preliminary list, the Committee should then commence a proceeding such as a deposition to determine whether a grant of immunity will be necessary and, if it is required, the Committee should take the steps necessary to obtain the immunity. The House Managers believe that in order to avoid any undue delay of the trial, these proceedings should be commenced as early as possible. In addition, the House Managers believe that if Borders refuses to testify even with a grant of immunity, enforcement proceedings should be authorized as early as possible.

(b) Recommendation.

A schedule for the submission of preliminary witness lists should be established at the April 4, 1989 meeting with the Chairman and Vice-Chairman. The procedures to be followed with respect to the possible testimony of William Borders should also be discussed and established at the April 4, 1989 meeting.

7. PRE-TRIAL STATEMENT. To date, there has been no discussion of pre-trial statements. However, in the Senate impeachment proceeding of Judge Harry Claiborne, the Rule XI Committee adopted such a procedure.

(a) Position of House Managers.

The House Managers recommend that the Committee require the parties to submit pre-trial statements one week prior to the beginning of the presentation of evidence. As in the Claiborne proceeding, the pre-trial statements would include a final list of witnesses to be called at trial, a summary of their proposed testimony and a summary of the evidence the parties intend to introduce in support of or in defense to the 17 Articles of Impeachment. In addition, the pre-trial statement should contain a list of the exhibits each party intends to introduce at trial. The exhibits could then be pre-marked, exchanged by the parties and filed with the Committee in advance of trial.

(b) Recommendation.

This proposal should be considered at the meeting of the Chairman and Vice-Chair on April 4, 1989.

8. SCHEDULING OF TRIAL. The Committee should also consider the scheduling of the trial and any procedures that will facilitate a smooth and expeditious presentation of the evidence.

(a) Position of the House Managers.

The House Managers recommend that the Committee schedule the trial in a manner that allows for the presentation of evidence during at least three consecutive days per week, and for five consecutive hours per day (preferably in the afternoon). The House Managers recommend this procedure for two reasons. First, the majority of witnesses to be called will have to travel to Washington, D.C. to testify. In order to ensure that their testimony is completed during one trip, consecutive days and hours of testimony are necessary. Second, significant blocks of trial time are required to ensure a coherent and meaningful presentation of the evidence to the benefit of the Committee and the parties.

In addition, the House Managers are available to present evidence during the one week per month that the Senate is out of session.

(b) Recommendation.

The House Managers ask that the issue of scheduling be discussed at the April 4, 1989 meeting with the Chairman and Vice-Chair.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron /LEP
Alan I. Baron
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Managers of the House of Representatives

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Peter Levinson, Associate Counsel
Raymond V. Smietanka, Associate Counsel

March 31, 1989

DOCUMENTS MADE AVAILABLE TO THE HOUSE OF REPRESENTATIVES IN THIS IMPEACHMENT PROCEEDING

1. Materials accompanying the Certificate of the Judicial Conference of the United States concurring in the determination of the Judicial Council of the Eleventh Circuit that impeachment of Judge Hastings may be warranted. These materials include the Report of the Eleventh Circuit Investigating Committee, 28 volumes of testimony taken by the Eleventh Circuit Investigating Committee and approximately 2800 exhibits. The House has provided Respondent with either copies of or access to these materials.

2. Record of the Eleventh Circuit Investigating Committee appointed to investigate the disclosure of confidential wiretap information. The House received these materials from Respondent.

3. Working files of John Doar, Counsel to the Eleventh Circuit Investigating Committee. These materials are described in the two orders attached as Addenda A and B to Respondent's First Request for Production of Documents and Other Tangible Material.

4. Records of Grand Jury 81-A (MIA) (investigating the bribery conspiracy) and Grand Jury 86-3 (MIA) (investigating the unauthorized disclosure of wiretap information). The House has provided both records to Respondent.

5. Records of the United States District Court for the Southern District of Florida, In the Matter of the Application of the United States of America for an Order Authorizing the Interception of Wire Communications, Misc. No. 412-Hastings, the wiretap which Respondent was supervising. Respondent has received copies of these materials.

6. Department of Justice investigative and trial files pertaining to the bribery conspiracy case and the investigation into the disclosure of confidential wiretap information. Many documents are duplicative of those contained in categories 1 and 2 above.

7. FBI investigative files and tape recordings, falling into five general categories of documents. Many documents are irrelevant to the charges contained in the Articles of Impeachment or are duplicative of documents contained in categories 1 and 2 above. The FBI redacted the documents prior to providing them to the House. Respondent has been granted access to all tape recordings. The five categories are:

i) documents pertaining to the bribery conspiracy case and the investigation of the unauthorized disclosure of wiretap information, including FBI 302s, teletypes, investigative reports, surveillance records, forensic reports, administrative memoranda, transcripts of tape recordings and newspaper articles.

ii) documents pertaining to the FBI background check prior to Respondent's appointment to the Federal bench.

iii) documents pertaining to an FBI investigation of an alleged terrorist organization believed to have made threats to numerous people, including Respondent.

iv) documents pertaining to other FBI investigations that are irrelevant to the charges in the Articles of Impeachment.

v) documents pertaining to requests by the Eleventh Circuit Investigating Committee for FBI assistance in locating witnesses and documents, and conducting investigations.

NOTE: The House produced a 14 volume Statement of Information that contains all the documentary evidence it relied upon in support of Articles I through XV and XVII. The documents reproduced in the Statement were selected from the categories of documents listed above (excluding category 5) and from those independently gathered by the Subcommittee on Criminal Justice. The House Managers have provided Respondent with a copy of the complete Statement of Information.

In addition, the House has published the materials relied upon in support of Article XVI in Appendix IV to the hearings of the Subcommittee on Criminal Justice in this matter. A copy of that appendix has been provided Respondent.

Finally, the House Managers will provide Respondent with any document in its possession that falls into any of the four discovery categories proposed by the House, if the document has not already been provided.

Exhibit 3

SUBMISSION BY MANAGERS, APRIL 4, 1999, ON DOCUMENTS THAT THE HOUSE HAS (OR HAS NOT) PROVIDED TO JUDGE HASTINGS

I. DOCUMENTS PROVIDED JUDGE HASTINGS BY HOUSE

1. House of Representatives' Statement of Information
[14 volumes, containing evidence relied upon by House for Articles I-XV and XVII. Provided May 9, 1988.]

2. 11th Circuit Investigating Committee Report
[768 pages, including appendices of evidence. Provided September 27, 1987.]

3. 11th Circuit Investigating Committee hearing transcripts
[28 volumes of hearing testimony. Provided April 25, 1988.]

4. 11th Circuit Investigating Committee exhibits
[Excluding those listed below in category II. Copied overwhelming majority of the approximate 2800 exhibits. Provided April 25, 1988.]

5. Trial transcript of United States v. Borders
[Provided April 25, 1988.]

6. Record of Grand Jury 81-A (MIA)
[Investigation of bribery conspiracy. Provided May 9, 1988.]

7. Record of Grand Jury 86-3 (MIA)
[Investigation of wiretap leak. Provided May 9, 1988.]

8. Court documents relating to Title III wiretap application
[Includes all progress reports and court orders. Provided May 9, 1988.]

9. Diary of Assistant U.S. Attorney Roberto Martinez
[Relates to wiretap leak. Provided May 17, 1988.]

10. NMAP Conference Schedule dated Sept. 6-7, 1985
[Provided May 17, 1988.]

11. Kevin Gordon Plea Agreement
[Gordon was one of the targets on the wiretap investigation. Provided May 17, 1988.]

12. FBI documents pertaining to wiretap investigation
[Redacted by House to protect individual privacy. Provided December 1988.]

13. Miscellaneous Material printed in Appendix V to Subcommittee Hearings
[includes, for example, U.S. Judicial Conference certification, correspondence and staff interview of Dudley Williams (former law partner of William Borders). Provided Feb. 1989.]

II. DOCUMENTS IN HOUSE FILES TO WHICH JUDGE HASTINGS HAS BEEN GRANTED ACCESS

Judge Hastings has been granted access to the following documents and was told we would copy any pages he designated.

1. 11th Circuit Investigating Committee Exhibits that were difficult to copy

   These exhibits were listed for Judge Hastings. Access granted April 25, 1988.

   a) Nos. 1-29 (Borders' message pads)

   b) No. 3001 (Hastings' 1981 court diary)

   c) No. 3002 (Betty Ann Williams' 1981 court diary)

   d) No. 3003 (Courtroom deputy's 1981 diary)

   e) Nos. 3004-5 (Hastings' message pads)

   f) No. 3006 (Betty Ann Wiliams' 1981 desk calendar)

   g) No. 3007 (" " " 1982 " ")

   h) No. 3008 (" " " 1983 " ")

   i) No. 3009 (1981 diary containing Hastings' personal travel and appointments)

   j) No. 3010 (Jan.-April 1983 diary containing Hastings' personal travel and appointments)

   k) No. 4500 (used men's purse)

   l) Nos. 1103-1653 (Hemphill Pride disciplinary file)

   m) No. 4500-A (new men's purse)

2. United States v. Hastings trial transcript

3. United States v. Borders trial exhibits

4. United States v. Romano trial transcript

Access granted April 25, 1988

Judge Hastings has also been provided access to all FBI tapes relating to the bribery conspiracy and wiretap disclosure.

III. DOCUMENTS IN HOUSE FILES NOT MADE AVAILABLE

1. Working files of John Doar, Counsel to the 11th Cir Investigating Committee
We reviewed all the items listed in Exhibit 1 to the Sept. 25, 1987 Judicial Council Resolution and Exhibit 2 to the October 9, 1987 Judicial Council Resolution. We did not copy all of the documents.

2. FBI investigative files, falling into five general categories of documents
Many documents are irrelevant to the charges contained in the Articles of Impeachment or are duplicative of documents already provided to Judge Hastings. The FBI redacted the documents prior to providing them to the House.

The five categories of documents are:

i) documents pertaining to the bribery conspiracy case and the investigation of the unauthorized disclosure of wiretap information, including FBI 302s, teletypes, investigative reports, surveillance records, forensic reports, administrative memoranda, transcripts of tape recordings and newspaper articles.

ii) documents pertaining to the FBI background check prior to Respondent's appointment to the Federal bench.

iii) documents pertaining to an FBI investigation of an alleged terrorist organization believed to have made threats to numerous people, including Respondent.

iv) documents pertaining to other FBI investigations that are irrelevant to the charges in the Articles of Impeachment.

v) documents pertaining to requests by the Eleventh Circuit Investigating Committee for FBI assistance in locating witnesses and documents, and conducting investigations.

NOTE: We have also reviewed, but at this time do not have copies of, Department of Justice investigative and trial files pertaining to the bribery conspiracy case and the investigation into the disclosure of confidential wiretap information.

NOTE: We will provide Judge Hastings with any documents listed above that fall into the 4 discovery categories proposed by the House Managers.

Exhibit 4

65

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE
TO JUDGE NIXON'S DISCOVERY REQUEST

The House of Representatives, through its Managers and counsel, responds as follows to the discovery requests of Respondent, Judge Walter L. Nixon, Jr.

Preliminary Statement

As set forth below, the House strongly objects to portions of Respondent's discovery requests. Respondent essentially seeks to duplicate the House's impeachment investigation and gain equal access to every shred of information gathered or reviewed by the House, including information that did not give rise to impeachment articles and will not be at issue before the Senate. Respondent's requests are overbroad and seek the privileged work product of Congress.

A person under investigation by the House or Senate, whether in regard to confirmation to hold public

office, impeachment to determine fitness to continue to hold office or some other special investigative context, is not entitled to learn everything that Congress discovers about him. As a matter of fairness and due process, a person subject to Congressional inquiry should be entitled to know the charges and specific proof against him. But no broader right of discovery should be afforded to a person under investigation. To grant further access would intrude upon the Congressional investigative prerogative and interfere with Congress' ability to seek the truth. Sources of information will be far less forthcoming if it is understood that everything brought to the attention of Congress will be turned over to the subject of the investigation.

In addition, the wide-open discovery sought by Respondent, as if this were civil litigation only recently filed, is inappropriate given the nature of this proceedings. The impeachment of Judge Nixon comes before the Senate after four (4) years of contested proceedings including a criminal indictment, pre-trial discovery, a two-week jury trial, a post-trial evidentiary hearing, an unsuccessful appeal and petition for writ of certiorari, a motion to vacate the conviction, additional discovery in connection with said motion, a two-day evidentiary hearing

on the motion to vacate, and lengthy evidentiary hearings in the House whereby Respondent was made fully aware of the facts giving rise to the impeachment charges against him. Even Respondent's own counsel admits that the impeachment articles contain "nothing new."

Under these circumstances, the House Managers assert that discovery in the Senate proceedings should be limited to (1) documents intended to be offered in the case-in-chief; (2) statements that are sworn or adopted by witnesses who will testify at trial; (3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and (4) exculpatory materials.

Accordingly, as set forth below, the House shall provide Respondent all materials falling within the aforementioned categories. Moreover, in the spirit of compromise sought by the Chairman and Vice Chairman during their June 1 meeting with counsel, and to avoid burdening the Committee with discovery squabbles, the House agrees to provide voluntarily the additional material described below. With these concessions by the House, Respondent will obtain the same access to material as that afforded to Judge Alcee L. Hastings of Florida, who is currently facing impeachment charges before a separate Senate Committee.

Request No. 1: All statements, affidavits, transcripts of

witness statements, and interview memoranda, and memoranda including or referring to statements of witnesses, which have been acquired by Special Impeachment Counsel staff or other investigators or counsel from any other federal agency in connection with any investigation of Judge Nixon.

Response to Request No. 1: The House objects to this request, which is far too broad and seeks the internal, privileged work product of the House and its agents. The House agrees to provide all statements, affidavits and transcripts of witnesses scheduled to testify at trial in these proceedings. However, the House declines to provide materials concerning persons not scheduled to testify. The House also refuses to provide interview memoranda that constitute internal, investigative work product of the House. Exculpatory materials, if any, and from any source, will be provided.

Request No. 2: All documentary materials which have been acquired by the Impeachment Counsel staff, by subpoena or through voluntary production, in the course of the investigation.

Response to Request No. 2: The House objects to this request. Again, Respondent seeks to follow in the footsteps of the House's investigation and gain access to materials that will not be introduced into evidence during the case-in-chief against him. However, in the spirit of compromise requested by the Chairman and Vice-Chairman of the Committee, the House will make available to Respondent

all subpoenaed records produced by third parties that Respondent would otherwise have an independent right to review, by virtue of his status as an account holder at a bank or similar status. The House declines to produce materials, gained during its investigation through voluntary production by third parties, that will not be introduced in the case-in-chief against Respondent. However, exculpatory materials, if any, and from any source, will be provided.

Request No. 3: All transcripts of grand jury testimony of the Special Grand Jury empaneled on July 18, 1984 in Hattiesburg, Mississippi and any other grand jury (including any grant jury in the Southern District of Mississippi or the Northern District of Florida) that has heard testimony relating to any allegations concerning Judge Nixon.

Response to Request No. 3: The House will provide Respondent with copies of all grand jury testimony of witnesses scheduled to testify at trial. No other grand jury testimony will be provided. Respondent has no right to probe into the secret, grand jury testimony of witnesses who will not testify at trial against him. However, exculpatory materials, if any, and from any source, will be provided.

Request No. 4: With respect to each grand jury identified in connection with the previous paragraph, all documentary exhibits and other materials received by the grand juries referred to in the proceeding paragraph.

Response to Request No. 4: The House will provide

Respondent with any grand jury materials that will be used in the case-in-chief against him. No other grand jury exhibits or documents will be provided. However, exculpatory materials, if any, and from any source, will be made available to Respondent.

Request No. 5: FBI and Justice Department investigative files that have been reviewed by the Special Impeachment Counsel staff since March of 1988, including the memoranda recommending prosecution of Paul "Bud" Holmes of Hattiesburg in 1985, Wiley Fairchild of Hattiesburg in 1984, and Judge Nixon in 1985.

Response to Request No. 5: The House will provide Respondent with any materials that will be used in the case-in-chief against him. Moreover, in the spirit of compromise requested by the Committee, to the extent acceptable to the FBI the House will make available that agency's investigative files as was done in pre-trial discovery in the impeachment proceedings involving Judge Alcee L. Hastings. No other materials sought in this request in the possession of the House will be produced. However, any exculpatory materials, from any source, will be provided to Respondent.

Request No. 6: The identity of any expert witness consulted by the House Managers or the House Impeachment Counsel staff in connection with this proceeding, and, if the expert witness is expected to testify in this proceeding, all writings and correspondence between that expert witness and the House Managers

and the House Impeachment Counsel staff.

Response to Request No. 6: The House has consulted with Professors Andrew Kaufman of Harvard Law School and Steven Lubet of Northwestern University School of Law. Respondent is familiar with these gentlemen and had the opportunity to cross-examine them during Subcommittee hearings. If these experts are scheduled to testify, the House will provide the requested correspondence in the spirit of compromise requested by the Committee, so long as Respondent provides the House with reciprocal material concerning any expert who may be scheduled to testify on behalf of Respondent. Any exculpatory material will be provided to Respondent.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK)
Alan I. Baron
Special Counsel

Managers of the House of Representatives

Jack Brooks
Don Edwards
Benjamin L. Cardin
F. James Sensenbrenner
William E. Dannemeyer

In The Senate of the United States

Sitting as a Court of Impeachment

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

THE HOUSE'S CONSOLIDATED OPPOSITION TO
JUDGE G. THOMAS PORTEOUS, JR.'S MOTION TO COMPEL AND
MOTIONS FOR ASSISTANCE IN SECURING DISCOVERY

The House of Representatives ("House"), through its Managers and counsel, respectfully submits to the Committee this consolidated opposition and response to the three motions filed by Judge Porteous on June 27, 2010, related to pre-trial discovery in this case.[1]

I. OVERVIEW

The Senate Impeachment Trial Committee ("Committee") set a deadline for filing discovery motions in this matter of May 28, 2010. Nevertheless, a month after that deadline passed, Judge Porteous has filed three motions related to discovery matters. These motions should be denied on both procedural and substantive grounds.

Judge Porteous's Motion to Compel is nothing more than a rehash of document requests that he previously sought in his May 28, 2010 Motion for Discovery from the House Managers.

[1]This Opposition addresses: (1) Judge G. Thomas Porteous, Jr.'s Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives and Requested for Expedited Consideration ("Motion to Compel"); (2) Judge G. Thomas Porteous, Jr.'s Motion for Assistance in Securing Discovery from the Department of Justice ("Motion for Assistance"); and (3) Judge G. Thomas Porteous, Jr.'s Motion for Assistance in Securing Discovery from the Metropolitan Crime Commission ("Motion for Assistance").

The Committee already carefully considered and ruled upon Judge Porteous's initial discovery motion, granting the motion in part, but denying it with respect to several overly broad and unreasonable requests. Apparently dissatisfied with the Committee's Disposition of Discovery Issues ("Disposition"), Judge Porteous in his Motion to Compel now repeats his requests, thereby seeking to have the Committee address an issue previously resolved. To this end, Judge Porteous has advanced nothing new to support the relief he seeks.

Judge Porteous has also filed two Motions for Assistance in Securing Discovery. The first seeks assistance in securing discovery from the Department of Justice ("DOJ"). The second seeks assistance in securing discovery from the Metropolitan Crime Commission ("MCC"). These requests are also without merit as a matter of both process and substance. As to the request related to the DOJ, Judge Porteous is asking the Senate to request that the DOJ and the FBI devote substantial resources to review and make available an immense collection of documents that cannot reasonably be seen as relevant to his defense. Moreover, it is foreseeable that this sweeping and untimely request, if granted, would be a prelude to further requests for continuances and litigation over process that is far-removed from the factual issues in this case. As to the request related to the MCC, it is apparent that Judge Porteous has not even reviewed the MCC materials that have been made available from the House, nor has Judge Porteous asked the House if it has produced all MCC documents. Instead, Judge Porteous has moved straight to a request for the Senate to chase down what are irrelevant and likely non-existent materials, again, with no showing of specificity or need.

As discussed in greater detail below, Judge Porteous's three discovery motions should be denied.

II. HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION TO COMPEL

A. JUDGE PORTEOUS HAS ALLEGED NOTHING NEW TO WARRANT THE COMMITTEE REVISING ITS DISCOVERY DISPOSITION

There is nothing whatsoever in Judge Porteous's pleading which warrants the Committee revisiting its prior discovery Disposition. Indeed, substantial portions of the two pleadings are nearly identical. For example, Judge Porteous's Motion to Compel argues:

> What is particularly notable is that the Hastings impeachment followed an [sic] criminal indictment and a full trial in a federal court. Substantial evidence had been presented in the public record, and had been tested under the beyond-a reasonable-doubt standard. Thus, as in the impeachment of Judge Walter L. Nixon, Jr., the House and Senate were able to benefit from a detailed trial record. . . .
>
> In this case – where there is no prior indictment, no Court-ordered discovery, and no previous trial – the material already available to Judge Porteous is substantially less than that which was available to Judges Hastings and Nixon.[2]

This is the identical argument Judge Porteous made in his initial request for discovery, in which he sought limitless access to the House files:

> In each of the three prior cases involving a Rule XI committee, the House of Representatives returned Articles of Impeachment against a district judge after that judge had been indicted and tried at a criminal jury trial. . . . As a result, in those cases, by the time the issue of discovery arose before the Senate Impeachment Trial Committee, the parties had developed a record at a federal criminal trial and had been involved in extensive discovery prior to the return of the Articles of Impeachment. Thus, before

[2]Motion to Compel at 8-9.

> appearing before the Senate Impeachment Trial Committee each of these judges had the opportunity to cross-examine the government's witnesses, inquire in to the validity of documents presented as evidence against them, and call witness on his own behalf.[3]

Though Judge Porteous's Motion to Compel has cited to additional sources in connection with describing prior Impeachment proceedings, the essence of Judge Porteous's instant argument is no different from that made in his prior discovery motion.[4] Apparently, Judge Porteous concluded that the Committee did not understand his arguments the first time they were raised. That is not the case.

The Committee considered Judge Porteous's May 28, 2010 initial discovery motion, and in its Disposition dated June 9, 2010, it carefully addressed his discovery requests. There is simply no basis to allow Judge Porteous a "do-over" and permit him to re-argue points that have already been raised and decided simply because he is dissatisfied with this Committee's Disposition.

B. AS A MATTER OF SUBSTANCE, JUDGE PORTEOUS HAS ALLEGED NOTHING TO WARRANT THE COMMITTEE REVISING ITS DISCOVERY DISPOSITION

Furthermore, as a factual matter, Judge Porteous's Motion to Compel alleges nothing new that would justify the Committee to revisit its Disposition.

The House has set forth the background associated with discovery both in prior pleadings and in correspondence it has provided to the Committee, but the salient facts include the following:

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[3]Motion of Judge G. Thomas Porteous, Jr. For Discovery From the House Managers (May 28, 2010), at 1-2.

[4]Accordingly, the House relies upon and incorporates by reference its reply to that argument, set forth in Response by the House of Representatives to Motion of Judge G. Thomas Porteous, Jr. For Discovery from the House Managers (June 4, 2010), at 5-7.

1. The House provided Judge Porteous with an exhibit list on March 23, 2010 and an accompanying disc containing the exhibits. These materials account for nearly the entirety of the House's case, and Judge Porteous received them six months prior to trial. When these materials (which include witness testimony) are reviewed in conjunction with the highly detailed Impeachment Report, it is evident that Judge Porteous has been provided with what is close to a line-by-line preview of the House's case. There is no credible contention that Judge Porteous will be surprised at trial or that he does not know the evidence that he needs to address.[5]

2. On April 9, 2010, Judge Porteous's attorneys reviewed materials in the House's possession (document review 1). These included, generally, financial records of Judge Porteous and third parties (such as credit card records of some of the witnesses, and bank records of Judge Porteous's secretary, Rhonda Danos).[6] Although invited to do so, the attorneys made no request to copy any portion of these records.

3. On May 20, 2010, Judge Porteous's attorneys reviewed additional materials in the House's possession (document review 2). These consisted of complete and un-redacted sets of materials, from which only a subset had been marked as a trial exhibit. After their review, Judge Porteous's

[5]In that March 23 letter, the House also apprised Judge Porteous's counsel that it had additional materials obtained from third parties that it would make available for inspection and copying.

[6]A significant portion of these materials consisted of financial records that were the bases of various summary charts that were introduced at the Fifth Circuit Hearing. All of these underlying financial records were themselves made a part of the official record in the Fifth Circuit, pursuant to Judge Porteous's request.

attorneys requested a complete copy set of these materials. The House provided the materials the next day.

4. On May 26, Judge Porteous's attorneys reviewed additional materials identified by the House, generally consisting of Marcotte-related credit card and business records. Again the attorneys made no request to copy any of these records (document review 3).

5. The House identified what it believes to be a final collection of discoverable materials, and so informed both Messrs. Turley and Westling by way of a letter dated June 15, 2010. Also included was an updated exhibit list and updated disc of exhibits. The House also sent new counsel a letter dated June 22, 2010, making available the documents that were previously inspected (document reviews 1 and 3), and reiterating that a collection of documents referenced in the June 15 letter was still available for inspection and copying. On June 24, 2010, new counsel reviewed the materials that were previously part of document reviews 1 and 3 as well as the new materials (document review 4). As of June 27, 2010 – the date that Judge Porteous filed his Motion to Compel – Judge Porteous's attorneys had not sought copies of any of these materials that counsel reviewed on April 9, May 26, or June 24.[7]

[7]On June 30, 2010, Judge Porteous's attorneys sent an email to the House seeking to continue their review of documents in the House's possession and to make arrangements for copying.

The House has complied in good faith with the Committee's Disposition of Discovery Issues, and discovery is now complete.[8] Nothing in Judge Porteous's Motion to Compel provides any reason to conclude otherwise. Simply put, nothing has transpired since the issuance of the Committee's Disposition and Judge Porteous's filing of his Motion to Compel that provides any basis for the Committee to reconsider its Disposition or to support the conclusion that relevant materials covered by that Disposition have not been produced. Though Judge Porteous objects to the House making the determination of relevance associated with the production of documents,[9] that is precisely the burden that the Committee has required of the House, and the Committee has every reason to expect that the House has complied and will continue to comply with this obligation in a conscientious manner. It is also the burden placed upon counsel in civil and criminal litigation.[10] The House knows what is relevant to the four Articles of Impeachment, and Judge Porteous has never articulated any other factual theories that may constitute defenses that fall outside any reasonable understanding of the scope of those Articles.

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[8]The House recognizes the on-going nature of its discovery obligations, and if it locates or obtains additional discoverable materials, it will produce them to Judge Porteous promptly.

[9] "Only Judge Porteous's counsel can determine what materials in the Special Impeachment Counsel's possession may lead to evidence relevant to Judge Porteous's defense." Motion to Compel at 5.

[10]As a practical matter, it is nearly always the case that a party producing discovery makes commonsense decisions as to whether materials are discoverable under a "relevance" standard, and it is never the case that one party is provided access to all materials in the other party's possession solely on the claim that that the producing party cannot be trusted to determine what may be relevant to its case. No litigant is permitted access to the opposing party's warehouse of files so that it may pick and choose what materials it wants, on the argument that presumably, every document in the warehouse "touches upon" the case.

Indeed, Judge Porteous's discovery position should be evaluated in light of the fact that he has offered no competing version of facts, and he has been unable to articulate or explain exactly what it is that he is looking for to support his defense. It is apparent that his view of discovery is essentially that he be given the right to "fish" through document collections to see what he can come up with.[11] As but one example, Judge Porteous seeks materials that relate to "uncharged offenses" because such materials "may" lead to exculpatory information – a contention that is not only speculative in the extreme, but runs contrary to common sense. In any event, counsel for the House recognizes its obligation to turn over any exculpatory materials that come into its possession. In essence, Judge Porteous would have the Committee revisit the relevance standard and replace it with a standard that would permit him access to inspect all materials that "touch upon" the investigation – even materials that are irrelevant to the Articles. He equates "discovery" with unlimited access to the House's files. And, as discussed in the next Sections, Judge Porteous's two motions for Committee assistance likewise reflect little more than a desire to see what else may be out there in the possession of third parties. The Committee rightfully rejected these arguments as to the

[11]Judge Porteous in fact admitted before the Fifth Circuit Special Committee significant aspects of the factual allegations in two of the four Articles of Impeachment, such as his receipt of monies from Creely and Amato prior to taking the Federal Bench, his solicitation and receipt of cash from Amato while the Liljeberg case was pending, and his receipt of the payment of various expenses from Creely in connection with his May 1999 trip to Las Vegas (Article I). These are fully discussed in the Report. Judge Porteous has also admitted that several aspects of the bankruptcy petition were not true, though he has testified that these false statements were either by innocent mistake or otherwise without the intent to defraud (Article III). Notwithstanding the blanket denial in Judge Porteous's Answer to the Articles of Impeachment, numerous critical facts are likely to be uncontested.

scope of discovery, and Judge Porteous has provided no grounds to suggest that the Committee should revisit that decision.

Relying on his own views of discovery, Judge Porteous contends in his Motion that the House has "withheld" documents. If by the use of that term Judge Porteous seeks to imply that the House has failed to produce documents that the House should produce pursuant to the Committee's Disposition, then the House denies that allegation and again stresses that there is nothing in Judge Porteous's pleading that suggests otherwise. If Judge Porteous simply uses that term to suggest that the House has not produced irrelevant documents, then his use of the term "withheld" to describe that practice adds nothing to his claims.[12]

Further, it is difficult to take seriously Judge Porteous's attempts to litigate discovery when he has not made even a cursory effort to actually obtain documents that have been made available to him prior to filing his Motion to Compel. For example, the

[12]Indeed, Judge Porteous's reliance on loaded phrases and ad hominem attacks serves primarily to highlight the lack of real substance to his claims. For example, Judge Porteous asserts: "[the House's position is] gamesmanship . . . ;" "[the House's position is] particularly alarming . . . ;" "[implying the House is] skirmish[ing] for tactical advantage . . .; " "[implying the House] appear[s] to be making up for evidentiary shortcoming through tactical maneuvers that would deny Judge Porteous access to evidence and time necessary for a proper defense. Such tactics should be condemned in a standard criminal case, and should be anathema in a criminal trial." Even though this is decidedly not a criminal case, Judge Porteous's final comment in particular betrays ignorance of discovery in criminal cases, where witness statements are not ordered to be produced until after the witness testifies, where third party non-testifying witness statements are not typically produced or required to be produced (unless they are exculpatory), where the Government does not provide a published report describing its case, and where the Government's obligation to produce information "material to the preparation of the defense" has never been interpreted as permitting a defendant the right to rummage through the prosecutor's files because the prosecutor cannot be trusted to make such a determination himself and because, presumably, everything in the prosecutor's files "touches upon" the investigation. See Fed. R. Crim. Pro. 16. Discovery in this case is accordingly far broader – not narrower as Judge Porteous implies. Judge Porteous describes the law as he wishes it were, not as it is.

House marked as a trial exhibit only certain pages of the documents obtained from the Metropolitan Crime Commission (the "MCC"), but made available to Judge Porteous's counsel all documents that it obtained from the MCC. Significantly, Judge Porteous has not sought to copy the remainder of the MCC documents or even to inquire of the House whether Judge Porteous has been provided all materials from the MCC. Instead, Judge Porteous has filed a motion seeking the United States Senate to intervene with a public interest "good government" group in New Orleans.

Because Judge Porteous has failed to justify having the Committee take the extraordinary step of revisiting its Disposition, Judge Porteous's Motion to Compel should be denied.

III. THE HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE DEPARTMENT OF JUSTICE

It should be made clear at the outset that all relevant Wrinkled Robe materials the House has received from the Department of Justice have been given to or made available for inspection by Judge Porteous.

Judge Porteous has requested that the Senate Committee assist him in seeking eight categories of documents from the Department of Justice. The House objects to that request as it relates to the last six categories – generally involving the Wrinkled Robe investigation – because of the lack of any meaningful showing of relevance, the sheer breadth of the requests, the inexcusable delay in making them, and above all, the inevitable delay in these proceedings which would result from acceding to this request.[13]

[13]The first two categories of materials sought from the Department suffer from some of the same defects, though the requests are at least somewhat narrower in scope and have facial relevance to Article IV. As a practical matter, the House does not object if the Senate were to request the Department of Justice to search for additional materials in the

The Wrinkled Robe investigation involved the convictions of approximately 20 individuals for corruption at the Jefferson Parish, Louisiana courthouse, including two state court

judges and law enforcement personnel, arising from the provision and receipt of things of value from bail bondsman Louis Marcotte and his sister Lori Marcotte. The investigation commenced in or about 1999, with search warrants and wiretaps subsequently being executed. Because Judge Porteous had been on the Federal Bench since 1994, he was not a target in that investigation (though his relationship with the Marcottes was described in the FBI's affidavit in support of its request for wiretaps). There are thus relatively few materials relating to Judge Porteous that were obtained by the FBI in that investigation, and those that did relate to him – including some calendars from the Marcottes' bail bonds business that reflected meals with Judge Porteous in the mid to late 1990s and other evidence related to meals (such as credit card records) – were obtained by the House and have been made available to Judge Porteous.

The breadth of Judge Porteous's request related to the Wrinkled Robe materials is simply staggering. He seeks <u>all</u> material from that investigation that "relates to the setting, modifying, and/or splitting of bail bonds" and which relates to "Louis Marcotte, and Lois [sic] Marcotte." Each of these two categories would appear to encompass the

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nature of rough notes, for example, related to the FBI's interviews with Judge Porteous, Louis Marcotte and/or Robert Creely, in that Judge Porteous's statements are at issue, and Louis Marcotte and Robert Creely are likely witnesses. Those would be the only interviews that would conceivably be relevant. As a factual matter, the House has been advised that such notes do not exist. Accordingly, the House respectfully suggests that a letter to the DOJ and the FBI asking if such materials exist might be a better way of dealing with this issue. The House reiterates that it does not possess those materials. Furthermore, it is the House's understanding that it has been provided by the DOJ the complete background investigation, which the House, in turn, has provided to Judge Porteous.

entirety of the investigative materials. Another of the requests – for material that "relates to gifts, money, or other items of value received by judges, magistrates, or other judicial officers in the Jefferson Parish Courthouse" seeks review of massive amounts of evidence that can have no conceivable relevance to this Impeachment.

Granting Judge Porteous's request, in the absence of any coherent showing by Judge Porteous of potential relevance of the documents or a description with some precision of what exactly Judge Porteous is looking for, virtually guarantees procedural delay and opens the door to additional litigation. The access sought by Judge Porteous would almost certainly require that the DOJ and the FBI devote substantial resources – hundreds of hours – to the task of locating, organizing and reviewing materials prior to making them available to Judge Porteous. In particular, the FBI (as well as, in all likelihood, the Assistant United States Attorneys assigned to the case) would need to review materials to protect source information, wiretap information, grand jury information, and financial record information. The DOJ/FBI would not only need to search hundreds of boxes of hard copy records, but computerized and electronically stored materials as well. If DOJ were to agree to that task, and if the conduct of the trial were to await its completion and counsel's review, these proceedings would grind to a halt.

Moreover, as noted at the outset of this Section, Judge Porteous has failed to provide any compelling explanation as to why such documents are even relevant to his defense. Whether state judges were or were not prosecuted cannot possibly be relevant to whether Judge Porteous committed the acts alleged in Article II. Similarly, whether the usable evidence available to DOJ supporting the prosecution of other judges was greater

or lesser than the evidence against Judge Porteous cannot possibly be relevant to whether Judge Porteous committed the acts alleged in Article II. This Impeachment is thus quite unlike the Hastings Impeachment. In that case, Judge Hastings sought the FBI to produce documents related to its investigation of Judge Hastings. In this case, Judge Porteous explicitly seeks that the FBI produce records that are nearly entirely related to the investigation of third parties. What Judge Porteous seeks is little more than the proverbial "fishing" expedition, and the Senate should not bait the hook for that effort.

Furthermore, Judge Porteous's Motion for Assistance marks the first time that the House has been made aware of Judge Porteous's desire to review documents in the FBI's possession. We note that in Judge Porteous's discovery letter of May 6, 2010, counsel did not seek from the House its assistance in obtaining access to the massive collection of Wrinkled Robe documents in the DOJ's or FBI's possession or otherwise inquire as to those documents. In the same vein, Judge Porteous's discovery motion filed on May 28, 2010 did not seek access to documents in the DOJ's or FBI's possession, nor did it seek the Committee's assistance in obtaining those documents. Only on June 27, 2001, one month after the filing deadline for discovery motions, did Judge Porteous for the first time state that he needed the "immediate assistance of the Senate in procuring these materials" – the existence of which has been known to Judge Porteous for years.[14] If these documents were truly important and relevant, Judge Porteous would have sought access to them months ago. Instead, the untimely and sweeping nature of the request, made late in the day, unsupported by any reasonable showing of relevance or specificity,

[14]The mere substitution of counsel does not justify or explain Judge Porteous's decision at this stage of the proceedings – three months subsequent to the House making its first document production – for the defense.

on the heels of prior requests for continuance and delays, only underscores the request's lack of merit. Accordingly, Judge Porteous's request for Committee assistance should be denied.

IV. THE HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE METROPOLITAN CRIME COMMISSION

In 1994, the Metropolitan Crime Commission of New Orleans, responding to a complaint, investigated Judge Porteous's actions in setting aside the conviction of a Marcotte employee, Aubrey Wallace, in the last days of Judge Porteous's tenure on the state bench. Ultimately, the MCC concluded that the judicial action was improper but that there was nothing it could do because Judge Porteous was by that time a Federal Judge.

The MCC provided a portion of its investigative files to the Department of Justice, and the Department has since provided those materials to the House. Separately, in 2009, the MCC provided directly to the House what the House believes to be the MCC's complete file. The House has marked a portion of the MCC documents as exhibits for potential use at the Impeachment trial, and has made the remainder of the MCC documents available for Judge Porteous's defense team to review. Significantly, as of June 27, 2010 – the date Judge Porteous filed his Motion for Assistance – he had not sought to copy those MCC documents which have been made available to him.

Even putting aside that the House believes it to be unlikely that the MCC actually possesses other documents related to Judge Porteous, the House urges the Committee to reject Judge Porteous's request. As with his request for Wrinkled Robe materials, Judge Porteous does not seek to invoke the Committee's assistance to request that the MCC

provide any particular documents to support a particular evidentiary or factual theory. Rather, Judge Porteous seeks that the Committee help him determine whether the MCC has any additional documents – regardless of relevance – and if so, to make them available. This is precisely the sort of "fishing" expedition that is disapproved in the discovery process, and Judge Porteous has made no showing that would justify the Committee's intervention, particularly where he has not yet obtained or looked at the MCC documents which have been made available.

WHEREFORE, the House requests Judge Porteous's Motion to Compel and Motions for Assistance be denied.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager

Alan I. Baron
Special Impeachment Counsel

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

July 1, 2010

Attachment One

United States Senate
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
DISPOSITION OF PRETRIAL ISSUES
FOURTH ORDER

Upon consideration of the submissions of the parties and after hearing from them at the pretrial conference of May 18, 1989, the chair, in consultation with the vice chair, issues the following rulings on behalf of the committee:

Stipulations

Senate Resolution 480 of the 100th Congress, which was agreed to on September 30, 1988, requested the parties to work together to stipulate to evidentiary matters that are not in dispute and to report to the Senate on the stipulations to which they had agreed. On December 15, 1988, the House served proposed documentary and factual stipulations. On February 20, 1989, the parties reported to the Senate that they had reached no agreement on any stipulations.

On January 17, 1989, by which time it may have become apparent that a voluntary stipulation process would not be productive, the House proposed that the Senate "adopt a rule that would hold that any proposed stipulation of fact filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true." The House also requested that the Senate "adopt a parallel rule addressing

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the authenticity of documents, which would establish that any proposed stipulation regarding the admissibility of a document filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true." Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration, at 2-3.

On March 31, 1989, the House renewed its proposals on admissions concerning facts and documents, and resubmitted its stipulation of facts in revised form. In a filing with the committee on April 2, 1989, Judge Hastings stated his opposition to the House's proposals for stipulations prior to trial. A Further Memorandum on Pre-Trial and Trial Procedures Necessary for a Trial that is Fair to Respondent, at 31-32.

The committee heard oral argument by the parties on April 12, 1989, and issued its first order on pretrial issues on April 14, 1989. In that order, the committee adopted the House proposal that any proposed stipulation of fact be accepted as true unless the opposing party files an objection, including a proffer as to why the proposed stipulation should not be taken as true. A like rule was adopted for the stipulations as to documents. By its second order, dated April 21, 1989, the committee extended to May 17, 1989 the date for the filing of Judge Hastings' response to the House

stipulations. The second order also extended until May 17, 1989, the date for Judge Hastings to file his own stipulations, which, like those of the House, would be accepted as true unless a specific objection was filed. Judge Hastings chose not to file his own stipulations.

Judge Hastings' Response to Stipulations Proposed by the House, which was received by telecopy on May 18, 1989, does not comport with the committee's order. Judge Hastings has in large part failed to respond to the stipulations proposed by the House. Although his response makes certain generalized objections, a few specific objections, and several generalized concessions, the committee in most cases is unable to determine Judge Hastings' position with respect to particular House stipulations. Instead, Judge Hastings, without having asked the committee to reconsider the April 14, 1989 order at any time between its issuance and the May 17, 1989 date for compliance, argues that he should not be required to take part in this process of identifying those matters that are not truly in contest. While the committee appreciates the inevitable burdens which these proceedings impose on all concerned, it believes that these burdens can best and most efficiently be discharged by complying with its orders, rather than by reiterating at length the difficulties of compliance.

The committee continues to believe that both parties as well as the Senate will benefit from a narrowing of the issues to those matters which are truly in dispute. The committee accordingly will review the stipulations proposed by the House and give careful consideration to any specific objections that it is able to identify in Judge Hastings' May 18, 1989 response and in any supplement that he may file to that response by June 1, 1989. Upon completion of its review, the committee will issue a ruling that sets forth the matters which shall be deemed to be found as true as a matter of record for purposes of the committee's evidentiary proceedings and its report to the Senate of matters that are not in dispute.

If Judge Hastings wishes to participate further in this process of distinguishing contested from uncontested issues, he may submit an additional response to the House's proposed stipulations on or before June 1, 1989. That response shall set forth for each proposed fact and each document his specific objection, or lack of objection, to each particular stipulation. In so doing, Judge Hastings should respond to each factual and documentary stipulation proposed by the House: for example, that a particular document is authentic or is a business or public record, or that a particular fact is true. He need not address whether a particular document or fact is relevant and admissible in evidence.

Although the House has referred to its "proposed stipulation[s] regarding the admissibility of a document," see page 2 supra, we agree with both parties that documentary admissions need go no further than the genuineness of the documents and, for those categories specifically identified by the House, their status as records of regularly conducted activities or public records, see Proposed Stipulations of Documents, filed December 15, 1988, at 1. Admissions concerning facts also need go only to their truth and not to their relevance.

Depositions

By its April 14, 1989 order, the committee advised Judge Hastings that it would consider his request to take pretrial depositions if he provided a list of, and certain information concerning, his proposed deponents. Judge Hastings responded with a Request for Specific Depositions, filed on May 10, 1989, in which he asked that subpoenas be issued for sixteen individuals. The House, on May 16, 1989, filed a request for the issuance of deposition subpoenas, naming three individuals.

In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition

could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.

For persons whom Judge Hastings designates as "Participants in Borders's Scheme," the committee declines to issue the requested subpoenas for Rebecca Sutton Nesline and Peter Chaconas. No showing has been made that either Rebecca Sutton Nesline or Peter Chaconas has knowledge of any matter relevant to the Articles of Impeachment. With respect to Joseph Nesline, before deciding whether a threshold showing has been made which might justify the issuance of a subpoena, the committee requests that the House make available to the committee the information in the House's possession concerning Mr. Nesline's competency as a witness.

The committee will grant Judge Hastings' request for the issuance of a subpoena to William Dredge for pretrial testimony. Although Mr. Dredge's testimony before the Eleventh Circuit Investigating Committee is available to Judge Hastings' counsel, the committee has decided to permit a pretrial examination of Mr. Dredge because Judge Hastings has argued that Mr. Dredge's testimony may be especially central to his defense. The committee requests that the parties confer with each other on arrangements for a pretrial examination of Mr. Dredge and that they advise the committee about available dates for that examination so that a subpoena

may be issued for a suitable time.

Concerning the FBI and Justice Department officials for whom Judge Hastings requests the issuance of deposition subpoenas, Judge Hastings is ordered, on or before June 1, 1989, to provide the committee with a list of the three individuals, in order of priority, whom he deems most important to depose. In compiling that list, he should be mindful of whether or not he has access to the individual's prior testimony. He should also furnish to the committee at that time any supporting information, including documentation, which supports his claim that these persons possess knowledge relevant to the Articles of Impeachment, and shows that he is in fact unable to obtain information voluntarily from those persons. The committee will then determine whether it will issue subpoenas for their pretrial examination.

With respect to the House requests, the committee declines to issue subpoenas for Marilyn Carter and Alan G. Ehrlich, both of whom have given previous testimony which is available to the House for its trial preparation. In contrast to Mr. Dredge, whose pretrial examination we will allow, there is no indication that either of these witnesses is sufficiently central to these proceedings to warrant the issuance of subpoenas for their pretrial examination. The committee has decided that a subpoena shall issue for Joanne Tyson Colt, who was a law clerk in Judge Hastings' chambers

in October of 1981, who has never previously testified, and who has refused to be interviewed by the House. The requested subpoena shall issue for her pretrial testimony after counsel for the parties have advised the committee about available dates for Ms. Colt's pretrial examination.

Conduct of Evidentiary Hearings

Pursuant to the committee's second pretrial order, issued on April 21, 1989, the committee heard from the parties at the May 18, 1989 pretrial conference on various proposals concerning the conduct of the evidentiary hearings which shall begin on July 10, 1989. To the extent that Judge Hastings' submissions to the committee should be understood to be a request to postpone those hearings, that request is denied.

One of the issues that the parties addressed, at the committee's request, was whether the evidentiary proceedings should be bifurcated to permit the taking of each party's evidence first on the bribery and perjury articles and second, after receiving all the evidence on those matters, on the wiretap disclosure article. Judge Hastings objects to bifurcation because it would require him, if he testifies, to divide his testimony into two parts. We will respect Judge Hastings' objection and will not bifurcate the evidentiary hearings. The committee will accommodate the interest of the House in deferring, if it so wishes, the portion of its

opening statement on the wiretap disclosure issue to the point in the presentation of its evidence when it is prepared to present its case on that issue.

At the May 18, 1989 conference, the parties also briefly discussed whether it would be appropriate to permit introduction of prior testimony, taken in United States v. Borders, United States v. Hastings, and before the Eleventh Circuit Investigating Committee, in place of taking live testimony before this committee. The committee believes that the use of such prior recorded testimony is desirable in certain circumstances, particularly, for example, where the testimony is not that of a key witness whose credibility is at issue, and encourages its use consonant with fairness to the parties and the development of a coherent record for use by the Senate.

Accordingly, both parties are directed to file and serve, no later than June 14, 1989, an identification of the prior testimony which, to the best of their knowledge, they in fact intend to offer into evidence. That identification shall: (1) specify the proceedings from which the proffered testimony is drawn, (2) append a copy of the proffered testimony, and (3) briefly state why the party believes that it would be appropriate to submit that particular testimony by way of prior recorded testimony rather than through a live witness. Each party shall in its pretrial statement on

June 21, 1989, state, for each such proffer of prior testimony by the opposing party, whether or not it objects to introduction of that prior testimony and, if so, the specific nature of its objections.

The parties were also invited to suggest ways in which the evidentiary proceedings could be structured to permit the taking of evidence within a three-week period of time. In response, the House suggested that the committee adopt the procedure, used by United States District Judge Pierre Laval in the Westmoreland v. CBS defamation case, of dividing a predetermined number of hours between the parties, leaving each side free to determine how its case can best be presented within the available time. Judge Hastings has not responded to the particulars of the House proposal or offered any specific proposals of his own.

The committee believes that guidelines, fairly and flexibly applied, must be adopted to facilitate realistic trial preparation and to enable the Senate and the parties to focus on matters that will be important to the Senate's disposition of the Articles of Impeachment. In framing their final pretrial statements, due on June 21, 1989, and in preparing for the evidentiary proceedings which will commence on July 10, 1989, the parties should operate within guidelines premised on the availability of eighty trial hours during the course of three weeks of hearings. Reserving several hours for miscellaneous matters, the parties should

anticipate that they will each have thirty-eight hours in which to present their evidence on all matters, dividing their time as each sees fit between direct and cross-examination. In addition, each party may present an opening statement of no longer than one hour, which, if either party wishes, may be divided into two portions.

The parties should address in their final pretrial statements of June 21, 1989, and be prepared to discuss at the pretrial conference on June 22, 1989, the amount of time which they intend to allocate to direct testimony, whether by prior or live testimony, and whether their preparation has shown that some modification of these guidelines is necessary. The committee is mindful that the foregoing guidelines may need adjustment, both before commencement of the evidentiary proceedings and in the course of those proceedings, and that there must, and will, be flexibility in their application.

An additional order providing further details about the required content of the final pretrial statements will be issued shortly.

Jeff Bingaman
Chairman

Arlen Specter
Vice Chairman

May 24, 1989

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW

July 1, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous

Dear Senator McCaskill and Senator Hatch:

On June 27, 2010, the defense filed a Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives (the "House") in its investigation and impeachment of Judge G. Thomas Porteous, Jr. In that Motion, the defense noted that a recent review of previously withheld documents revealed obviously relevant and material evidence. House Impeachment Counsel have opposed the requested inspection and have refused to provide a general listing of still withheld files, despite past precedent in other impeachment trials. House Impeachment Counsel claim they have produced, or made available, all relevant discovery to the defense. That is simply incorrect. This letter is to raise a disturbing example of material identified among the withheld evidence which should have been produced to Judge Porteous.

Yesterday, the House filed a "Supplemental Filing in Support of its Preliminary Requests for Subpoenas and Immunity." Included in that filing was a list of individuals for whom the House seeks a subpoena from the United States Senate. That list includes Michael J. Reynolds. Mr. Reynolds is referenced by name in the House of Representatives Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana (Report 111-427, dated March 4, 2010, hereinafter "House Report."). Specifically, on page 76, footnote 369, the House quotes a statement purportedly made by Mr. Reynolds during a "Task Force Staff Interview" taken on January 5, 2010. The defense has not received a copy of the transcription, notes, or summary of this Task Force Staff Interview. Further, based on the defense's review to date, we do not believe that the House has made such materials available for inspection and copying. Given the House's use of and reliance upon such

quoted statements, such material is clearly relevant and material.[1]

According to House report, the Task Force Staff "interviewed over 70 individuals," many of who "were not deposed." *See* House Report at 7 and footnote 1. In addition to Reynolds, the House references other interviews with key witnesses as part of the investigation of Judge Porteous, including (1) Justice of the Peace Kevin Centanni (*id.* at fn. 380), (2) Amwest official Norman Stotts (*id.* at fn. 395), (3) U.S. Bankruptcy Judge William Greendyke (*id.* at fn. 531), and (4) Sharon Konnerup (*id.* at 123.) These were all interviews conducted as part of the investigation of Judge Porteous and part of the record leading to his impeachment. This material is obviously relevant and discoverable.

Yesterday, after receiving the House filing with the listing of Reynolds, the defense, through a letter to the House Impeachment Counsel, demanded the production of the Reynolds interview material. The defense also requested, among other things, that the House produce all documents created in connection with any other Task Force Staff Interviews. The House declined to respond to this request, prompting this letter to the Senate Impeachment Trial Committee.

The House Counsel has yet to state a compelling public purpose served by withholding evidence, particularly in a constitutional process designed to ensure the greatest possible scrutiny before the removal of a federal judge. Not only is the House withholding obviously material evidence but it is even opposing the standard request that the Senate request relevant material from the Justice Department and Metropolitan Crime Commission – material that the House likely already possesses in full or in part. Similar materials have been provided in prior impeachment proceedings, but House Impeachment Counsel seeks to exploit their advantage as "prosecutor" by blocking even this modest request in an apparent effort to disadvantage the accused in every possible way. House Impeachment Counsel contend that Judge Porteous' requests are just an excuse to delay further the hearing in this case. In fact, what is delaying proper preparation for the hearing, so that it can occur as scheduled, is House Impeachment Counsel's peculiar intransigence in refusing to comply with normal discovery processes. While the House Impeachment Counsel advises the Senate that it applied a "commonsense" approach to determining what the defense needs for trial, it is now clear that "commonsense" has dictated the withholding of material that would be produced in any civil or criminal case. Indeed, the withholding of such evidence would likely result in sanctions in federal court.

We request that the Senate order House Impeachment Counsel to immediately make the above-referenced material available to the defense. Quite apart from these specific documents, the withholding of such obviously relevant material confirms our earlier-stated concerns that the House is adopting an exceptionally narrow interpretation

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[1] Notably, given the House's use of the interview (as well as the attendant notes or summaries created in connection with that interview) to support its allegations, any claim of privilege has clearly been waived.

of materiality in order to deny the defense the full record in the case, thus depriving Judge Porteous of an opportunity to adequately prove his defense. Given the short period for new counsel to prepare this case for trial, the continued withholding of such evidence constitutes a direct denial of a fair trial and due process.

Given the still pending motion for inspection of withheld information, the defense opted to supply this information in a letter as opposed to a motion to avoid unnecessary litigation. However, we would be happy to submit such a motion if the Senate would prefer formal argument on the matter. We ask that the Senate order this production in addition to an immediate inspection of the withheld evidence referenced in the pending motion.

Respectfully,

Jonathan Turley

Jonathan Turley
Counsel to Judge G. Thomas Porteous

cc: Alan I. Baron, Esq., House Impeachment Counsel
Mark Dubester, Esq., House Impeachment Counsel
Harry Damelin, Esq., House Impeachment Counsel
Kirsten Konar, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Impeachment Counsel

Congress of the United States
Washington, DC 20515

July 2, 2010

Via Electronic Mail and Hand Delivery

The Honorable Claire McCaskill
Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

The Honorable Orrin Hatch
Vice Chairman, Senate Rule XI Impeachment Committee
United States Senate
Washington, D.C.

Re: Impeachment of Judge G. Thomas Porteous, Jr.

Dear Senator McCaskill and Senator Hatch:

Late yesterday, July 1, 2010, Mr. Turley submitted a letter to the Senate Impeachment Trial Committee relating to various discovery issues. On the second page of his letter, Mr. Turley makes reference to sending House Impeachment Counsel a letter on June 30, 2010, which made certain demands for interview notes related to Mr. Michael Reynolds. He also noted that the House declined to respond to this letter.

For your information, enclosed please find the letter that House Impeachment Counsel received from Judge Porteous's counsel at 6:50 p.m. on June 30, 2010, requesting a response by noon the next day. Also enclosed is House Impeachment Counsel's response to the June 30, 2010 letter, which was sent to Judge Porteous's counsel this morning.

There should be no mistake, the House did not decline to respond to the defense's letter. The House declined to be compelled to answer within the unilaterally imposed "deadline" announced by counsel for Judge Porteous.

Very Truly Yours,

Alan I. Baron

Alan I. Baron
Special Impeachment Counsel

PRINTED ON RECYCLED PAPER

cc: Jonathan Turley, Esq. (via e-mail)
Daniel C. Schwartz, Esq. (via e-mail)
P.J. Meitl, Esq. (via e-mail)
Dan O'Connor, Esq. (via e-mail)
Morgan Frankel, Esq. (via e-mail)

Attachment 1

BRYAN CAVE

Daniel C. Schwartz
Direct: 202-508-6025
dschwartz@bryancave.com

June 30, 2010

VIA EMAIL AND FIRST-CLASS MAIL

Alan I. Baron, Esq.
Special Impeachment Counsel
United States House of
Representatives
The Ford House Office Building
Room H2-365
Washington, D.C. 20515

Dear Mr. Baron:

This morning, the House of Representatives (the "House") filed a "Supplemental Filing in Support of its Preliminary Requests for Subpoenas and Immunity." Included in that filing was a list of individuals for whom the House seeks a subpoena from the United States Senate. That list includes Michael J. Reynolds.

Mr. Reynolds is referenced by name in the House of Representatives Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana (Report 111-427, dated March 4, 2010). Specifically, on page 76, footnote 369, the House quotes a statement purportedly made by Mr. Reynolds during a "Task Force Staff Interview" taken on January 5, 2010. We have not received a copy of the transcription, notes, or summary of this Task Force Staff Interview. Further, based on our review to date, we do not believe that the House has made such materials available for our inspection and copying. As such, we believe these materials have been improperly withheld from the defense. Accordingly, we request that the House immediately produce these materials to the defense.[1] There can be no serious debate that this material is highly relevant to the instant proceeding. Moreover, given the House's use of the interview (as well as the attendant notes or summaries created in connection with that interview) to support its allegations, any claim of privilege has clearly been waived. Indeed, since the defense cannot obtain this material from any other source, any potentially applicable privilege must yield to the needs of the defense.

Additionally, we request that the House also produce all documents created in

[1] This request is separate and apart from our request for full inspection of the materials in the possession of the House. This request is a specific demand for material clearly relevant to this matter and which should have been disclosed in the first instance.

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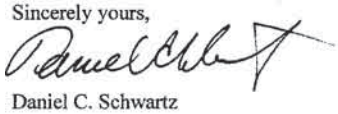
connection with any other Task Force Staff Interviews. If you claim privilege as to some portion of these materials, we ask that you produce an appropriate privilege log so that we can review your claims.

Finally, House Exhibit 69(e) contains a Federal Bureau of Investigation 302 Report (labeled PORT000000753-60). In that 302 Report, the name of the interviewee is redacted. Please advise whether the House is aware of the identity of the individual whose interview formed the basis for that Report. If the House is aware of that information, we request that the House immediately disclose the individual's identity to the defense.

We request that you explain the basis for withholding this highly relevant information and inform us of your response to this request by noon tomorrow, July 1, 2010, so that we may expeditiously seek relief as required and appropriate.

Sincerely yours,



Daniel C. Schwartz

cc: Mark Dubester, Esq., House Impeachment Counsel
Harry Damelin, Esq., House Impeachment Counsel
Kirsten Konar, Esq., House Impeachment Counsel

Attachment 2

Congress of the United States
Washington, DC 20515

July 2, 2010

Via Electronic Mail and First Class Mail

Daniel C. Schwartz
Bryan Cave LLP
1155 F Street N.W.
Washington, D.C. 20004

Re: Impeachment of Judge G. Thomas Porteous, Jr.

Dear Mr. Schwartz:

This letter is in response to your correspondence of June 30, 2010, in which you request any transcriptions, notes, or summaries of the January 5, 2010 Task Force interview of Michael J. Reynolds. No transcription of Mr. Reynolds's interview exists. The only notes taken during this interview were taken by Task Force counsel on behalf of the House. To the extent your letter seeks copies of these interview notes, those notes clearly constitute attorney work product, to which you are not entitled and which the House declines to provide.

As you are undoubtedly aware, Judge Porteous previously requested the production of all witness interview notes taken by Task Force counsel in his May 28, 2010 Motion for Discovery. The Senate Impeachment Trial Committee specifically denied that request in its June 9, 2010 Disposition of Discovery Issues.

We would note that, contrary to the representation in your letter, there is no reason to believe that Mr. Reynolds is unavailable for interview by counsel for Judge Porteous, should you wish to interview him. Moreover, as your letter acknowledges, the House of Representatives Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana was issued on March 4, 2010. Judge Porteous has thus had almost four months to interview witnesses identified in that Report, including Mr. Reynolds.

Finally, with regard to the redactions in House Exhibit 69(e), pertaining to the identity of the interview subject in an FBI 302, as we previously explained to Richard Westling, the redactions in Exhibit 69(e) were made by the Department of Justice. The House therefore has no authority to un-redact this information. Accordingly, we are not in a position to provide you with the identity of the interview subject.

Very Truly Yours,

Alan I. Baron
Special Impeachment Counsel

PRINTED ON RECYCLED PAPER

cc: Johnathan Turley, Esq. (via e-mail)
P.J. Meitl, Esq. (via e-mail)
Dan O'Connor, Esq. (via e-mail)

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

JONATHAN TURLEY
J.B. AND MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW

July 2, 2010

By Electronic Mail and Courier Delivery

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: The Impeachment Trial of Judge G. Thomas Porteous Jr.

Dear Senator McCaskill and Senator Hatch:

I write to briefly respond to the House of Representatives' (the "House") letter dated July 2, 2010. Given the importance of this issue, I hope that the parties can address this matter more fully in the meeting of counsel next week. To facilitate that discussion, I am writing to make clear the position of Judge G. Thomas Porteous, Jr. with regard to the requested documents and the nature of the ongoing discovery disputes.

The House, in its Report on the Impeachment of G. Thomas Porteous, Jr. of the United States District Court for the Eastern District of Louisiana (Report 111-427, dated March 4, 2010, hereinafter "House Report"), explicitly relied upon (and, in fact, quoted) from the notes of the Task Force Staff related to the interview of Michael Reynolds. In response to the defense's request for those and other similar materials relied upon by the House, House Impeachment Counsel concedes that the material is relevant but argues that it is protected by the work-product privilege.

House Impeachment Counsel fails to address substantively the defense's assertion that such claimed privileges have been waived. For there to be true due process in these proceedings, we assume the Senate Impeachment Trial Committee (the "Committee") intends to recognize and respect asserted common-law privileges,[1] such as the attorney-client privilege and the attorney work-product privilege. If so, it also must recognize the long-standing and established limits to those privileges. The "work-product privilege is a

[1] Congress has increasingly exercised its discretion to deny privilege, regardless of whether a judge would uphold the claim. *See* Jonathan P. Rich, *Note, The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 159 (1988).

qualified one." *FTC v. Grolier, Inc.*, 462 U.S. 19 (U.S. 1983). "Like other qualified privileges, it may be waived." *United States v. Nobles*, 422 U.S. 225, 239 (U.S. 1975). Courts, in cases where the asserting party relies upon or quotes a document, routinely find that the work-product privilege has been waived as to that document. *See Avago Techs. Gen. IP PTE LTD. v. Elan Microelectronics Corp.*, 2006 U.S. Dist. LEXIS 86292 (N.D. Cal. Nov. 13, 2006) (finding "that work product protection has been waived as to [a certain] report, because plaintiffs revealed part of the contents of the report."). Other courts, when specifically considering quoted material that one party claims to be protected by the attorney work-product privilege, have determined that that waiver extends to the information disclosed as well as "the details underlying the data which was . . . published." *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988). In fact, the Fourth Circuit, in *In re Martin Marietta* found that "the work product protection ha[d] been waived as to most of the internal notes and memoranda [of] these interviews which, by way of summarizing in substance and format the interview results, [the privilege asserting party] used as the basis of its disclosure." *Id.* at fn. 2. As such, the fact that the House, in its published Report quoted part of its interview of Reynolds, thereby relying upon notes or summaries that it had created, have waived any work-product privileges that may have otherwise applied.

Moreover, the material cited in our last letter falls squarely under conventional federal discovery rules, including but not limited to *Brady v. Maryland*, 373 U.S. 83 (1963), the Jencks Act, 18 U.S.C. § 3500, Rule 16 of the Federal Rules of Criminal Procedure and Rule 26.2 of the Federal Rules of Criminal Procedure. In fact, the arguments of House were specifically rejected by the Supreme Court in *Goldberg v. United States*, 425 U.S. 94, 102 (U.S. 1976), where the Court stated that "there is no broad attorney's work-product exception to the Jencks Act that shelters statements relating to the subject matter of the testimony of a witness merely because the statements were obtained by a government attorney rather than a government investigator."[2] Thus, under either a civil or criminal standard, the material must be disclosed, given the nature of the House's use of the material and its relevance to these proceedings.

House Impeachment Counsel further argues that the reason for the withholding of the documentation is that the Committee has already considered the instant request and rejected it. This is simply incorrect. In the May 28, 2010 Discovery Request submitted by Judge Porteous (through his previous counsel), the defense requested categories of documents and did not make specific arguments regarding the waiver of privilege or the fact that certain documents had been relied upon by the House and not turned over to the defense. In response, the Committee determined that these general requests made by the defense "would intrude into the work product of the House and conclude[d] that disclosure is not justified at this time." *See* Committee Disposition of Discovery Issues, dated June 9, 2010. As such, the Committee qualified its rejection of the request, leaving open a later review and specifically did not rule upon requests as to certain documents for

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[2] In this case, the Task Force Staff may very well have been acting in an investigatory capacity during these interviews, as opposed to that of attorneys representing the United States.

which the defense claimed that asserted privileged had been waived.[3]

The intransigence and stubbornness of House Impeachment Counsel regarding the production of the material related to Mr. Reynolds is indicative of the larger campaign by the House to force the defense to fight and claw for every piece of evidence, wasting valuable time that could be spent on the defense of the matter. This is a particularly troubling in a case where, unlike the Hastings and Nixon cases, the Committee and the defense do not have a developed trial record. This matter is not the typical civil litigation, where parties routinely employ litigation tactics to frustrate discovery for a litigation advantage. This is a trial in the United States Senate of a sitting United States District Court Judge, a proceeding which has taken place less than twenty times in the history of our nation. The House appears intent on substituting a "fast" for a "fair" trial and withholding documents for no other reason that they believe they can. If federal law is any measure, they cannot. The House relied on these references to secure impeachment and now are preparing to call this very witness. We ask the Senate to order the immediate disclosure of this information.

Respectfully,

Jonathan Turley /cjm

Jonathan Turley
Counsel to Judge G. Thomas Porteous

cc: Alan I. Baron, Esq., House Impeachment Counsel
Mark Dubester, Esq., House Impeachment Counsel
Harry Damelin, Esq., House Impeachment Counsel
Kirsten Konar, Esq., House Impeachment Counsel
Morgan Frankel, Esq., Senate Impeachment Counsel

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[3] The House also makes the argument that the House Report has been made public for four months and the defense is only now requesting the material. It is unclear why the timing of the request is of significance, particularly when new counsel for Judge Porteous has only been fully responsible for all four articles of impeachment for only the last two weeks, and the House only recently finished producing what it claims to be all discoverable material.

United States Senate

SENATE IMPEACHMENT
TRIAL COMMITTEE
WASHINGTON, DC 20510-6326

DISPOSITION OF JUDGE G. THOMAS PORTEOUS, JR.'S MOTIONS TO COMPEL AND FOR DEPOSITIONS

Judge G. Thomas Porteous, Jr. filed (1) a Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives and (2) a Motion for Authority to Issue or, Alternatively, Assistance in Issuing, Deposition Subpoenas, which requests pretrial depositions of ten potential witnesses. The House has submitted Oppositions to both motions. The Committee hereby denies the Motion to compel and grants in part and denies in part the Motion for depositions.

MOTION TO COMPEL

Judge Porteous alleges that the House is withholding non-privileged documents that are relevant to his defense. He seeks an order compelling production of the documents or a "generalized list" of the categories of withheld documents. In addition, Judge Porteous specifically seeks access to the House Impeachment Task Force's staff notes, arguing that what appears to be a two-word quotation from a witness interview included in a footnote to the House Judiciary Committee Report waived work product protection with regard to the underlying witness interview notes. The House maintains that it has either provided copies of or access to inspect all non-privileged documents relevant to the four Articles of Impeachment.

Judge Porteous seeks broad access to the files of the House Impeachment Task Force beyond the parameters set out in the Committee's Disposition of Discovery Issues of June 9, 2010 ("June 9 Discovery Order"). In his Motion for Discovery filed on May 28, 2010, Judge Porteous included requests for witness interview notes taken by Task Force staff and an index of withheld documents. The Committee ruled that the House should produce information "relevant to, or likely to lead to new evidence on, the adopted Articles of Impeachment" but that the House was not required to produce its work product or the requested index.[1]

Judge Porteous has neither demonstrated noncompliance by the House with the June 9 Discovery Order nor moved for its reconsideration. The House has provided voluminous material to Judge Porteous and afforded multiple opportunities for his counsel to inspect numerous other documents and request copies. The House represents that it is withholding a few folders of documents that are irrelevant to the Articles of Impeachment. Judge Porteous argues, in effect, that the House should not be determining what must be produced and may be withheld under the Committee's June 9 Discovery Order. However, in any litigation, the parties bear the affirmative burden of complying with court orders; without concrete evidence of noncompliance or bad faith, the Committee has no cause to intervene. A brief reference to a witness interview

[1] Senate Impeachment Trial Committee, Disposition of Discovery Issues (June 9, 2010).

does not justify removing work product protection for the House's staff notes. For these reasons, the Motion to Compel is denied.

DEPOSITION REQUESTS

Judge Porteous requests pretrial depositions of the following ten witnesses "to elicit from these witnesses exculpatory and/or contradictory testimony concerning the House's Articles of Impeachment": Jacob Amato, Jr.; Robert Creely; Louis Marcotte, III; Lori Marcotte; Rafael Goyeneche; DeWayne Horner; Joseph Mole; Claude Lightfoot; Bobby Hamil; and Cheyenne Tackett. The House argues that under the Committee precedent depositions should only be permitted for central witnesses who have not previously testified or have refused to cooperate and that Judge Porteous's requests do not meet this standard.

The taking of pretrial deposition testimony is neither a guaranteed right of an impeached federal officer nor an established norm of Senate impeachment trial proceedings. Use of pretrial depositions in impeachment proceedings is a recent development first authorized in the 1989 Committee proceedings for the impeachment trial of Judge Alcee Hastings.[2] The Hastings Committee highlighted the unprecedented nature of the deposition requests and authorized only four of the sixteen requests:

> In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.[3]

The Hastings Committee recognized that deposition testimony should be rare and subject to a demanding standard.

The Committee finds that Judge Porteous has demonstrated "a strong showing of need" for taking pretrial depositions of the following four witnesses: (1) Jacob Amato, Jr.; (2) Robert Creely; (3) Louis Marcotte, III; and (4) Lori Marcotte. First, these four witnesses were key participants in Judge Porteous's alleged pattern of corrupt conduct. These four witnesses will likely offer relevant testimony and probative evidence for the House's case and Judge Porteous's defense.

Second, although these witnesses have given some prior testimony before a federal grand jury, the Special Investigatory Committee of the Fifth Circuit Court of Appeals, and the House Impeachment Task Force that Judge Porteous may use to prepare for the Senate trial, pretrial depositions will supplement the limited opportunities for examination that he had in those proceedings. Notwithstanding the House's argument, the existence of prior witness testimony from other proceedings alone does not prohibit a witness deposition. The Hastings Committee authorized the deposition of a witness who had given testimony before the Eleventh Circuit

[2] There is no record of the use of pretrial depositions in the Committee impeachment trial proceedings against Judge Harry Claiborne and Judge Walter Nixon.

[3] Report of the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings, S. Hrg. 101-194, pt. 1, at 605-06 (1989).

investigatory committee because he was considered to be "especially central to [Judge Hastings's] defense."[4] The Committee concludes that Mr. Amato, Mr. Creely, Mr. Marcotte, and Ms. Marcotte will likely be "especially central" witnesses in this proceeding and that their depositions will give Judge Porteous "a sufficient basis for trial preparation."[5]

Judge Porteous has not demonstrated "a strong showing of need" for the depositions of Mr. Goyeneche, Mr. Horner, Mr. Mole, Mr. Lightfoot, Mr. Hamil, and Ms. Tackett. None of these witnesses can be deemed "especially central" to Judge Porteous's defense. To the extent that these witnesses have relevant testimony, the existing transcripts of testimony from prior proceedings, documentary evidence already provided to Judge Porteous, and the opportunity to interview these witnesses should provide him "a sufficient basis for trial preparation." For these reasons, the Committee denies the Motion as to Mr. Goyeneche, Mr. Horner, Mr. Mole, Mr. Lightfoot, Mr. Hamil, and Ms. Tackett.

The depositions of Mr. Amato, Mr. Creely, Mr. Marcotte, and Ms. Marcotte shall be set for August 2, 2010 in the Senate Office Buildings. The Committee hereby authorizes subpoenas to issue for these witnesses. As all four of these witnesses have given some prior testimony, each deposition shall be limited to no more than three hours. The Committee staff will issue appropriate deposition notices after subpoenas are served.

Dated: July 19, 2010

CLAIRE McCASKILL
Chairman

ORRIN G. HATCH
Vice Chairman

[4] *Id.* at 606.
[5] *Id.*